

DATED

2009

SOVEREIGN HOUSING ASSOCIATION LIMITED

and

WEST BERKSHIRE COUNCIL

RISK SHARING AGREEMENT

**relating to
The Priory, Hungerford Project**

**GOSSCHALKS
QUEENS GARDENS
KINGSTON UPON HULL**

TEL: 01482 324252

Fax: 01482 590290

E-MAIL: pp@gosschalks.co.uk

(Ref : PP.tw/5507702V5)

THIS AGREEMENT is dated the day of 2009

BETWEEN

- (1) **SOVEREIGN HOUSING ASSOCIATION LIMITED** an Industrial and Provident Society having registered number 26480R and whose registered office is at Berkshire House, 22-24 Bartholomew Street, Newbury, RG14 5LL (“the Employer”); and
- (2) **[WEST BERKSHIRE COUNCIL** of Market Street, Newbury, Berkshire, RG14 5LD (“the Council”)].

WHEREAS

- (A) The Parties (as defined below) have agreed to collaborate in relation to the Project (as defined below).
- (B) For the purposes of that collaboration and the Project, the Employer has agreed to incur certain Costs (as defined below) in relation to the pre-planning process in respect of the Project.
- (C) The Council has accordingly agreed, in certain specified circumstances, to share such Costs on and subject to the terms of this Agreement.

AGREED TERMS

1. Interpretation

- 1.1 The definitions and rules of interpretation in this clause apply in this Agreement.

Agreed Proportion: as regards the Council, seventy per cent (70%) but subject always to the provisions of clause 2.3.

Agreed Commitments : means:-

- (a) any Costs which the Employer has agreed (whether in writing or otherwise) to incur but which are yet to be incurred; and
- (b) any Costs which the Employer has incurred but in respect of which the Employer has not received an invoice or invoices.

Amount Payable: means a sum of money payable by the Council to the Employer pursuant to this Agreement.

Commencement Date: means 6th April 2009.

Costs : means:-

- (a) any Pre-Construction Agreement Costs;
- (b) any Legal Fees;
- (c) any Employer’s Agent Fees; and

(d) any Planning Consultant's Fees.

Council's Representative : the person or persons appointed by the Council to oversee the supervision and management of the Project on behalf of the Council.

Employer's Agent Fees : means any fees and/or costs incurred or to be incurred by the Employer in relation to services provided by the employer's agent engaged by the Employer in respect of the Project.

Employer's Solicitors: means Gosschalks Solicitors of Queens Gardens, Hull, East Yorkshire, HU1 3DZ and any other firm of solicitors engaged by the Employer in respect of the Project with the prior approval of the Project Manager.

Invoices Received : means any invoice or invoices received by the Employer from third parties in respect of Costs but which remain unpaid.

Legal Fees : means any legal fees and/or costs incurred or to be incurred by the Employer in relation to legal services provided by the Employer's Solicitors in respect of the Project.

Monies Paid : means any monies actually paid by the Employer in respect of Costs.

Parties : means the Employer and the Council or either of them and reference to a **Party** shall be construed accordingly.

Planning Consultant's Fees : means any fees and/or costs incurred or to be incurred by the Employer in relation to services provided by the planning consultant engaged by the Employer in respect of the Project.

Pre-Construction Agreement : means the pre-construction agreement dated [● May] 2009 and entered into between [Doubloon Developments Limited] (1) Leadbitter Construction (2) and the Employer (3) a copy of which is appended to this Agreement.

Pre-Construction Agreement Costs : means any fees and/or costs incurred or to be incurred by the Employer pursuant to the Pre-Construction Agreement.

Project : means the redevelopment by the Employer of land at The Priory, Priory Road, Hungerford, West Berkshire for the provision of new accommodation for older persons with additional accommodation available within.

Project Manager: means the person or persons appointed from time to time by the Employer at its sole discretion to supervise and manage the Project.

Termination Date: means the date upon which [a building contract is entered into by the Employer][construction commences] in respect of the Project.

Trigger Date: means the date upon which a Triggering Event occurs.

Triggering Event: means any of the events set out in Clauses 3.1.1 to 3.1.5.

1.2 Clause and Schedule headings do not affect the interpretation of this Agreement.

- 1.3 **Person** includes a corporate or unincorporated body.
- 1.4 Words in the singular include the plural and in the plural include the singular.
- 1.5 A reference to one gender includes a reference to the other gender.
- 1.6 **Writing** or **written** includes faxes but not e-mail.

2. Agreement to Pay Agreed Proportion

- 2.1 In consideration of the Employer agreeing to collaborate with the Council in relation to the Project and engaging Leadbitter Construction to manage and oversee the pre-construction works on the terms of the Pre-Construction Agreement, the Council hereby agrees that upon and subject to the occurrence of a Triggering Event, it shall be responsible for the Agreed Proportion of all Costs from and including the Commencement Date up to and including the Trigger Date.
- 2.2 The Council hereby acknowledges that since the Commencement Date but prior to the date of this Agreement the Employer has incurred or agreed to incur Costs and for the avoidance of doubt and without prejudice to the provisions of Clause 2.1, the Council hereby agrees that upon and subject to the occurrence of a Triggering Event, it shall be responsible for the Agreed Proportion of all such Costs.
- 2.3 Notwithstanding the provisions of Clause 2.1 and Clause 2.2, upon the occurrence of a Triggering Event, the Council shall not be liable for any Costs to the extent that :-
- 2.3.1 the Agreed Proportion of any Pre-Construction Agreement Costs exceed the sum of £250,000;
- 2.3.2 the Agreed Proportion of any Legal Fees exceeds the sum of £●;
- 2.3.3 the Agreed Proportion of any Employer's Agent Fees exceeds the sum of £●; and/or
- 2.3.4 the Agreed Proportion of any Planning Consultant's Fees exceeds the sum of £●,

and, for the avoidance of doubt, the liability of the Council pursuant to the Agreement shall be limited to the amounts set out in Clauses 2.3.1 to 2.3.4 above and the Employer shall remain solely responsible for the excess.

3. Triggering Events

- 3.1 The Council's liability to pay the Agreed Proportion of any Costs in accordance with Clause 2.1 and/or Clause 2.2 shall crystallise upon the earlier of:-
- 3.1.1 the date upon which either outline or detailed planning permission (as applicable) in respect of the Project is refused by the Council's planning committee;
- 3.1.2 the date upon which planning permission in respect of the Project is granted, but where such planning permission, in the opinion of the

Employer or the Council's Representative, imposes unacceptable planning conditions; or

- 3.1.3 the date upon which it becomes apparent to the Employer that the costs deficit per dwelling unit to be incurred by the Employer in respect of the Project (calculated on an open book modelling appraisal basis by the Employer using its 30 year repayment business model) exceeds the sum of £80,000; or
- 3.1.4 the failure to secure funding required in respect of and in order to complete the Project from the Employer, the Council and The Homes & Communities Agency (or any of them); or
- 3.1.5 the Council failing to continue to support the Project (whether financially or otherwise).

4. Payments following the Trigger Date

- 4.1 The Employer shall, within 30 days of the Trigger Date, deliver to the Council:-
 - 4.1.1 a written statement in substantially the same form as set out in [Schedule 1] setting out details of all Agreed Commitments in respect of the period up to and including the Trigger Date;
 - 4.1.2 a written statement in substantially the same form as set out in [Schedule 2] setting out details of all Invoices Received in respect of the period up to and including the Trigger Date and showing the date that each of such Invoices Received are due for payment;
 - 4.1.3 a written statement in substantially the same form as set out in [Schedule 3] setting out details of all Monies Paid during the period from the Commencement Date up to and including the Trigger Date; and
 - 4.1.4 a valid VAT invoice for a sum equal to the Agreed Proportion of all Monies Paid as set out in the statement delivered pursuant to Clause 4.1.3.
- 4.2 Within 14 days of the end of each calendar month following the Trigger Date the Employer shall deliver to the Council a statement of all additional Monies Paid during such calendar month in respect of the Agreed Commitment and/or Invoices Raised set out in the statements delivered pursuant to Clauses 4.1.1 and 4.1.2 above together with a valid VAT invoice for the Agreed Proportion of all such Monies Paid.
- 4.3 The Council shall pay all sums due pursuant to any invoices raised in accordance with Clause 4.1.4 or Clause 4.2 above (as applicable) within 30 days of the date of such invoice.

5. Supervision and Management

- 5.1 The Parties acknowledge that the supervision and management of the Project (including, without limitation, the authorisation of all Costs) shall be the responsibility of the Project Manager.
- 5.2 The Parties shall procure that a meeting between the Project Manager and the Council's Representative shall take place at least once a month and either the Project Manager or the Council's Representative may call such a meeting on not less than 48 hours notice (save in exceptional circumstances). Such meeting shall take place at the [offices of the Employer] or such other place as may be agreed between the Parties.
- 5.3 At each meeting held in accordance with Clause 5.3, the Project Manager shall provide to the Council's Representative details of :-
- 5.3.1 all Agreed Commitments in respect of the period from the Commencement Date up to and including the last day of the calendar month immediately preceding the date of such meeting;
 - 5.3.2 all Invoices Received in respect of the period from the Commencement Date up to and including the last day of the calendar month immediately preceding the date of such meeting; and
 - 5.3.3 all Monies Paid in respect of the period from the Commencement Date up to and including the last day of the calendar month immediately preceding the date of such meeting.
- 5.4 The Employer shall procure that the Project Manager shall use his reasonable endeavours to provide to the Council's Representative any further information in respect of Costs which may from time to time be reasonably requested by the Council's Representative **PROVIDED ALWAYS THAT** the provision of such information shall not be a condition precedent to the Council's liability to pay the Agreed Proportion of any Costs upon the occurrence of a Triggering Event.
- 5.5 Notwithstanding the provisions of Clause 5.1, the Council's Representative (on behalf of the Council) shall have the right to dispute the level or proposed level of any Legal Fees, Employer's Agent Fees and Planning Consultant's Fees (together referred to as **Disputable Costs**) and shall put such dispute in writing (setting out in reasonable detail the reasons for such dispute) within 2 business days of the date of the meeting held in accordance with Clause 5.2 at which the relevant Disputable Cost was brought to the attention of the Council's Representative (a **Dispute Notice**). For the avoidance of doubt, the Council's Representative/the Council shall have no right to dispute any Pre-Construction Agreement Costs.
- 5.6 Upon receipt by the Project Manager of a Dispute Notice, the Parties shall procure that the Project Manager and the Council's Representative meet within 2 business days of receipt by the Project Manager of the Dispute Notice who shall negotiate in good faith with a view to agreeing the level of such Disputable Cost(s). In the event such dispute shall not be resolved at such meeting, the matter shall be referred to the Employer's and the Council's joint partnership project team for determination, whose decision shall be final and binding on the Parties.

- 5.7 Subject to Clause 5.8, notwithstanding that the level of any Disputable Cost(s) the subject of a Dispute Notice may be agreed or determined in accordance with Clause 5.6 at a level lower than that proposal prior to the date of the Dispute Notice (the **Original Amount**), nothing shall prevent the Employer incurring or agreeing to incur such Disputable Cost(s) at the Original Amount.
- 5.8 In the event that the Employer, in accordance with Clause 5.8, incurs or agrees to incur any Disputable Cost in respect of which a Dispute Notice has been served at the Original Amount, the Council's liability in respect of such Disputable Cost(s) pursuant to this Agreement and upon the occurrence of a Triggering Event shall be limited to the Agreed Proportion of the lower level of such Disputable Cost(s) agreed or determined in accordance with Clause 5.6.

6. Termination

The Council's liability pursuant to this Agreement shall cease, and no payments shall become due and payable by the Council in respect of the Agreed Proportion of any Costs, upon the Termination Date.

7. Confidentiality

- 7.1 The Parties each undertake to keep confidential and not to disclose to any third party, or to use themselves other than for the purposes of the Project or as permitted in accordance with this Agreement, any confidential or secret information in any form directly or indirectly belonging or relating to the other, its or their business or affairs, disclosed by one and received by the other pursuant to this Agreement or otherwise in respect of the Project (**Confidential Information**).
- 7.2 The obligations contained in Clause 7.1 shall survive the expiry or termination of this Agreement for any reason, but shall not apply to any Confidential Information which:-
- 7.2.1 is publicly known at the time of disclosure to the receiving Party;
 - 7.2.2 becomes publicly known otherwise than through breach of this Agreement by the receiving Party, its officers, employees, agents or contractors;
 - 7.2.3 can be proved by the receiving Party to have reached it otherwise than by being communicated by the other Party including:-
 - (a) being known to it prior to disclosure;
 - (b) having been developed by or for it wholly independently of the other Party; or
 - (c) having been obtained from a third party without any restriction on disclosure on such third party of which the recipient is aware, having made due enquiry; or
 - 7.2.4 is required by law, regulation or order of a competent authority (including any regulatory or governmental body or securities

exchange) to be disclosed by the receiving Party, provided that, where practicable, the disclosing Party is given reasonable advance notice of the intended disclosure.

8. Costs

8.1 [All legal and other costs and expenses incurred by the Employer in connection with the negotiation, preparation, execution and performance of this Agreement shall constitute Costs for the purposes of this Agreement and accordingly the Council shall, upon the occurrence of a Triggering Event, be responsible for the Agreed Proportion of the same.]

8.2 The Council shall pay its own legal and other costs and expenses incurred in connection with the negotiation, preparation, execution and performance of this Agreement.

9. Further Assurance

Each Party shall promptly execute and deliver all such documents, and do all such things, as may from time to time be reasonably required for the purpose of giving full effect to the provisions of this Agreement.

10. Assignment (Prohibited)

10.1 Neither Party may, without the prior written consent of the other Party, assign, transfer, charge or grant any other security interest over or otherwise deal in any other manner with this Agreement or any of its rights under it, or purport to do any of the same, nor sub-contract any or all of its obligations under this Agreement save that the Employer may assign the benefit of this Agreement to any subsidiary of the Employer, any holding company of the Employer, or any subsidiary of any holding company of the Employer from time to time.

11. Set-Off (Excluded)

All amounts due under this Agreement shall be paid in full without any deduction or withholding other than as required by law and neither Party shall be entitled to assert any credit, set-off or counterclaim against any other Party in order to justify withholding payment of any such amount in whole or in part.

12. Default Interest

12.1 If the Council defaults in the payment of any Amount Payable on the due date for payment, the Borrower shall pay interest on that Amount Payable for the period from the due date for such payment until actual payment (as well after as before judgement) at the rate of 4% per annum above the base rate of Lloyds TSB Bank plc for the time being and from time to time.

12.2 All interest payable pursuant to Clause 12.1 above shall accrue from day to day and shall be calculated on the basis of a year of 365 days and shall be paid on demand.

13. Variation and Waiver

- 13.1 Any variation of this Agreement shall be in writing and signed by or on behalf of each of the Parties.
- 13.2 Any waiver of any right under this Agreement is only effective if it is in writing and it applies only to the Party to whom the waiver is addressed and the circumstances for which it is given and shall not prevent the Party who has given the waiver from subsequently relying on the provision it has waived.
- 13.3 No failure to exercise or delay in exercising any right or remedy provided under this Agreement, or by law, constitutes a waiver of such right or remedy or shall prevent any future exercise in whole or in part thereof.
- 13.4 No single or partial exercise of any right or remedy under this Agreement shall preclude or restrict the further exercise of any such right or remedy.
- 13.5 Unless specifically provided otherwise, rights arising under this Agreement are cumulative and do not exclude rights provided by law.

14. Whole Agreement

- 14.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 14.2 Nothing in this clause operates to limit or exclude any liability for fraud.

15. Counterparts

This deed may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document.

16. Third Party Rights

- 16.1 This deed is made for the benefit of the Parties and their successors and permitted assigns and is not intended to benefit, or be enforceable by, anyone else.
- 16.2 The right of the Parties to terminate, rescind or agree any amendment, variation, waiver or settlement under this deed is not subject to the consent of any person that is not a party to the Agreement.

17. Relationship of Parties

Nothing in this Agreement, and no action taken by the Parties pursuant to this Agreement, shall constitute, or be deemed to constitute, a partnership between the Parties, or shall constitute either Party as the agent, employee or representative of the other Party.

18. Successors

The rights and obligations of the Parties under this Agreement shall continue for the benefit of, and shall be binding on, their respective successors and permitted assigns.

19. Survival

Provisions of this Agreement which are either expressed to survive its termination or, from their nature or context it is contemplated that they are to survive such termination, shall remain in full force and effect notwithstanding such termination.

20. Notices

20.1 Any notice given under this Agreement:

20.1.1 shall be in writing in the English language (or be accompanied by a properly prepared translation into English) and signed by or on behalf of the Party giving it;

20.1.2 shall be sent to the address, specified in this Agreement (or such other address or person as the relevant Party may notify to the other Party, in accordance with the provisions of this Clause 20); and

20.1.3 shall be:

(a) delivered personally; or

(b) sent by pre-paid first-class post or recorded delivery;

(c) (if the notice is to be served by post outside the country from which it is sent) sent by airmail.

20.2 A notice is deemed to have been received:

20.2.1 if delivered personally, at the time of delivery; or

20.2.2 in the case of pre-paid first class post or recorded delivery, 48 hours from the date of posting; or

20.2.3 in the case of airmail, five days from the date of posting; or

20.2.4 if deemed receipt under the previous paragraphs of this Clause 20.2 is not within business hours (meaning 9.00 am to 5.30 pm Monday to Friday on a day that is not a public holiday in the place of receipt), when business next starts in the place of receipt.

20.3 To prove service, it is sufficient to prove that the envelope containing the notice was properly addressed and posted.

21. Governing Law and Jurisdiction

21.1 This Agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the laws of England.

21.2 Each Party irrevocably agrees that the courts of England have exclusive jurisdiction to settle any dispute, claim or matter that arises out of or in connection with this deed.

IN WITNESS whereof this Agreement has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

SCHEDULE 1

Pro-forma Statement of Agreed Commitments

SCHEDULE 2

Pro-forma Statement of Invoices Received

SCHEDULE 3

Pro-forma Statement of Monies Paid

SIGNED and DELIVERED as a deed by)
SOVEREIGN HOUSING ASSOCIATION LIMITED)
acting by one of its directors in the presence of:-)

.....
Director

Witness Signature:

Name:

Address:

.....

Occupation:

SIGNED and DELIVERED as a deed by)
WEST BERKSHIRE COUNCIL acting by one its)
authorised signatories in the presence of:-)

.....
Authorised Signatory

Witness Signature:

Name:

Address:

.....

Occupation: