

DATED 10 April **2024**

(1) HASTINGS BOROUGH COUNCIL

and

(2) EAST SUSSEX COUNTY COUNCIL

and

(3) BIRCHPARK LIMITED

DEED OF AGREEMENT

**PURSUANT TO SECTION 106 OF THE TOWN AND COUNTRY
PLANNING ACT 1990**

**RELATING TO
Site of the Former Dane Court Nursing Home
32-36 Chapel Park Road
St Leonards on Sea
TN37 6HU**

PLANNING APPLICATION NO: HS/FA/22/00409

HASTINGS BOROUGH COUNCIL

MURIEL MATTERS HOUSE

BREEDS PLACE

HASTINGS

EAST SUSSEX

TN34 3UY

THIS AGREEMENT is made the 10th day of April 2024

BETWEEN

- (1) **HASTINGS BOROUGH COUNCIL** of Muriel Matters House, Breeds Place, Hastings, East Sussex, TN34 3UY ('the Council')
- (2) **EAST SUSSEX COUNTY COUNCIL** of County Hall, St Anne's Crescent, Lewes, East Sussex, BN7 1UE ("the County Council")
- (3) **BIRCHPARK LIMITED** a company registered in the Isle of Man with company number 11948V (**Registered overseas entity number OE003988**) of PO Box 145, Level 6, 10A Prospect Hill, Douglas, IM991FY ('the Owner')

RECITALS

- (A) The Council is the local planning authority for the administrative area in which the Site is situated and is the planning authority by whom the obligations contained in this Deed are enforceable.
- (B) The County Council is the highway authority for the purposes of the 1980 Act, the county planning authority for the purposes of the Act and a local authority for the purposes of the 1972 Act for the area within which the Site is situated.
- (C) The Owner is the freehold owner of the Site registered at HM Land Registry under title numbers ESX8795, ESX12126 and ESX67607.
- (D) The Owner submitted the Planning Application for the Development to the Council under reference number HS/FA/22/00409. The Council's Planning Committee having regard to the provisions of the Local Plan and to all other

material considerations resolved on 4th October 2023 to grant the Planning Permission for the Development subject to the prior completion of this Deed.

- (E) The Council and the County Council have agreed to enter into this Deed in order to secure the Planning Obligations contained in this Deed. The Council and the County Council consider this Deed is necessary to make the Development acceptable in planning terms as the Planning Obligations are directly related to the Development and fairly and reasonably related in scale and kind to the Development.
- (F) The Parties agree that the obligations contained in this Deed are in accordance with the National Planning Policy Framework and satisfy the requirements of Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended).
- (G) The Council has not adopted the Community Infrastructure Levy tariff.

NOW THIS DEED is made in pursuance of Section 106 of the Act and contains planning obligations and is a planning obligation for the purposes of that Section and **WITNESSES** as follows:-

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

For the purposes of this Deed the following expressions shall have the following meanings:

1972 Act

means the Local Government Act 1972 (as amended)

1980 Act

means the Highways Act 1980 (as amended)

Act

means the Town and Country Planning Act 1990 (as amended).

Assistant Chief Executive, Governance Services

means the Assistant Chief Executive, Governance Services for the time being of the County Council and shall include his duly authorised agents and representatives and any successor of his

Badger Mitigation Strategy

means the revised Badger Mitigation Strategy as referenced in the Biodiversity Enhancement Strategy

Biodiversity Enhancement Strategy

means the Strategy as set out in the Report of Middlemarch dated March 2022 at Appendix 2 of this Deed

**Commencement of
Development**

shall have the same meaning as ascribed to a 'material operation' by Section 56(4) of the Act PROVIDED THAT for the purposes of determining whether or not a material operation has been carried out there shall be disregarded such operations as site clearance, archaeological investigations, demolition work, engineered groundworks, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, piling, erection of any temporary means of enclosure and the temporary display of site notices or advertisements and "**Commenced**" and

"Commencement" shall be construed accordingly

Development

the erection of an 80 Bedroom Care Home with associated access, parking, open space and landscaping as set out in the Planning Application and authorised by the Planning Permission

Director

means the Director of Communities, Economy and Transport for the time being of the County Council and shall include his duly authorised agents and representatives and any successor of his.

Highway Drawing

means the drawing numbered 3593-F01 attached as Appendix 4 to this Deed

Highway Works

means the works set out in Section B of Part 1 of Schedule 2 of this Deed

Index Linked

that where a sum payable under this Deed is required to reflect changing costs the sum shall be increased in accordance with the provisions of clause 7 of this Deed and "Indexation" shall be construed accordingly.

Inflation Index

the "all items" index figure of the Retail Prices Index published by the Office for National Statistics and if the name or basis of computation of such index should change any official replacement of the said index by the Office of National Statistics and in the absence of such official replacement such other index as may be agreed between the Owner the Council and the County Council.

Monitoring Contribution

means a non-refundable sum of £550 (five hundred and fifty pounds) payable to

the Council for the purposes of the Council's monitoring and reporting of the planning obligations through the s.106 Agreement in accordance with the provisions of Part 2 of Schedule 1 of this Deed

Necessary Highway Consents

means any by-law approvals, and other consents, licences, permissions and orders required from the County Council for the carrying out of the Highway Works.

Occupation

the occupation of any part of the Site to be sold or occupied pursuant to the Planning Permission Provided that this shall not include occupation of any part of the Site for the purposes of marketing or occupation of any part of the Site for development purposes and "Occupy", "Occupied" and "Occupier" shall be construed accordingly.

Parties

means the Council, the County Council and the Owner and “Party” shall mean any one of them (as the context requires).

Payment Notice

means a notice in the form set out in Schedule 3 of this Deed.

Plan

means the drawing numbered 2610 dated November 2023 attached at Appendix 1 to this Deed.

Planning Application

means the planning application for planning permission submitted to the Council for the Development of the Site and allocated reference number HS/FA/22/00409

Planning Obligations

means the planning obligations entered into by the Owner set out in this Deed.

Planning Permission

means the planning permission subject to conditions to be granted in pursuance of the Planning Application substantially in the form of the draft attached at Appendix 5 to this Deed and this shall include in each case any permission granted pursuant to an application under section 73 of the Act to amend or vary the Planning Permission unless the Council decides that a new agreement under Section 106 of the Act is required.

Section 278 Agreement

means an agreement substantially in the form set out in Appendix 3 to this Deed with such amendments as are required by the Owner and which may be agreed by the County Council and made under section 278 of the 1980 Act to secure the carrying out of Highways Works.

Specified Date

means the date specified in the relevant clause or paragraph of this Deed upon which an event is to occur which will trigger an obligation arising under this Deed to be performed or a payment made or if no date is specified then fifteen (15) Working Days after the occurrence of the event triggering the relevant obligation or payment.

Site

the area of land the subject of the Planning Application against which this Deed may be enforced shown for the purposes of identification only edged red on the Plan.

Travel Plan

means a Travel Plan that shall

1. ensure that private car trips to and from the Site are minimized
2. include targets for reduced car use

3. incorporate a monitoring programme so as to ensure that the targets within the Travel Plan are met

Travel Plan Audit Fee

means the sum of Six Thousand Pounds (£6000.00) plus interest payable under Clause 6.2 (if any) and Indexation payable under Clause 7 (if any) towards the costs of auditing the Travel Plan payable by the Owner in accordance with the provisions Section A of Part 2 of Schedule 2 of this Deed

Working Day

means a day other than a Saturday or Sunday or public holiday in England or the days after Boxing Day until January 2.

STATUTORY AUTHORITIES

- 1.2 This Deed is made pursuant to section 106 of the Act and section 111 of the 1972 Act and section 1 of the Localism Act 2011 and all other enabling powers.
- 1.3 The covenants, restrictions and requirements contained in this Deed are Planning Obligations for the purposes of Section 106 of the Act whether expressed to be Planning Obligations or not and are enforceable by the Council and the County Council in accordance with Section 106 of the Act against the Owner and any person deriving title from the Owner (subject to Clauses 1.9-1.11 inclusive and clause 1.31).
- 1.4 The obligations are undertaken by the Owner with the intention that they shall bind their respective interests in the Site and shall be enforceable by the Council and the County Council as the respective planning authority, county planning authority and highway authority for the area of the Site.
- 1.5 Except insofar as legally or equitably permitted nothing in this Deed shall fetter or restrict the discretion of the Council and the County Council in the exercise of their powers under any statutory enactment or other enabling power for the time being in force.

CONDITIONALITY

- 1.6 It is hereby agreed and declared that save for the provisions of Clause 1.16 which shall have effect on the date of this Deed the obligations under this Deed shall not have effect unless and until the grant of the Planning Permission by the Council.

THE OWNER'S COVENANTS

- 1.7 The Owner covenants with the Council and the County Council that they will carry out their obligations with the restrictions and requirements set out in Schedules 1 and 2 and Clause 1.16 of this Deed.

THE COUNTY COUNCIL'S COVENANTS

- 1.8 The County Council covenants with the Owner that it will carry out and comply with the restrictions and requirements set out in Schedule 3 of this Deed.

RELEASE AND DISCHARGE

- 1.9 The Owner and any successor or assignee with an interest in the Site shall cease to have any statutory or contractual obligation or liability under the terms of this Deed in relation to the Site or any part of it once it shall have parted with all its respective interest in the Site or that part save in so far as it relates to any relevant prior breach of its obligations under this Deed.
- 1.10 Nothing in this Deed shall be construed as prohibiting or limiting the right to develop any part of the Site in accordance with a planning permission (other than the Planning Permission) granted by the Council or any other competent authority after the date of this Deed and Provided Further that this shall not prevent any subsequent section 106 Agreement being entered into in respect of the Site which might vary or supersede this Deed.
- 1.11 None of the terms, obligations and covenants in this Deed shall be binding upon or enforceable against:(a) any statutory undertakers in relation to any part or parts of the Site acquired by them for electricity substations gas governor stations or pumping stations or the provision of other infrastructure as may be required to fulfil their statutory functions;

NOTICES

1.12 Any notice or other written communication to be served upon or given to the Parties shall be in writing and shall be sent to the address provided in Clause 1.13 or such substitute address in England as may from time to time have been notified in writing by that Party:

- (a) by hand Provided That a signed and dated written receipt on the recipients headed paper must be obtained at the time of delivery from the recipient; or
- (b) by special or recorded delivery post; or
- (c) such other method of service as may be agreed in writing between the Parties concerned.

1.13 The Council: Hastings Borough Council

Contact: Chief Legal Officer

Address: Hastings Borough Council, Muriel Matters House, Breeds Place, Hastings, East Sussex, TN34 3UY.

The County Council: East Sussex County Council

Contact: Assistant Chief Executive, Governance Services

Address: East Sussex County Council, County Hall, St Anne's Crescent, Lewes, East Sussex, BN7 1UE

The Owner : Birchpark Limited

Contact: The Company Secretary

Address: , Level 6, 10a Prospect Hill, Douglas, Isle Of Man, IM1 1EJ

1.14 Any notice served shall be deemed to have been validly served or given

1.14.1 If personally delivered at the time of delivery.

1.14.2 If posted at the expiration of 48 hours after the envelope containing the same was delivered into the custody of the postal authority within the United Kingdom.

1.14.3 In proving such service it shall be sufficient to prove that personal delivery was made or that the envelope containing such notice was properly addressed and delivered into the custody of the postal authority in a pre-paid first-class envelope or recorded delivery envelope as the case may be.

THIRD PARTY RIGHTS

1.15 No third party is intended to have a right to enforce the terms of this Deed pursuant to the Contracts (Rights of Third Parties) Act 1999.

COST OF DEED

1.16 The reasonable and proper legal costs of the Council and the County Council in connection with the preparation and completion of this Deed shall be paid by the Owner prior to the completion of this Deed.

MISCELLANEOUS

1.17 The headings appearing in this Deed are for ease of reference only and shall not affect the construction of this Deed.

1.18 Where reference is made to a Clause, Recital, Schedule, Paragraph or Plan such reference (unless the context requires otherwise) is a reference to a clause, recital,

schedule, paragraph or plan contained in (or in the case of plans attached to) this Deed.

- 1.19 For the avoidance of doubt the provisions of this Deed shall not have any effect until this document has been dated.
- 1.20 Reference to the Council shall include any successors to their functions as local planning authority, county planning authority or highway authority and references to the Owner includes successors in title to the Site or part thereof and references to any other party include the successors in title of that party.
- 1.21 The Planning Obligations restrictions and requirements contained in this Deed shall be treated as Local Land Charges and registered at the Local Land Charges Registry for the purposes of the Local Land Charges Act 1975.
- 1.22 References to statutes, by-laws, regulations, orders and delegated legislation shall include any statute, by-law, regulation, order or delegated legislation re-enacting or made pursuant to the same.
- 1.23 Unless the context otherwise requires words in the singular include the plural and words in the plural include the singular.
- 1.24 Unless the context otherwise requires words importing the masculine gender include the feminine.
- 1.25 Unless the context otherwise requires words importing the feminine gender include the masculine.
- 1.26 Subject to clause 1.9 where a Party includes more than one person any obligations of that Party shall be joint and several.

- 1.27 If any provision or sub-provision of this Deed is held to be invalid illegal or unenforceable (for whatever reason) under any enactment or rule of law that term or provision shall to that extent be deemed not to form part of this Deed and the enforceability of the remaining provisions of this Deed shall remain unaffected.
- 1.28 Where the agreement, approval, consent or expression of satisfaction is required from the Council under the terms of this Deed such agreement, approval, consent or expression of satisfaction shall not be unreasonably withheld or delayed.
- 1.29 This Deed shall cease to have effect (insofar only as it has not already been complied with) if the Planning Permission shall be quashed, revoked or otherwise withdrawn or (without the consent of the Owner) they are modified by any statutory procedure or expire prior to the Commencement of Development.
- 1.30 The Owner hereby AGREES and DECLARES that permission shall be granted to authorised officers of the Council upon reasonable notice and request and at reasonable times (except in an emergency) and subject to any instructions which any contractor may give to ensure safety for officers of the Council (or their nominated representatives) at their own or at the Council's risk to gain access to the Site in order to monitor compliance with this Deed following Commencement of Development.
- 1.31 This Deed shall not be enforceable against any future mortgagee or chargee who from time to time shall have the benefit of a charge or mortgage registered against any part or parts of the Site unless and until it takes possession of any part or parts of the Site in which case it too will be bound by the obligations affecting the part or parts of the Site in which it is in possession as if it were a person deriving title from the Owner for all such time that it remains in possession PROVIDED THAT the mortgagee / chargee will not be personally liable for any breach of the obligations in this Deed unless committed or continuing at a time when the mortgagee or chargee is in possession of all or any part of the Site/

2. DISPUTE RESOLUTION

- 2.1 In the event of there being any dispute between the Parties in respect of any matter to be agreed pursuant to this Deed such dispute shall be determined in accordance with this clause and any Party may at any time require by notice to the other Parties an independent expert to be appointed to resolve the dispute.
- 2.2 The expert (who shall be a person having not less than 10 (ten) years' experience of the type of dispute in question) shall be agreed upon by the Parties within 4 (four) weeks of the notice pursuant to Clause 2.1 and in default of such agreement shall be appointed by the President for the time being of the Royal Institution of Chartered Surveyors or the Law Society (as appropriate) on the application of the Party or Parties made at any time thereafter.
- 2.3 The expert shall give notice of his appointment to the Parties and invite them to submit written representations to him and if any submissions are received the expert will provide them to the other Party within a specified period (which will not exceed 4 (four) weeks) if they wish with an invitation to respond within a specified period (not exceeding 2 (two) weeks).
- 2.4 The expert shall act as an expert and not as an arbitrator and he shall consider any written representation submitted to him within the said specified period and shall not be in any way limited or fettered thereby and shall determine the dispute in accordance with his own judgment.
- 2.5 The expert shall give notice in writing of his decision with reasons therefore to the Parties within 2 (two) months of his appointment or within such extended period as the Parties may together allow.
- 2.6 The decision of the expert shall be final on all matters referred to him and in the absence of manifest error or fraud shall be binding on the Parties.
- 2.7 If for any reason the expert fails to give notice of his decision within the time and in the manner herein before provided the Party or Parties may apply to the

President of the Royal Institution of Chartered Surveyors or the Law Society (as appropriate) for a substitute to be appointed in his place and the procedure may be repeated as many times as necessary.

2.8 Each Party shall bear its own costs save that the cost of appointing the expert and the fees of the expert and of the Royal Institution of Chartered Surveyors or of the Law Society (as appropriate) and any costs properly incurred by the expert arriving at his determination (including any fees and costs of any advisers of the expert) shall be in the expert's decision.

2.9 It is agreed that nothing in this Clause shall be taken to fetter the Parties' ability to seek legal redress in the Courts (or otherwise) for any breach of the obligations in this Deed.

3. WARRANTY AS TO TITLE

3.1 The Owner confirms and warrants to the Council that it has not leased, mortgaged, charged or otherwise knowingly created any legal interest in the Site (as defined by section 106 of the Act) at the date of this Deed save for those charges noted on the title to the Site and that Recital (C) of this Deed is correct and accurate in every respect.

4. WAIVER

4.1 The Owner undertakes that no waiver (whether express or implied) by the Council and /or the County Council of any breach or default in performing or observing any of the covenants, terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council and/or the County Council from enforcing any of the relevant covenants, terms or conditions or from acting upon any subsequent breach or default.

5. SPECIFIED DATE AND PAYMENT NOTICE

The Owner undertakes that where this Deed imposes a requirement for the payment of a financial contribution on a Specified Date:-

- 5.1 written notice of the Specified Date shall be given to the Council or the County Council (as appropriate) in the form of the Payment Notice not more than five (5) Working Days after such Specified Date.
- 5.2 if the written notice of a Specified Date is not given, the Council or the County Council (as appropriate) shall be entitled (acting reasonably) to determine the Specified Date and shall give written notice to the Owner of its determination.
- 5.3 to make the payment due under this Deed to the Council or the County Council (as appropriate) and to attach a fully completed Payment Notice with such payment.

6. PAYMENT OF SUMS DUE

- 6.1 All sums payable under this Deed shall (unless otherwise stated in this Deed) become due after ten (10) Working Days after the Specified Date and shall henceforth be debts due to the Council or the County Council (as relevant) recoverable by action as a simple contract debt and may be deducted from any monies due to the Owner from the Council or the County Council under any contract agreement or arrangement whatsoever.
- 6.2 If any such sums are not paid by the Due Date then the Owner shall thereafter be liable to pay to the Council or the County Council (as relevant) interest on the same calculated on a daily basis at a daily rate of 1/365th of the annual rate of interest of 4% per annum greater than the National Westminster Bank PLC base rate in force from time to time from the Specified Date to the date of payment thereof.

7. INDEX LINKING

- 7.1 The Monitoring Contribution and the Travel Plan Audit Fee shall be Index Linked so that the sum actually payable shall be recalculated by the application of the following formula:-

$$A = \frac{B \times C}{D}$$

where:

A is the sum actually payable on the relevant Specified Date

B is the original sum mentioned in this Deed

C is the Inflation Index for the quarter immediately preceding the relevant Specified Date

D is the Inflation Index for the quarter immediately preceding the date of this Deed

C divided by D is equal to or greater than 1.

8. JURISDICTION

- 8.1 This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) will be governed by and construed in accordance with the law of England.

SCHEDULE 1

THE OWNER'S OBLIGATIONS TO THE COUNCIL

PART 1

NOTICE OF COMMENCEMENT OF DEVELOPMENT / CHANGE IN OWNERSHIP / OCCUPATION

- 1.1 The Owner hereby covenants with the Council to provide the Council with no less than ten (10) Working Days prior written notice of Commencement of Development, or First Occupation in respect of the Site.
- 1.2 The Owner hereby covenants with the Council to provide the Council with the following details within ten (10) Working Days of completion of any conveyance, transfer or lease for a term of more than 20 years (or that lease's assignment) ("the Disposition") entered into in respect of all or any part of the Site:
 - 1.2.1 the name and address of the person to whom the Disposition was made; and
 - 1.2.2 the nature and extent of the interest disposed of.

PART 2

MONITORING CONTRIBUTION

2. The Owner hereby covenants with the Council in respect of the Development:
 - 2.1 To pay to the Monitoring Contribution to the Council prior to Commencement of Development
 - 2.2 Not to Commence Development until the Monitoring Contribution has been paid to the Council.

PART 3

BIODIVERSITY ENHANCEMENT STRATEGY

3. The Owner hereby covenants with the Council:

3.1 . Unless otherwise approved in writing by the Council not to Commence the Development until the Owner has provided the Council with no less than ten (10) Working Days' notice in writing of the implementation of the approved Biodiversity Enhancement Strategy;

3.2 to thereafter implement and comply with the approved Biodiversity Enhancement Strategy and the Badger Mitigation Strategy in accordance with the time limits set out therein (unless otherwise agreed in writing by the Council);

3.3 not to carry out any changes to the approved Biodiversity Enhancement Strategy and the Badger Mitigation Strategy without the prior written consent of the Council

3.4 No building forming part of the Development shall be Occupied until the Biodiversity Enhancement Strategy and the Badger Mitigation Strategy have been implemented.

SCHEDULE 2

THE OWNER'S COVENANTS TO THE COUNTY COUNCIL

PART 1

SECTION A

SECTION 278 AGREEMENT

The Owner hereby covenants with the County Council:

1. that prior to Commencement of Development it will enter into the Section 278 Agreement with the County Council to secure the carrying out of the Highway Works.
2. Not to Commence Development until it has entered into the Section 278 Agreement paying all of the County Council's proper and reasonable legal costs relating to the Section 278 Agreement.
3. That prior to Occupation of any part of the Development it will complete the Highway Works in accordance with the provisions of the Section 278 Agreement.
4. Not to Occupy or cause or allow Occupation of any part of the Development until it has completed the Highway Works in accordance with the provisions of the Section 278 Agreement.

SECTION B

HIGHWAY WORKS

The Highway Works are to include:-

1. the relocation of existing traffic calming feature;
2. a review of road markings and any action required as a result of the review; and
3. the construction of a new access to the Site

as shown for illustrative purposes only on the Highway Drawing together with any other ancillary works reasonably required by the Director

PART 2

SECTION A

TRAVEL PLAN AUDITING FEE

The Owner hereby covenants with the County Council:-

1. To pay the Travel Plan Audit Fee to the County Council prior to Occupation of any part of the Development.
2. Not to Occupy or cause or allow Occupation of any part of the Development until the Travel Plan Audit Fee has been paid to the County Council in full.

SECTION B

TRAVEL PLAN

1. Prior to the first Occupation of any part of the Development to prepare and submit to the County Council a draft travel plan ("the Draft Travel Plan") such plan to be based on and consistent with the analysis contained in the Travel Plan Statement submitted by Eddisons in support of the planning application and dated November 2021 .
2. Not to Occupy or cause or allow to be Occupied any part of the Development until the Draft Travel Plan has been approved in writing by the County Council as the travel plan ("the Travel Plan")
3. To use best endeavours to achieve the objectives set out in the Travel Plan ("the Travel Plan Objectives") and on the anniversary of the date six (6) months from the date of first Occupation to submit to the County Council base line data and thereafter monitoring information (data and report) in accordance with the methodology(ies) detailed in the Travel Plan.

4. If the monitoring information submitted shows that the Travel Plan Objectives are not being achieved then after each monitoring of the Travel Plan to implement further suitable measures and initiatives in agreement with the County Council to achieve the Travel Plan Objectives before the next monitoring surveys

SCHEDULE 3

THE COUNTY COUNCIL'S COVENANTS TO THE OWNER

1. The County Council shall use reasonable endeavours to enter into the Section 278 Agreement and any Necessary Highway Consents with the Owner to secure the provision of the Highway Works and their subsequent adoption as publicly maintainable highway within a reasonable time scale so as not to cause unnecessary delay to the Development;

SCHEDULE 4

PAYMENT NOTICE

Agreement Details	
Application Site address	
Application	
Date of original agreement under S106 of the Town and Country Planning Act 1990	
Date of variation of original agreement [where relevant]	
Parties to agreement	
Details of obligation giving rise to payment (and Clause number)	
Payee Details	
Payee [name, address and reference]	

APPENDIX 1

Plan