

Dated:

2021

MICHAEL ANTHONY ORSULIK
and
FOREMAN 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
development of land at east of Posbrook Lane
Titchfield Fareham Hampshire PO14 4EZ

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

Ref: ENV-041056

GIVEN BY:

- (1) **MICHAEL ANTHONY ORSULIK** of 65 Locks Heath Park Road, Locks Heath, Southampton SO31 6NA ("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.
- C The Appellant has the benefit of an option to purchase the land from the Owner.
- D The Appellant submitted the Application to the Borough Council.
- E The Appellant has submitted the Appeal to the Secretary of State.
- F The Owner and the Appellant enter into this Deed to give the following obligations in the manner hereinafter appearing.
- G The Owner and Appellant undertake that the Development shall be carried out only in accordance with the Permission 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/20/3254389
"Application"	The application for outline planning permission allocated reference number P/19/1193/OA for the erection of up to 57 dwellings, together with associated parking, landscaping and access from Posbrook Lane
"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)
“Contributions”	Any one or number of the financial contributions required to be made pursuant to this Deed
“Decision Letter”	The letter issued by the Inspector determining the outcome of the Appeal
“Deed”	This unilateral 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”	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
“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 “Initiate/d” shall be construed accordingly
“Inspector”	the Planning Inspector appointed by the Secretary of State to determine the Appeal

“Interest”	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 east of Posbrook Lane Titchfield Fareham Hampshire PO14 4EZ as shown edged red [and blue] on Plan 1 and registered with title absolute at the Land Registry under Title Number HP652326
“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
“Permission”	The planning permission subject to conditions to be granted pursuant to the Appeal
“Plan 1”	The plan annexed hereto numbered 16.092.01 and marked “Plan 1” showing the Land edged red [and blue]
“Residential Units”	Individual units within the Development to be used for residential purposes (and for the avoidance of doubt this definition shall include affordable housing units, houses and flats as appropriate)
“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)”	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 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 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 granting the Permission 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 Schedule One 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 Schedule 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.
- 6.3 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

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 parties to this Deed 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 CONTRACTS (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 undertakes to the Borough Council that it will:

13.1.1 notify the Borough Council in writing of the date of Initiation of the Development within five Working Days of it occurring;

13.1.2 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 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/19/1193/OA".
 - 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 INDEX LINKING

- 15.1 Each and every one of the Contributions which are to be paid under the terms of this Deed shall be Index Linked (unless otherwise specified in this Deed).

16 PAYMENT OF THE CONTRIBUTIONS

- 16.1 The Owner shall pay the Contributions to the Borough Council by either:
- 16.1.1 cheque made payable to the Borough Council ;
 - 16.1.2 by BACS or telegraphic transfer.
- 16.2 All payments shall state the Permission reference number P/19/1193/OA and the address to which this Deed relates.
- 16.3 Payment by cheque shall be sent to the Borough Council in accordance with the details set out in clause 14.1 identifying the obligation to which the payment relates.

17 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.

18 MORTGAGEE CLAUSE

- 18.1 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 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.

19 NOTIFICATION OF SUCCESSORS IN TITLE

- 19.1 Save in the case of the disposal of an individual 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.

20 VAT

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

21 DISPUTE RESOLUTION

- 21.1 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:
- 21.1.1 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;
 - 21.1.2 if the parties are unable to resolve the dispute amicably pursuant to clause 21.1.1, invite the Borough Council to agree that the dispute be referred for resolution in accordance with clause 21.2.
- 21.2 Any such dispute or difference to be referred for resolution pursuant to clause 21.1.2 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.
- 21.3 Nothing in this clause 21 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.

22 APPELLANT'S CONSENT

- 22.1 The Appellant hereby consents to this Deed being entered into 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 option referred to in Recital D.

23 JURISDICTION

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

24 DELIVERY

- 24.1 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 Contribution to the Borough Council prior to the Commencement of Development.
- 1.2 Not to Commence the Development unless the Habitats Mitigation 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)
MICHAEL ANTHONY ORSULIK,)
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:)