

Dated:

2021

DUNLEY ESTATE LIMITED
and
PERSIMMON HOMES LIMITED
to
FAREHAM BOROUGH COUNCIL

UNILATERAL UNDERTAKING
pursuant to Section 106 of the Town and Country
Planning Act 1990 and other powers relating to
land to the east of Crofton Cemetery and west of
Peak Lane, Stubbington

BY:

- (1) **DUNLEY ESTATE LIMITED** (Company Registration No 463118) whose registered address is at Dunley Park, Dunley, Whitchurch, RG28 7TU (“the Owner”); and
- (2) **PERSIMMON HOMES LIMITED** (Company Registration No 04108747) whose registered address is at Persimmon House, Fulford, York, YO19 4FE (“the Appellant”)

TO:

- (3) **FAREHAM BOROUGH COUNCIL** of Civic Offices, Civic Way, Fareham, Hampshire, PO16 7AZ (“the Borough Council”); and

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 HM Land Registry under Title Number HP701497.
- C The Appellant submitted the Application to the Borough Council which was refused by notice dated 18 February 2021.
- 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.

NOW THIS DEED WITNESSES AS FOLLOWS:

1 DEFINITIONS

1.1 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 against the refusal of the Application by the Borough Council and given reference number APP/A1720/W/21/3275237
“Application”	The application for planning permission allocated reference number P/20/0522/FP for development comprising 206 dwellings, access road from Peak Lane maintaining link to Oakcroft Lane, stopping up of a section of Oakcroft Lane (from old Peak Lane to access road), with car parking, landscaping, substation, public open space and associated works.
“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)
“Decision Letter”	means the decision letter issued by the Planning Inspector or the Secretary of State confirming whether or not the Appeal is allowed
“Deed”	This undertaking made by deed
“Development”	The development of the Land in accordance with the Permission
“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 obligations created by this Deed
“European Nature Conservation Sites”	<ol style="list-style-type: none"> 1. New Forest Special Area of Conservation 2. New Forest Special Protection Area 3. New Forest Ramsar site
“Habitats Mitigation Contribution”	The sum of £351.20 per Residential Unit to be paid to the Borough Council to mitigate the impact which the Development would otherwise have on the European Nature Conservation Sites within the administrative area of the New Forest National Park Authority
“Index Linked”	for the purposes of the Habitats Mitigation Contribution in Schedule One means adjusted in accordance with the Inflationary Index by multiplying in each case the payment due by a fraction whose denominator shall be the last Inflationary Index monthly figure published before 1 April 2021 and whose numerator shall be the last published (whether provisional or not) Inflationary Index monthly figure available before the date on which payment is due but which for the avoidance of doubt shall not fall below the original payment figure;
“Inflationary Index”	The Retail Prices Index all items excluding mortgage interest payments (RPIX) issued by the Office for National Statistics during any period when no such index exists the index which replaces the same or is the nearest equivalent thereto as the Borough Council shall reasonably nominate taking into account any official reconciliation of changes in its basis of calculation
“Interest”	Means interest at 4 per cent 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 land known as land east of Crofton Cemetery and west of Peak Lane shown for identification purposes only edged with a red line on Plan 1
“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”	The plan annexed hereto and marked “Plan 1” showing the Land edged red
“Permission”	The full 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
“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(s)”	Days on which banks in the City of London are open to the public

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 an act of Parliament shall include any modification, extension or re-enactment of that act 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 Act 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 their respective 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 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 covenants, restrictions and requirements imposed upon the Owner under this Deed create planning obligations pursuant to Section 106 of the Act and are enforceable by the Borough Council as local planning authorities against the Owner, their successors in title and any person deriving title in the Land or any part of it from the Owner.

4 EFFECT OF THE UNDERTAKING

- 4.1 The obligations contained in this Deed are conditional upon the Secretary of State (through his Inspector or otherwise) granting the Permission PROVIDED THAT if the Secretary of State or his Inspector expressly states in the Decision Letter that a particular obligation contained in this Deed does not satisfy the tests of Regulation 122 of the Community Infrastructure Levy Regulations 2010 then such obligation shall not be enforceable by the Borough Council
- 4.2 This Deed takes effect on the date hereof provided that the covenants in clause 4.1 shall not take effect until:
- 4.2.1 the grant of the Permission; and
- 4.2.2 Commencement save where the obligations expressly or by necessary implication take effect prior to Commencement

5 THE OWNER'S COVENANTS

- 5.1 The Owner hereby covenants with the Borough Council that it will observe and perform the covenants on its part contained in Schedule One

6 RELEASE AND LAPSE

- 6.1 It is hereby agreed that 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 their respective interests in the Land.
- 6.2 It is further agreed that this Deed shall lapse and be of no further effect if:
- 6.2.1 the Permission shall lapse without having been Commenced; 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.
- 6.3 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 No obligation contained in this Deed shall be binding on any freehold or leasehold owners or occupiers of individual Residential Units, constructed pursuant to the Permission (or their respective mortgagees) or their successors in title 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 and/or the Appellant 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 DUTY TO ACT REASONABLY

- 8.1 All parties to this Deed acknowledge that they are under a duty to act reasonably and (without prejudice to generality) if any deed consent approval or expression of satisfaction is due from one party to another under the terms of this Deed the same shall not be unreasonably withheld or delayed.

9 NO FETTER ON DISCRETION OR WAIVER

- 9.1 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.
- 9.2 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.

10 COVENANT AS TO TITLE

- 10.1 The Owner hereby covenants with the Borough Council that no person other than the parties to this Deed has any interest in the Land for the purposes of section 106 of the Act.

11 SEVERABILITY

- 11.1 It is agreed that 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.

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 parties and the Borough Council without the consent of any such third party.

13 NOTIFICATION OF COMMENCEMENT/OCCUPATION

- 13.1 The Owner and the Appellant each covenant with the Borough Council that they will notify the Borough Council in writing of the date of Commencement of the Development within five Working Days of it occurring

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 or by email 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 "s106-P/20/0522/FP";
- 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 to the Land and Planning Director at the address as detailed above or as notified by the Appellant in writing to the Borough Council.

15 INDEX LINKING

15.1 The Habitats Mitigation Contribution which is to be paid under the terms of this Deed shall be Index Linked.

16 INTEREST ON LATE PAYMENTS

16.1 Any amount due from the Owner or the Appellant under this Deed which is not paid on the due date shall be payable with Interest.

17 MORTGAGEE CLAUSE

17.1 Notwithstanding clause 3.2, no obligation in this Deed shall be binding on or enforceable against any other chargee or mortgagee from time to time who shall have the benefit of a charge or mortgage of or on any part or parts of the Land or any receiver appointed by such chargee or mortgagee or any person deriving title through such charge, 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

18 NOTIFICATION OF SUCCESSORS IN TITLE

18.1 The Owner and the Appellant covenants with the Borough Council that they 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.

19 VAT

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

20 DISPUTE RESOLUTION

20.1 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 notify the Borough Council as appropriate that the matter is in dispute and:

20.1.1 the parties to the dispute shall first attempt to resolve that dispute or difference amicably including holding a meeting attended by at least one senior representative from each party within 10 Working Days of receipt of notice that a matter is in dispute;

20.1.2 if after a further 5 Working Days the parties are unable to resolve the dispute amicably pursuant to clause 20.1.1, one party may serve notice on the other party or parties (as the case may be) to the dispute of their intention to refer the dispute in accordance with clause 20.2 specifying in such notice:

20.1.2.1 the nature, basis and brief description of the dispute; and

20.1.2.2 the clause or paragraph of this Deed pursuant to which the dispute has arisen; and

- 20.1.2.3 a written request to concur as to the appropriateness of the professional qualifications of the person (or body) they propose to be appointed pursuant to clause 20.2.
- 20.2 Any such dispute or difference notified pursuant to clause 20.1.2 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.
- 20.3 In the absence of agreement as to the appointment or suitability of the person to be appointed pursuant to clause 20.2 or as to the appropriateness of the professional body within 10 Working Days after any party has given the other parties to the dispute or difference a written request to concur as to the appropriateness of the professional qualifications of the person (or body) to be appointed pursuant to clause 20.2 then such question may be referred by any party to the president for the time being of the Law Society for him to appoint a solicitor to determine the appropriate professional body or person to resolve the dispute such solicitor acting as an expert and his decision shall be final and binding on all parties in the absence of manifest error and his costs shall be payable by the parties to the dispute in such proportion as he shall determine and failing such determination shall be borne by the parties in equal shares.
- 20.4 Any expert howsoever appointed shall be subject to the express requirement that a decision is reached and communicated to the relevant parties within the minimum practical timescale allowing for the nature and complexity of the dispute and in any event not more than twenty Working Days after the conclusion of any hearing that takes place or twenty Working Days after he has received any final written representation pursuant to clause 20.5.
- 20.5 The expert shall be required to give notice to any of the said parties requiring them to submit to him within 10 Working Days of notification of his appointment written submissions and supporting material and the other parties will be entitled to make a counter written submission within a further 10 Working Days.
- 20.6 Nothing in this clause 20 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.

21 JURISDICTION

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

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

HABITATS MITIGATION CONTRIBUTION

The Owner covenants with the Borough Council as follows:

1 Habitats Mitigation Contribution

- 1.1 To pay the Habitats Mitigation Strategy Contribution to the Borough Council prior to the Commencement of Development.
- 1.2 Not to Commence the Development unless the Habitats Mitigation Strategy Contribution has been paid in full to the Borough Council.

IN WITNESS whereof the parties hereto have executed this Deed on the day and year first before written

EXECUTED AS A DEED by)
DUNLEY ESTATE LIMITED)
in the presence of:)

Director:

Director/Secretary:

EXECUTED AS A DEED by)
PERSIMMON HOMES LIMITED)
in the presence of:)

Director:

Director:

Witness:



Drawing Title S106 - Plan 1	Job No 220	Drawing No S106 - P1	Rev -	Rev	Date	Revision Details	Dr	Ch
	Drawn br	Checked db	Date 13.02.19	 PERSIMMON Together, we make a home				
Job Title Oakcroft Lane, Stubington	Scale 1:5000 @ A4 metres 25 50 75 100	Status APPROVAL						