

Dated:

2021

LAWRENCE TREVOR HAMBLEN and MICHAEL HAMBLEN

and

FOREMAN HOMES LIMITED

to

FAREHAM BOROUGH COUNCIL

UNILATERAL UNDERTAKING

pursuant to section 106 of the Town and Country
Planning Act 1990 (as amended) and other
powers relating to development of land to the
south of Romsey Avenue Fareham Hampshire

**Southampton & Fareham Legal Services Partnership
Southampton City Council
Civic Offices
Southampton
SO14 7LY**

Ref: FBC/ENV-022227

Ref: HCC/DL/138900

IS GIVEN BY:

- (1) **LAWRENCE TREVOR HAMBLÉN** and **MICHAEL HAMBLÉN** both of Winnham Farm, The Thicket, Portchester, Hampshire PO16 8JX ("the Owner")
- (2) **FOREMAN HOMES LIMITED** (Co. Reg. No. 03313213) whose registered office is at Unit 1 Station Industrial Park, Duncan Road Park Gate, Southampton, Hampshire, SO31 1BX ("the Appellant")

TO:

- (3) **FAREHAM BOROUGH COUNCIL** of Civic Offices, Civic Way, Fareham PO16 7AZ ("the Borough Council")

RECITALS

- A The Borough Council is the local planning authority for the purposes of the Act for the area in which the Land is situated.
- B The Owner is the freehold owner of the Land registered with title absolute at the Land Registry under title number HP215695, held subject to the terms of an agreement dated 19 January 2017 for the benefit of the Appellant.
- C The Appellant submitted the Application to the Borough Council.
- D The Appellant has submitted the Appeal to the Secretary of State.
- E The Owner and the Appellant enter into this Deed to give the following obligations in the manner hereinafter appearing.
- F The Owner and Appellant undertake that the Development shall be carried out only in accordance with the Permission and any Reserved Matter Approvals along with the rights and obligations set out in this Deed.

NOW THIS DEED WITNESSES AS FOLLOWS:**1 DEFINITIONS**

- 1.1 In addition to the definitions set out below, a series of specific definitions are included in each of the schedules to this Deed giving further defined terms and expressions to facilitate interpretation and unless stated to the contrary the specific definitions in the schedules shall apply throughout this Deed where the relevant terms and expressions are used.
- 1.2 In this Deed the following expressions shall have the meanings indicated:

"Act"	The Town and Country Planning Act 1990 (as amended)
"Appeal"	the appeal submitted to the Secretary of State for refusal of the Application by the Borough Council registered under reference number APP/A1720/W/21/3271412
"Application"	the application for outline planning permission for the Development relating to the Site and allocated reference number P/18/1073/FP
"Bird Conservation Area"	as defined in schedule one to this Deed

"Borough Council's Legal Costs"	the Borough Council's legal costs in connection with the preparation and completion of this Deed
"Commence"	the carrying out of a "material operation" (as defined in section 56(4) of the Act) in connection with the Development save that for the purposes of this Deed and for no other purpose operations consisting of site clearance, demolition work, archaeological investigations, 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, erection of any temporary means of enclosure, the temporary display of site notices or advertisements shall not be included (and "Commencement" and "Commenced" shall be construed accordingly)
"Completed"	practically complete save for minor snagging items such that it is reasonably fit for Occupation (and "Complete" and "Completion" shall have the same meaning)
"Decision Letter"	the letter issued by the Inspector determining the outcome of the Appeal
"Deed"	this unilateral undertaking made by deed
"Development"	the outline proposal for residential development of 225 dwellings, bird conservation area and area of public open space with all matters reserved except for access carried out pursuant to the Planning Permission granted in accordance with the Planning Application and any Reserved Matters Approval
"Enabling Powers"	section 111 of the Local Government Act 1972 (as amended) section 1 of the Localism Act 2011 and all other enabling powers which may be relevant for the purpose of giving validity to or facilitating the enforcement of the covenants, restrictions and obligations created by this Deed
"Initiation"	the beginning of the Development by the carrying out of a material operation as defined in section 56(4) of the Act pursuant to the Permission (irrespective of non-compliance with any condition of the Permission) and the phrase "Initiated" shall be construed accordingly
"Inspector"	the Planning Inspector appointed by the Secretary of State for Housing, Communities and Local Government to determine the Appeal
"Interest"	interest at four per cent (4%) above the base lending rate of the Barclays Bank Plc (calculated on a daily basis from the date on which it fell due until the actual date of payment)
"the Land"	the part of the Site known as land lying to the south of Romsey Avenue Fareham the freehold to which is registered with title absolute at the Land Registry under title number HP215695 and described edged in red on Plan 3 appended to this Deed
"Occupation"	occupation for the purposes permitted by the Permission but not including occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing or display or occupation in relation to security operations and "Occupy" and "Occupied" shall be construed accordingly

“Plan 1”	‘Location Plan 16.140.01 revision C (August 17)’ drawing appended to this deed
“Plan 2”	‘Location Plan with geese area shown 16.140.SK10 revision C (May 18)’ drawing appended to this Deed
“Plan 3”	‘Location Plan access road not shown 16.140.SK50 (August 21)’ drawing appended to this Deed
“Permission”	the outline planning permission subject to conditions to be granted pursuant to the Appeal
“Residential Units”	individual units within the Development to be used for residential purposes (and for the avoidance of doubt this definition shall include houses and flats as appropriate) as approved by the Permission and any Reserved Matters Approval and “Residential Unit” shall be construed accordingly
“Reserved Matters Application”	a further planning application to obtain consent for those matters not included in the Permission which are subject to approval by the Borough Council
“Reserved Matters Approval”	an approval by the Borough Council of a Reserved Matters Application
“Site”	The area to which the Application relates as shown edged in red on Plan 1 which includes the Land
“Statutory Undertakers”	organisations licensed by the government which include all utilities electricity, gas, water, telephone, cable telephone and television and other telecommunication companies
“Working Day”	a day (other than a Saturday, Sunday or public holiday) when banks in England are open for business

2 INTERPRETATION

- 2.1 Where in this Deed reference is made to any clause, paragraph, schedule or recital such reference (unless the context otherwise requires) is a reference to a clause, paragraph, schedule or recital in this Deed.
- 2.2 Words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, corporations and firms and all words shall be construed interchangeable in that manner.
- 2.3 Wherever there is more than one person named as a party and where more than one party undertakes an obligation all their obligations can be enforced against all of them jointly and severally unless there is an express provision otherwise.
- 2.4 Any reference to a statute shall include any modification, extension or re-enactment of that statute for the time being in force and shall include all instruments, orders, plans regulations, permissions and directions for the time being made, issued or given under that statute or deriving validity from it.
- 2.5 References to any party to this Deed shall include the successors in title to that party and to any person deriving title through or under that party and in the case of the Borough Council the successors to its statutory functions.

- 2.6 References to "the parties" shall mean the parties to this Deed and reference to a "party" shall mean any one of the parties.
- 2.7 The headings and contents list are for reference only and shall not affect construction.
- 2.8 Words importing the singular meaning where the context so admits include the plural meaning and vice versa.

3 STATUTORY AUTHORITY

- 3.1 This Deed is made pursuant to section 106 of the Act and the Enabling Powers.
- 3.2 The undertakings, covenants, restrictions and requirements imposed upon the Owner under this Deed create planning obligations pursuant to section 106 of the Act and subject to clause 3.3 and/or as otherwise provided in this Deed are enforceable by the Borough Council as local planning authority against the Owner and any person deriving title in the Land or any part of it from the Owner.
- 3.3 The undertakings, covenants and obligations on the part of the Owner in this Deed shall not apply and shall not be enforceable by the Borough Council if the person appointed to determine the Appeal states clearly in the Decision Letter upholding the Appeal that such obligations, or any of them, are unnecessary to mitigate the impact of the Development or otherwise fail to meet the statutory tests set out in regulation 122 of the Community Infrastructure Levy Regulations 2010 PROVIDED THAT if any obligations are determined by the decision maker to be unnecessary or otherwise fail to meet the statutory tests it shall not affect the lawfulness of the balance of the covenants and obligations in this Deed which continue to be enforceable.
- 3.4 Insofar as any clause or clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed.

4 EFFECT OF THE DEED

- 4.1 This Deed shall take effect on the day and year first before written SAVE THAT the obligations contained in schedules one to six (inclusive) to this Deed shall take effect from the grant of Permission.

5 THE OWNER'S UNDERTAKINGS

- 5.1 The Owner undertakes to the Borough Council that it will observe and perform the obligations on its part contained in Schedules One.

6 RELEASE AND LAPSE

- 6.1 The Owner shall not be liable for a breach of any of its obligations under this Deed (save for antecedent breaches) after it shall have parted with all of its interests in the Land or the relevant part of it.
- 6.2 This Deed shall lapse and be of no further effect if:
 - 6.2.1 the Permission shall lapse without having been Initiated; or
 - 6.2.2 the Permission shall be varied or revoked other than with the consent of the Owner; or
 - 6.2.3 the Permission is quashed following a successful legal challenge.
 - 6.2.4 the Appeal is refused by the Inspector save for the provisions of clause 11.1 and 11.2 if they have not already been complied with and for the avoidance of doubt the Appellant shall not be entitled to a refund of any legal fees paid

to the Borough Council or the County Council pursuant to clauses 11.1 and 11.2 of this Deed

- 6.3 Nothing in this Deed shall prohibit or limit the right to develop any part of the Land in accordance with a planning permission (other than the Permission) granted (whether or not on appeal) after the date of this Deed.
- 6.4 This Deed shall not be enforceable against Statutory Undertakers who have an interest in or arising purely in connection with their apparatus or operational land situated within the Development.
- 6.5 This Deed shall not be enforceable against any owners or occupiers of a Residential Unit save in respect of any restriction on Occupation of such Residential Unit.

7 LOCAL LAND CHARGE

- 7.1 This Deed is a local land charge and is given on the basis that it shall be registered as such by the Borough Council.
- 7.2 Upon the full compliance with any terms of this Deed the Owner may request that the Borough Council procure that this is noted in the register of local land charges relating to it as soon as reasonably practicable

8 NO FETTER ON DISCRETION OR WAIVER

- 8.1 Nothing contained or implied in this Deed shall prejudice or affect the rights discretions powers duties and obligations of the Borough Council under all statutes by-laws statutory instruments orders and regulations in the exercise of their functions as a local authority.
- 8.2 No waiver (whether expressed or implied) by the Borough 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 Borough Council from enforcing any of the relevant terms or conditions or from acting upon any subsequent breach or default.

9 WARRANTY AS TO TITLE

- 9.1 The Owner hereby warrants to the Borough Council that no person other than the Owner has any interest in the Land for the purposes of section 106 of the Act.

10 SEVERABILITY

- 10.1 If any part of this Deed shall be declared unlawful or invalid by a court of competent jurisdiction then (to the extent possible) the remainder of this Deed shall continue in full force and effect.

11 THE COUNCIL'S COSTS

- 11.1 The Appellant undertakes to the Borough Council that it will on or before the date of this Deed pay the Borough Council's Legal Costs.

12 CONTRACT (RIGHTS OF THIRD PARTIES) ACT 1999

- 12.1 Notwithstanding the provisions of the Contracts (Rights of Third Parties) Act 1999 no part of this Deed shall be enforceable by a third party who is not a party to the Deed and for the avoidance of doubt the terms of this Deed may be varied by Deed between the Borough Council and any person against whom the covenants, restrictions and obligations under this Deed are enforceable without the consent of any such third party.

13 NOTIFICATION OF COMMENCEMENT/OCCUPATION

- 13.1 The Owner undertakes to the Borough Council and that it will:
- 13.1.1 notify the Borough Council in writing of the date of Commencement of the Development within five (5) Working Days of it occurring; and
 - 13.1.2 notify the Borough Council in writing of the date of Occupation for the first time of any part of the Development within five (5) Working Days of it occurring;
 - 13.1.3 pay to the Borough Council upon written demand its reasonable and properly incurred legal fees incurred for additional monitoring caused by the Owner's non-compliance with clauses 13.1.1 and 13.1.2.

14 NOTICES

- 14.1 Any notices required to be served by one party on another under this Deed shall be served by First Class prepaid post by hand or by email (in the case of the Borough Council) in the following manner:
- 14.1.1 on the Borough Council at the address shown above or by email to devcontrol@fareham.gov.uk marked "for the attention of the Head of Development Management" and bearing the reference "P/18/1073/FP"; and
 - 14.1.2 on the Owner at the address as detailed above or as notified by the Owner in writing to the Borough Council; and
 - 14.1.3 on the Appellant at the address as detailed above or as notified by the Appellant in writing to the Borough Council.

15 INTEREST ON LATE PAYMENTS

- 17.1 Any amount due from the Owner under this Deed which is not paid by the due date shall be payable with Interest.

16 MORTGAGEE CLAUSE

- 16.1 Notwithstanding clause 3.2, no obligation in this Deed shall be binding on or enforceable against any chargee or mortgagee from time to time who shall have the benefit of a charge or mortgage of or on any part of parts of the Land or any receiver appointed by such chargee or mortgagee or any person deriving title through such chargee, mortgage or receiver unless and until such chargee, mortgagee, receiver or person has entered into possession of the Land or part thereof to which such obligation relates.

17 NOTIFICATION OF SUCCESSORS IN TITLE

- 17.1 Save in the case of the disposal of a Residential Unit, the Owner covenants to the Borough Council that it will give immediate written notice to the Borough Council of any change of ownership of the Land if at such time the obligations contained within this Deed have not fully been discharged such notice to give details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the Land or unit of occupation purchased by reference to a plan.

18 VAT

- 18.1 All consideration given in accordance with the terms of this Deed shall be exclusive of any value added tax properly payable.

19 DISPUTE RESOLUTION

- 19.1 Where it is provided in this Deed that a matter is to be approved (or another cognate expression is used) by the Borough Council and such approval has been refused or given conditionally in accordance with the provisions of this Deed and the Owner wishes to dispute such refusal or conditions, then the Owner may:
- 19.1.1 first attempt to resolve that dispute or difference amicably by inviting the Borough Council to a meeting attended by at least one senior representative from each party;
 - 19.1.2 if the parties are unable to resolve the dispute amicably pursuant to clause 19.1.1, invite the Borough Council to agree that the dispute be referred for resolution in accordance with clause 19.2.
- 19.2 Any such dispute or difference to be referred for resolution pursuant to clause 19.1.2 shall be referred to an independent and suitable person holding appropriate professional qualifications, in light of the subject matter in dispute and such person shall act as an expert whose decision shall be final and binding on the parties in the absence of manifest error and any costs shall be payable by the parties to the dispute in such proportion as the expert shall determine and failing such determination shall be borne by the parties in equal shares.
- 19.3 Nothing in this clause 19 shall be taken to fetter the ability of the Borough Council to carry out its statutory functions as local planning authority with power to enforce any breach of the obligations entered into by the Owner in this Deed or any other planning breach in respect of the Development.

20 APPELLANT'S CONSENT

- 20.1 The Appellant hereby consents to this Deed being entered into by the Owner and to the obligations becoming binding on the Land notwithstanding any registration by or on behalf of the Appellant to protect its interest in the Land pursuant to the agreement referred to in Recital B.

21 JURISDICTION

- 21.1 This Deed is governed by and interpreted in accordance with the law of England and the parties submit to the exclusive jurisdiction of the courts of England.

22 DELIVERY

- 22.1 This Deed is for the purposes of the Regulatory Reform (Execution of Deeds and Documents) Order 2005 a deed and for the avoidance of doubt the Deed shall be deemed not delivered despite being executed by the parties until such time as it is dated.

SCHEDULE ONE

BIRD CONSERVATION AREA

DEFINITIONS

“Bird Conservation Area”	the land edged blue on Plan 2
“Bird Conservation Area Monitoring Scheme”	The Bird Conservation Area Monitoring Scheme approved pursuant to condition [] of the Permission
“Bird Conservation Area Scheme”	The Bird Conservation Area Scheme approved pursuant to condition [] of the Permission
“Bird Conservation Area Commuted Sum”	A reasonable sum for the future management and maintenance of the Bird Conservation Area as is determined as part of the Bird Conservation Area Scheme
“Bird Conservation Area Transfer”	means the transfer of the Bird Conservation Area to the HIWWT or the RSPB or to any other suitable party agreed with the Borough Council
“HIWWT”	the Hampshire & Isle of Wight Wildlife Trust of Beechcroft House, Vicarage Ln, Curdrige, Southampton SO32 2DP
“Management Company”	a company incorporated for the purposes of managing and maintaining the Bird Conservation Area in accordance with the Bird Conservation Area Monitoring Scheme or such other body as may be agreed with the Borough Council in writing to undertake the same purpose
“Perpetuity”	125 years from the date on which the Bird Conservation Area has been laid out in accordance with the Bird Conservation Area Scheme.
“RSPB”	Royal Society for the Protection of Birds, the charity registered in England and Wales under no. 207076

OBLIGATION

The Owner undertakes to the Borough Council as follows:-

1 Bird Conservation Area Provision

- 1.1 Not to Commence the Development (with the exception of any works required to be undertaken in order to provide and lay out the Bird Conservation Area) unless and until the Bird Conservation Area has been laid out in accordance with the relevant details in the Bird Conservation Area Scheme.
- 1.2 To use reasonable endeavours to agree to transfer the Bird Conservation Area to the HIWWT or the RSPB or to any other party as may be agreed with the Borough Council that is suitable for the management and maintenance of the Bird Conservation Area and to thereafter complete the Bird Conservation Area Transfer as soon as reasonably practicable.
- 1.3 Not to Commence the Development (with the exception of any works required to be undertaken in order to provide and lay out the Bird Conservation Area) unless either
 - 1.3.1 the Bird Conservation Area Transfer has been completed and the Bird Conservation Area has either been transferred to HIWWT, the RSPB or to any other party agreed

with the Borough Council at nil value together with such reasonably necessary rights, access and easements to permit HIWWT, the RSPB or to any other party agreed with the Borough Council to access the Bird Conservation Area for management and maintenance purposes in accordance with the Bird Conservation Area Scheme; or

- 1.3.2 The Owner has confirmed in writing that the Bird Conservation Area will be managed by a Management Company.
- 1.4 In the event that paragraph 1.3.1 above applies the Owner shall pay the Bird Conservation Area Commuted Sum to the party that receives the Bird Conservation Area Transfer upon the completion of the Bird Conservation Area Transfer
- 1.5 In the event that paragraph 1.3.2 applies, prior to the Commencement of Development (with the exception of any works required to be undertaken in order to provide and lay out the Bird Conservation Area) the Owner shall
 - 1.5.1 transfer the Bird Conservation Area to the Management Company and pay the Bird Conservation Area Commuted Sum to the Management Company; and
 - 1.5.2 provide evidence to the Borough Council that the Management Company has been incorporated and that the Bird Conservation Area Commuted Sum has been paid to the Management Company.
- 1.6 That there shall be no Commencement of Development (with the exception of any works required to be undertaken in order to provide and lay out the Bird Conservation Area) unless and until either
 - 1.6.1 the Bird Conservation Area Transfer has been completed and the Bird Conservation Area Commuted Sum has been paid pursuant to paragraph 1.3.1 and the Bird Conservation Area Commuted Sum has been paid pursuant to paragraph 1.4; or
 - 1.6.2 The Bird Conservation Area has been transferred to a Management Company and the Bird Conservation Area Commuted Sum has been paid to the Management Company pursuant to paragraph 1.5.1 and evidence of the same has been provided to the Borough Council pursuant to paragraph 1.5.2 above.

2 Bird Conservation Area Management Maintenance and Monitoring

- 2.1 To manage and maintain the Bird Conservation Area in accordance with the Bird Conservation Area Monitoring Scheme in Perpetuity.
- 2.2 To carry out any works to the Bird Conservation Area that are identified as necessary pursuant to the review meetings and monitoring that will take place in accordance with the Bird Conservation Area Monitoring Scheme.

IN WITNESS whereof the Owner and the Appellant have executed this deed on the day and year first before written

EXECUTED AS A DEED by)
LAWRENCE TREVOR HAMBLÉN)

In the presence of:)
)

Witness Signature:)

Witness Name:)

Witness Address:)

)

Witness Occupation:)

EXECUTED AS A DEED by)
MICHAEL HAMBLÉN)

In the presence of:)
)

Witness Signature:)

Witness Name:)

Witness Address:)

)

Witness Occupation:)

EXECUTED AS A DEED by)
FOREMAN HOMES LIMITED, acting by a director,)

In the presence of:)
)

Witness Signature:)

Witness Name:)

Witness Address:)

)

Witness Occupation:)