

DATED

12th OF SEPTEMBER

2018

THE DISTRICT COUNCIL OF FOLKESTONE AND HYTHE
as Council

FOLKESTONE HARBOUR NOMINEE (1) LIMITED
as First Owner

FOLKESTONE HARBOUR NOMINEE (2) LIMITED
as Second Owner

FOLKESTONE HARBOUR HOLDINGS LIMITED
as Mortgagee

**DEED OF VARIATION MADE PURSUANT TO SECTIONS 106 & 106A OF
THE TOWN AND COUNTRY PLANNING ACT 1990**

In relation to the development at Folkestone Harbour and Seafront, Folkestone, Kent

**BRYAN
CAVE
LEIGHTON PAISNER BLP**

Bryan Cave Leighton Paisner LLP
Adelaide House London Bridge London EC4R 9HA
Tel: +44 (0)20 3400 1000 Fax: +44 (0)20 3400 1111

DATED

23 NOV 2018

2018

PARTIES

- (1) **THE DISTRICT COUNCIL OF FOLKESTONE AND HYTHE** of Civic Centre, Castle Hill Avenue, Folkestone, Kent CT20 2QY ("Council"); and
- (2) **FOLKESTONE HARBOUR NOMINEE (1) LIMITED** (company number 6024730) whose registered office is at Strand House, Pilgrims Way, Monks Horton, Ashford, Kent TN25 6DR ("First Owner")
- (3) **FOLKESTONE HARBOUR NOMINEE (2) LIMITED** (company number 6044811) whose registered office is at Strand House, Pilgrims Way, Monks Horton, Ashford, Kent TN25 6DR ("Second Owner")

((2) and (3) together, the "Owner")
- (4) **FOLKESTONE HARBOUR HOLDINGS LIMITED** (company number 5124490) whose registered office is at Strand House, Pilgrims Way, Monks Horton, Ashford, Kent TN25 6DR ("Mortgagee")

((1) to (4) together, the "Parties")

BACKGROUND

- (A) The Council is the local planning authority for the purposes of the Act for the area within which the Site is situated.
- (B) The Council is the freehold owner of part of the Site which interests are registered at the Land Registry under title numbers K107007, K739733 and K910923.
- (C) The Owner is the freehold and leasehold owner of the majority of the Site which interests are registered at the Land Registry under title numbers K522863, K667505, K721157, K768960, K774627, K774929, K775141 and TT51691.
- (D) The Mortgagee has registered charges over those of the Owner's interests in the Site which are registered at the Land Registry under title numbers K522863, K667505, K721157, K768960, K774627, K774929 and K775141.
- (E) On 29 January 2015, the Parties entered into the First Section 106 Agreement in connection with the First Permission which was issued on 30 January 2015 under Council reference Y12/0897/SH. This authorised the Development.
- (F) The Owner wishes instead to carry out the Section 73 Development following the grant of the Section 73 Permission.
- (G) At its meeting on 24 April 2018, the Planning and Licensing Committee resolved to grant the Section 73 Permission subject to completion of this Deed.
- (H) As a result of the proposals contained in the Section 73 Application, a fund of £3,500,000 (three million five hundred thousand pounds) is to be made available for use towards the provision and improvement of community facilities. The Parties agree that the provision and improvement of community facilities to this value is necessary to make the Section 73 Development acceptable in planning terms, directly related to the Section 73 Development and is fairly and reasonably related in scale and kind to the Section 73 Development.

- (I) The Council and Owner have agreed to enter into this Deed so as to ensure that the covenants, restrictions and obligations contained in the First Section 106 Agreement (as varied by this Deed) continue in full force and effect in respect of the Section 73 Development insofar as such covenants, restrictions and obligations remain to be complied with.

OPERATIVE PROVISIONS

1 DEFINITIONS AND INTERPRETATION

- 1.1 All words and expressions defined in the First Section 106 Agreement shall bear the same meaning in this Deed except where otherwise provided or where the context otherwise requires.
- 1.2 The provisions regarding interpretation contained in clause 2 of the First Section 106 Agreement shall apply to this Deed.
- 1.3 In this Deed, the following words and expressions shall unless the context otherwise requires have the following meanings:

"Commencement of the Section 73 Development" means the date on which any material operation (as defined in Section 56(4) of the Act) forming part of the Section 73 Development begins to be carried out other than (for the purposes of this Deed and for no other purpose) operations consisting of site clearance, earth works, demolition work, works for refurbishment and enhancement of the Harbour Arm and the former rail platform and associated rooms, nourishment of the beach along the Folkestone seafront, archaeological investigations, investigations for the purpose of assessing ground conditions, ecological investigations, studies or implementation of ecological measures, 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, the erection of a site compound or sales office or structure, and **"Commence the Section 73 Development"** shall be construed accordingly.

"First Permission" means the planning permission granted by the Council for the Development on 30 January 2015 under reference Y12/0897/SH.

"First Section 106 Agreement" means the agreement made on 29 January 2015 between the Parties under Section 106 of the Act in connection with the First Permission.

"Section 73 Application" means the application for planning permission to carry out the Section 73 Development with reference Y17/1099/SH and submitted to the Council on 4 September 2017.

"Section 73 Development" means the Development as varied in the manner set out in the Section 73 Application for the removal of condition 41 (Provision of Sea Sports Centre) and variation of conditions 4 (Reserved Matters), 6 (Phasing), 7 (Reserved Matters Details), 15 (Public Realm), 16 (Play Space/ Amenity Facilities), 18 (Public Toilets), 21 (Wind Flow Mitigation), 23 (Heritage Assets), 25 (Bus Stop), 37 (Wave Wall); and 42 (Provision of Beach Sports Centre) of planning permission Y12/0897/SH (Outline planning application with all matters (access, scale, layout, appearance, landscaping) reserved for the redevelopment of the harbour and seafront to provide a comprehensive mixed use development comprising up to 1000 dwellings (C3), up to 10,000 square metres of commercial floorspace including A1, A3, A4, A5, B1, D1 and D2 uses as well as sea sports and beach sports facilities. Improvements to the beaches, pedestrian and cycle routes and

accessibility into, within and out of the seafront and harbour, together with associated parking, accompanied by an Environmental Statement) to enable changes to the plot shapes, footprints, maximum height, changes to parameter plans, levels, parking arrangements, how the sea sports and beach sports facilities are provided, and alterations to the Environmental Statement.

"Section 73 Permission" means the planning permission for the Section 73 Development granted by the Council pursuant to the Section 73 Application.

2 LEGAL EFFECT

- 2.1 This Deed is made pursuant to sections 106 and 106A of the Act.
- 2.2 To the extent that the obligations fall within the terms of section 106 of the Act, the obligations contained in this Deed are planning obligations for the purposes of section 106 of the Act and are enforceable by the Council as local planning authority.
- 2.3 To the extent that any of the obligations contained in this Deed are not planning obligations within the meaning of the Act, they are entered into pursuant to powers contained in section 111 of the Local Government Act 1972, section 1 of the Localism Act 2011 and all other enabling powers.
- 2.4 No person shall continue to be bound by any obligation or covenant once they have parted with all of their interest in the Site (or if some part thereof can be separately identified on which any breach occurs then all of their interest in that part) save in respect of any antecedent breach.
- 2.5 The owner or occupier of an Individual Dwelling (and any chargee(s)) shall have no obligation to comply with or perform any obligations herein by virtue of such person's interest in such Dwelling.
- 2.6 The obligations contained in this Deed shall not be binding upon any interest of any statutory undertaker in the Site for or in respect of land for and/or rights or easements for plant, apparatus, conduits and fittings held as part of their statutory undertaking nor on any changes of any such interest nor any receiver appointed by a chargee of such interest.

3 CONDITIONALITY

The terms of this Deed come into effect on the date of grant of the Section 73 Permission other than Clause 5.9 which comes into effect upon the date of this Deed.

4 VARIATION OF FIRST SECTION 106 AGREEMENT

- 4.1 The Owner covenants that from the Commencement of the Section 73 Development, the Site shall be subject to and bound by the terms and obligations contained in the First Section 106 Agreement as if the same were set out fully in this Deed but with the variations set out in Schedule 1 (*Variations to First Section 106 Agreement*) to this Deed.
- 4.2 Except as varied by this Deed, all the terms and obligations contained in the First Section 106 Agreement shall continue and remain in full force and effect.
- 4.3 The Council and Owner acknowledge and agree that the obligations contained in this Deed and in the First Section 106 Agreement are to be interpreted as

alternatives and not additional to each other and for the avoidance of doubt, no sum shall be payable under both the First Section 106 Agreement and this Deed.

5 MISCELLANEOUS

5.1 No provisions in this Deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999.

5.2 The Parties agree that the obligations contained in this Deed shall not be enforceable against any mortgagee or chargee of the whole or any part of the Site unless and until it takes possession of the Site, in which case it will be bound by the obligations as a person deriving title from the Owner.

5.3 The Owner hereby consents to the registration of this Deed as a local land charge.

5.4 Where the agreement, approval, consent, or expression of satisfaction is required by the Owner from the Council under the terms of this Deed, such agreement, approval or consent or expression of satisfaction shall not be unreasonably withheld or delayed.

5.5 Any notices shall be deemed to have been properly served if sent by recorded delivery to the principal address or registered office (as appropriate) of the relevant party.

5.6 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.

5.7 This Deed shall cease to have effect (insofar only as it has not already been complied with) if the Section 73 Permission shall be quashed, revoked or otherwise withdrawn or (without the consent of the Owner) it is modified by any statutory procedure or expires prior to the Commencement of the Section 73 Development.

5.8 Nothing in this Deed shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Section 73 Permission) granted (whether or not on appeal) before or after the date of this Deed and this Deed shall not apply to development carried out under any planning permission (other than the Section 73 Permission).

5.9 The Owner covenants that on completion of this Deed the Owner will pay the Council's reasonable legal costs incurred in the preparation and settlement of this Deed of £750 (no VAT), receipt of which the Council hereby acknowledges.

6 WAIVER

No waiver (whether expressed or implied) by the 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 from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default.

7 CHANGE IN OWNERSHIP

The Owner agrees with the Council to give the Council immediate written notice of any change in ownership of any of its interests in the Site (but not of any individual dwelling) occurring before all the obligations under this Deed have 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 Site or unit of occupation purchased by reference to a plan.

8 **INDEXATION**

Any sum referred to in Schedule 1 (*Variations to First Section 106 Agreement*) to this Deed shall be increased by an amount equivalent to the increase in the Index from the date hereof until the date of which such sum is paid.

9 **INTEREST**

If any payment due under this Deed is paid late, Interest will be payable from the date payment is due to the date of payment.

10 **VAT**

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

11 **JURISDICTION**

This Deed is governed by and interpreted in accordance with the law of England and Wales.

12 **MORTGAGEE'S CONSENT**

The Mortgagee acknowledges and declares that this Deed has been entered into by the Owner with its consent and that the Site shall be bound by the obligations contained in this Deed and that the security of the charges over the Site shall take effect subject to this Deed PROVIDED THAT the obligations contained in this Deed shall not be enforceable against the Mortgagee or any other mortgagee or chargee of the whole or any part of the Site unless and until it takes possession of the Site in which case it will be bound by the obligations as a person deriving title from the Owner.

Delivered as a deed on the date of this document.

**Schedule 1
Variations to First Section 106 Agreement**

1 CLAUSE 1 (DEFINITIONS)

1.1 References to the "Commencement of Development" shall be construed as references to the Commencement of the Section 73 Development.

1.2 References to the "Development" shall be construed as references to the Section 73 Development.

1.3 References to the "Application" shall be construed as references to the Section 73 Application.

1.4 References to the "Planning Permission" shall be construed as references to the Section 73 Permission and any subsequent planning permission granted under section 73 of the Act unless the Council requires otherwise.

1.5 The following definitions shall be added:

"Affordable Housing Contribution" means the residue of the Community Facilities Contribution once the Leas Lift Contribution, the Sea Sports Contribution, the GP Facilities Contribution, the contribution paid by the Owner towards the Beach Facilities (within the range specified below) and the Public Space and Parking Contribution have been deducted.

"Beach Facilities" means the beach sports facilities to be provided in the vicinity of the Site which may include water sports.

"Beach Plan" means a plan or plans setting out details of the Beach Facilities which may include water sports facilities.

"Community Facilities Contribution" means the sum of £3,500,000 (three million five hundred thousand pounds) to be used towards any of the following purposes:

- (a) the refurbishment of the Leas Lift (the **"Leas Lift Contribution"**);
- (b) the improvement and/or equipping and/or running costs of sea sports facilities which are situated within the Site (the **"Sea Sports Contribution"**);
- (c) the provision by the Owner of the Beach Facilities;
- (d) the provision of a new GP medical centre within 2.5km of the signal box within the Site (the **"GP Facilities Contribution"**); and
- (e) such improvements to public realm, walking and cycling routes and parking improvements as the parties may agree are of direct benefit to the Site (the **"Public Space and Parking Contribution"**),

PROVIDED THAT the sums to be spent on each element set out above is to be no less than the relevant sum specified immediately below:

£750,000 (seven hundred and fifty thousand pounds) for the Leas Lift Contribution;

£200,000 (two hundred thousand pounds) for the Sea Sports Contribution;

£500,000 (five hundred thousand pounds) (and no more than £800,000 (eight hundred thousand pounds)) for the Beach Facilities; and

For the Public Space and Parking Contribution, the balance following the payment to the Council of the Leas Lift Contribution, the Sea Sports Contribution, the GP Facilities Contribution and the contribution paid by the Owner towards the Beach Facilities (within the range specified above).

"Leas Lift Business Case" means a business case prepared by the Folkestone Leas Lift Company CIC (company number 11145968) detailing the financial viability of the Leas Lift.

"Viable" means it is projected that with the payment of the Leas Lift Contribution there will be sufficient revenue and/or capital reserved to fund the continuing operation of the Leas Lift (with all necessary operating, repair and maintenance costs and a reasonable contingency for unforeseen expenditure) for a period of at least 10 years after the payment is made.

2 **SCHEDULE 2 PART D (FINANCIAL CONTRIBUTIONS TO BE PAID AT OCCUPATION OF SECTION 73 DEVELOPMENT)**

The following new paragraphs are inserted:

11. Not to Occupy any Dwelling within Phase 1 of the Section 73 Development without first paying to the Council the first Instalment of the Leas Lift Contribution in the sum of £500,000 (five hundred thousand pounds)
12. Not to Occupy any Dwelling within Phase 5 of the Section 73 Development without first submitting to the Council the Leas Lift Business Case or any other information detailing the financial viability of the Leas Lift.
13. Prior to Occupation of the 50th Dwelling within Phase 5 of the Section 73 Development, to pay to the Council the second Instalment of the Leas Lift Contribution in the sum of £250,000 (two hundred and fifty thousand pounds).
14. If within one month following the receipt by the Council under paragraph 12 of this Schedule of the Leas Lift Business Case or any other information detailing the financial viability of the Leas Lift the Owner and the Council (acting reasonably) agree that the Leas Lift is not Viable then the second Instalment of the Leas Lift Contribution shall instead be used for the purposes of the Public Space and Parking Contribution. For the avoidance of doubt, if agreement is not reached within one month, the second Instalment of the Leas Lift Contribution shall be used for the purposes of the Public Space and Parking Contribution.
15. Not to Occupy any Dwelling within Phase 4 of the Section 73 Development without paying to the Council the Sea Sports Contribution.
16. Not to Commence Phase 6 of the Section 73 Development without paying to the Council the Public Space and Parking Contribution.
17. Not to Occupy more than 100 Dwellings and thereafter every subsequent 100th Dwelling and final Dwelling across the Section 73 Development

without paying to the Council the relevant instalment of the GP Facilities Contribution, to be calculated using the following formula:

$$D \times P \times \text{£}360$$

Where:

D = number of Dwellings

P = predicted occupancy rate per Dwelling, which is as follows:

Bedrooms per unit	Average occupancy rate
1	1.4 persons
2	2 persons
3	2.8 persons
4	3.5 persons
5	4.8 persons

18. In the event that there is an underspend of the Community Facilities Contribution, not to Commence Phase 6 of the Section 73 Development without paying to the Council the Affordable Housing Contribution (if applicable).

3 SCHEDULE 2 PART J (GP SURGERY)

Schedule 2 Part J is deleted in its entirety and replaced with a new Part J:

PART J

BEACH AND WATER SPORTS

1. Not to Commence Phase 4 of the Section 73 Development until the Owner has submitted to the Council the Beach Sports Plan for written approval.
2. Not to Commence Phase 5 of the Section 73 Development until the Beach Facilities have been provided in accordance with the approved Beach Plan.

4 SCHEDULE 3 (COUNCIL'S COVENANTS)

4.1 The following underlined text is added at paragraph 4.3:

- 4.3** Subject to paragraph 4.4 of this Schedule. In the event that any part or all of any of the financial contributions have not been allocated or used for the said purpose within fifteen (15) years from the date of payment to the Council and unless the Council and the Owner agree otherwise, the Council covenants forthwith to repay such sums or amounts (or such part thereof) to the Owner with all accrued interest but less any tax that may be payable thereon.

4.2 The following new paragraphs are inserted:

- 4.4 In the event that any part or all of any of the GP Facilities Contribution has not been allocated irrevocably or used for the said purpose within five (5) years from the date of payment to the Council and unless the Council and the Owner agree otherwise, the Council covenants forthwith to repay such sums or amounts (or such part thereof) to the Owner with all accrued interest but less any tax that may be payable thereon.
- 4.5 The Council covenants to pay the first Instalment of the Leas Lift Contribution in the sum of £500,000 (five hundred thousand pounds) to the Folkestone Leas Lift Company CIC (or any such successor organisation) on the condition that the sum must only be used towards the operation, repair and maintenance of the Leas Lift.
- 4.6 Subject to paragraph 4.7 of this Schedule, the Council covenants to pay the second instalment of the Leas Lift Contribution in the sum of £250,000 (two hundred and fifty thousand pounds) to the Folkestone Leas Lift Company CIC (or any such successor organisation) on the condition that the sum must only be used towards the operation, repair and maintenance of the Leas Lift.
- 4.7 If, under paragraph 14 of Part D of Schedule 2, the parties agree that the Leas Lift is not Viable or no agreement is reached then the Council covenants that the sum of £250,000 (two hundred and fifty thousand pounds) shall be used towards the purposes of the Public Space and Parking Contribution.

EXECUTION PAGE

Council

Executed as a deed by **THE DISTRICT)
COUNCIL OF FOLKESTONE AND)
HYTHE** by affixing its common seal in the)
presence of:)
)



Authorised Signatory

First Owner

Executed as a deed by **FOLKESTONE)
HARBOUR NOMINEE (1) LIMITED)
acting by:**)
)
)



) Director

In the presence of:

Name of witness: 

Signature of witness: 

Address: 

Occupation: 

Second Owner

Executed as a deed by FOLKESTONE)
HARBOUR NOMINEE (2) LIMITED)
acting by:)



) Director

In the presence of:

Name of witness: [Redacted]

Signature of witness [Redacted]

Address: [Redacted]

Occupation: [Redacted]

Mortgagee

Executed as a deed by FOLKESTONE)
HARBOUR HOLDINGS LIMITED acting)
by:)



) Director

In the presence of:

Name of witness: [Redacted]

Signature of witness: [Redacted]

Address: [Redacted]

Occupation: [Redacted]