Dated 2016

(1) CHURCHILL RETIREMENT LIVING LIMITED
(2) DEVON COUNTY COUNCIL
(3) EAST DEVON DISTRICT COUNCIL

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AGREEMENT

Under section 106 of the Town and Country Planning Act 1990
relating to Green Close, Drakes Avenue, Sidford, Sidmouth EX10 9JU

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PLANNING APPLICATION REF: 16/0867/MFUL

Shoosmiths LLP
Russell House
1550 Parkway
Solent Business Park Whiteley
Fareham
Hampshire
PO15 7AG
Tel: 03700 866800
Fax: 03700 866801
Ref: MDP/M-00484431
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THIS AGREEMENT is made on 2016

BETWEEN:

1. CHURCHILL RETIREMENT LIVING LIMITED (Company Regn No. 06260373), of Millstream House, Parkside, Ringwood, Hampshire, BH24 3SG (the “Applicant”);

2. DEVON COUNTY COUNCIL of County Hall, Topsham Road, Exeter EX2 4QD (the “Owner”);

3. EAST DEVON DISTRICT COUNCIL of Knowle, Sidmouth, Devon EX10 8HL (the “Council”)

BACKGROUND

(A) For the purposes of the 1990 Act, the Council is the local planning authority for the area within which the Site is located.

(B) The Owner is the freehold owner of the Site registered at HM Land Registry under Title number DN514843 free from encumbrances that would prevent the Owner from entering into this Agreement subject to an option in favour of the Applicant.

(C) Pursuant to the Planning Application the Applicant applied to the Council for full planning permission for the Development.

(D) The Council has resolved to grant Planning Permission subject to the prior completion of this Agreement to ensure certain planning obligations are secured, subject to the conditions set out in this Agreement, in respect of the Site.

The parties agree as follows:

1 DEFINITIONS

In this Agreement, unless the context otherwise requires, the following definitions apply:

“1990 Act” means the Town and Country Planning Act 1990;

“Affordable Housing Contribution” means (subject to the provisions of paragraph 11.2 to 11.4 of Schedule I) the sum of £41,208 (forty one thousand two hundred and eighty pounds) Index Linked to be paid by the Owner to the Council towards the provision of Off-Site Affordable Housing required as a consequence of the Development;

“Affordable Housing Contribution Uplift” means the sum equal to the amount by which the Revised Affordable Housing Contribution exceeds the Affordable Housing Contribution AND FOR THE AVOIDANCE OF DOUBT the Affordable Housing Contribution Uplift shall be zero where the Revised Affordable Housing Contribution is equal to, or less than, the Affordable Housing Contribution;

“Commencement Date” means the date on which the Development commences by the carrying out on the Site pursuant to the Planning Permission of a material operation as specified in section 56(4) of the 1990 Act other than (for the purposes of this Agreement and no other):

(a) site investigations or surveys;
(b) archaeological works;

(c) site decontamination;

(d) the demolition of any existing buildings or structures

(e) excavation works;

(f) the clearance or re-grading of the Site

(g) the erection of hoardings and fences;

(h) works connected with infilling;

(i) works for the provision or diversion of drainage or mains services to prepare the Site for development;

(j) the construction of access and service roads.

“Development” means the demolition of former residential care home and construction of 36 sheltered apartments including communal facilities, access, car parking and landscaping, as detailed in the Planning Application;

“Development Account” means the return to be provided by the Owner to the Council such return to detail:

(1) the date and price of disposal of each and every Dwelling to demonstrate the gross development value

(2) the Development Costs

(3) the Owner’s profit in accordance with the % identified in the Viability Appraisal

“Development Costs” means the actual costs incurred by the Owner in constructing the Development and which shall include:

any all of the following

land acquisition costs and any SDLT
legal fees in connection with land acquisition and plot sales

interest costs of obtaining planning permission

construction and labour costs

marketing costs

interest payments on borrowing

“Disposals of” means disposal of the Owner’s interest by way of the sale of the freehold interest or the granting of a long leasehold interest and ‘Disposals’ shall be construed accordingly.

“Dwelling” means a unit of residential accommodation consisting of the sheltered apartments comprised within the Development and “Dwellings” shall be construed accordingly;

“Expert” means a person having appropriate qualifications and local knowledge and experience in the matters in dispute as agreed by the Relevant Parties or failing agreement such person as is nominated by the President for the time being of the Royal Institution of Chartered Surveyors on the application of the
Relevant Parties;

“Index” Means the RCIS All in Tender Price Index

“Interest” means interest at 4% per cent above the Bank of England base lending rate published by National Westminster Bank Plc. from time to time or if such rate shall not be published at any time such other comparable rate of interest as the Council may then in writing specify having regard to interest rates current at such time;

“Occupation” means occupation of the Development for the purposes permitted by the Planning Permission but not occupation for the purposes of construction,fitting out or decoration for marketing or display purposes or in connection with security operations and “Occupy” and “Occupied” shall be construed accordingly;

“Off-Site Affordable Housing” means social rented,affordable rented and intermediate housing, provided to eligible households within the District of East Devon whose needs are not met by the market and as defined in the National Planning Policy Framework March 2012;

“Overage Cap” means the sum of £380,000 (three hundred and sixty thousand pounds)

“Overage Payment” means 50% of the amount of the Overage Value which exceeds the Overage Trigger and which shall be paid to the District Council

“Overage Payment Date” means the first working day falling 28 days after the date upon which the Council confirm in writing that the Development Account is agreed and the amount of the Overage Payment due

“Overage Trigger” [This will simply specify the sum that has to be reached before overage is applied i.e where the viability appraisal shows a £250K loses then the figure of £250K would be stated]

“Overage Value” Means the potential additional profit made by the Owner calculated in accordance with the following formulae,namely:

\[ P = A - B - C \]

Where;

\[ P = \text{Overage Value (being the additional profit element)} \]
\[ A = \text{gross development value being the actual sales receipts} \]
\[ B = \text{Development Costs} \]
\[ C = \text{Owner’s profit element in accordance with the % in the Viability Appraisal} \]

“Plan 1” the plan attached to this Agreement marked Plan 1;

“Planning Application” the application for full planning permission for the carrying out of the Development made by the Applicant validated on 21 June 2016 and given the reference 16/0867/MFUL by the Council;
“Planning Permission” the full planning permission that will be granted by the Council for the Development in pursuance of the Planning Application following the completion of this Agreement or any variation to that permission granted pursuant to Section 73 of the 1990 Act;

“Relevant Parties’ means the parties to this Agreement;

“Revised Affordable Housing Contribution” such financial contribution as may be determined as viable by the local planning authority acting reasonably and taking into account the Viability Appraisal and any assessment of that Viability Appraisal PROVIDED THAT the Revised Affordable Housing Contribution shall not in any event exceed the sum of £360,000 (three hundred and sixty thousand pounds)

“Shell and Core Finish” the stage when the buildings comprising the Development have been constructed to include all structural works with all external walls and roofs completed and ready to be fitted out internally for use in accordance with the Planning Permission;

“Site” the land at Green Close Drakes Avenue Sidford Sidmouth EX10 8JU shown edged in red on Plan 1 against which this Agreement may be enforced;

“Viability Appraisal” [the viability document submitted to the Council for comment is an appraisal of the economic viability of the Development in the format of the Homes and Communities Agency’s Development Appraisal Tool or any tool that replaces it;

“Working Day(s)” days on which banks in the City of London are open to the public;

2 INTERPRETATION

2.1 The clause headings in this Agreement are for reference only and do not affect its construction or interpretation.

2.2 References to clauses and Schedules are to the clauses and Schedules of this Agreement, unless stated otherwise.

2.3 A reference to a paragraph is to the paragraph of the Schedule in which the reference is made, unless stated otherwise.

2.4 Words imparting one gender include any other genders and words imparting the singular include the plural and vice versa.

2.5 A reference to a person includes a reference to a firm, company, authority, board, department or other body and vice versa.

2.6 Unless this Agreement states otherwise, any reference to any legislation (whether specifically named or not) includes any modification, extension, amendment or re-enactment of that legislation for the time being in force and all instruments, orders, notices, regulations, directions, byelaws, permissions and plans for the time being made, issued or given under that legislation or deriving validity from it.
2.7 References to the Site include any part of it.

2.8 References to any party in this Agreement include the successors in title of that party and in the case of the Council include any successor local planning authority exercising their planning powers under the 1990 Act.

2.9 References to “including” mean “including, without limitation”.

2.10 Any covenant by the Applicant and/or the Owner not to do any act or thing includes a covenant not to cause or permit or allow the doing of that act or thing by any other person.

2.11 Where two or more people form a party to this Agreement, the obligations they undertake may be enforced against them all jointly or against each of them individually.

2.12 If any provision is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remainder of this Agreement shall be unaffected.

3 LEGAL EFFECT

3.1 This Agreement constitutes a Deed and is made entered into pursuant to section 106 of the 1990 Act section 111 of the Local Government Act 1972 section 2 of the Local Government Act 2000 and section 14 of the Localism Act 2011 and all other enabling powers and enactments that are relevant.

3.2 To the extent that they fall within the terms of section 106 of the 1990 Act, the obligations contained in this Agreement are planning obligations for the purposes of section 106 of the 1990 Act with the intent that they bind the Land Site and are enforceable by the Council.

3.3 The Council is the local planning authority having the power to enforce the planning obligations contained in this Agreement against the Owner and its successors in title but without prejudice to all and any other means of enforcing them at law or in equity or by statute and a planning obligation not to do any act or thing includes an obligation not to cause or permit or suffer that act or thing to be done by any other person.

3.4 No person constituting the Owner will be liable for breach of a covenant restriction or obligation contained in this Agreement after he has parted with all the interest in the Site or the part in respect of which such breach occurs but without prejudice to liability for any subsisting breach of covenant prior to parting with such interest PROVIDED THAT a failure to comply with paragraph 2 of Schedule 1 shall constitute a subsisting breach for the purposes of this Clause.

3.5 This Agreement will be registered as a local land charge by the Council pursuant to section 106(11) of the 1990 Act.

3.6 Nothing in this Agreement:

3.6.1 prohibits or limits the right to develop any part of the Site in accordance with a planning permission, other than one relating to the Development as specified in the Planning Application, granted after the date of this Agreement, whether or not pursuant to an appeal;

3.6.2 shall be construed as restricting the exercise by the Council of any powers exercisable by it under the 1990 Act or under any other Act in the exercise of their functions as a local authority.

3.7 The obligations in this Agreement will not be enforceable against:
3.7.1 the buyers of an individual Dwelling; or

3.7.2 a statutory undertaker which acquires any part of the Site or any interest in it for the purposes of its statutory undertaking.

4 COMMENCEMENT

4.1 The obligations in this Agreement will take effect on the Commencement Date otherwise this Deed save for clause 12 which shall take effect immediately upon completion of this Agreement.

5 OBLIGATIONS OF THE PARTIES

5.1 The Owner covenants to comply with the obligations expressed to be on their part set out in Schedule 1 in relation to the Development.

5.2 The Council covenants to comply with the obligations expressed to be on its part set out in Schedule 2.

5.3 Within 28 (twenty eight) days of a request from the Owner the Council will certify whether or not an obligation under this Agreement has been satisfied and if not the steps that are required to be taken in order to secure its satisfaction provided that where such obligation is an ongoing obligation this clause shall not apply.

5.4 The Council agrees that upon the Owner’s obligations under this Agreement being satisfied and upon receipt of a written request by the Owner the Council will remove all relevant entries relating to this Agreement from the Local Land Charges Register.

6 TERMINATION OF THIS AGREEMENT

6.1 This Agreement will come to an end if:

6.1.1 the Planning Permission is quashed or revoked before the Commencement Date; or

6.1.2 the Planning Permission expires before the Commencement Date without having been implemented.

7 NOTICES

7.1 Any notice, consent, demand or any other communication served under this Agreement will be effective only if in writing and delivered by hand or sent by first class post, pre-paid or recorded delivery.

7.2 Any notice, consent, demand or any other communication served shall be sent to the address of the relevant party set out at the beginning of this Agreement or to such other address as one party may notify in writing to the others at any time as its address for service.

8 DETERMINATION OF DISPUTES

8.1 Any dispute relating to or arising out of the terms of this Agreement shall be referred to the Expert for determination of that dispute provided that the provisions of this clause shall be without prejudice to the right of any party to seek the resolution of any matter relating to this Agreement by the courts and/or in accordance with Section 108(8) of the 1990 Act

8.2 The Expert shall be appointed jointly by the Relevant Parties who are in dispute
8.3 The decision of the Expert shall be final and binding upon the Relevant Parties who are in dispute (save as provided for in Clause 8.1) and subject to the following provisions:

8.3.1 the charges and expenses of the Expert shall be borne equally between the Relevant Parties who are in dispute unless the Expert shall otherwise direct;

8.3.2 the Expert shall give the Relevant Parties who are in dispute an opportunity to make representations and counter representations to him before making his decision;

8.3.3 the Expert shall make his decision within the range of any representations made by the Relevant Parties who are in dispute themselves;

8.3.4 where there is a dispute as to the amount of any contribution the Owner shall pay its estimate of such contribution which sum shall be no less than the sum specified in this Agreement to the Council at the time specified in this Agreement and shall pay any difference between that figure and the amount determined by the Expert within 20 working days of the Expert's decision or the sum specified (in accordance with Clause 11 (this Agreement)) from the date the payment was required until the date it is made.

9 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

9.1 The parties to this Agreement do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it provided that the exclusion of the said Act shall not prevent all or any future successors in title to any of the parties to this Agreement from being able to benefit from or to enforce any of the provisions of this Agreement.

10 JURISDICTION

10.1 This Agreement shall be governed by the laws of England and Wales and the Courts of England shall have sole jurisdiction in respect of the construction of this Agreement and as to the respective rights and liabilities of the parties.

11 INTEREST

11.1 If any sum due under this Agreement is paid late Interest will be payable from the date the payment is due to the date of payment.

12 FEES

12.1 The Applicant covenants with the Council to pay to the Council prior to the date hereof the Council's reasonable legal fees for the preparation, negotiation and completion of this Agreement.

13 WAIVER

13.1 No waiver (whether express or implied) by any party to this Deed of any breach or default in performing or observing any of the provisions of this Deed by any other party shall constitute a continuing waiver, and no such waiver shall prevent the party granting it (or implied to have done so) from enforcing any of the relevant provisions or from acting upon any subsequent breach or default.

14 APPLICANT'S COVENANT

14.1 The Applicant hereby acknowledges and agrees that it will be bound by the obligations
entered into by the Owner and herein contained in the event it exercises the option referred to in Recital (B) and takes possession of the Site

15 INDEXATION

15.1 The contribution to be paid pursuant to the obligation contained in paragraph 1 of Schedule 1 shall be increased in accordance with the following formula:

\[ C = \frac{\$Y \times B}{A} \]

where:

A is the value of the relevant Index last published before the date hereof and

B is the value of the Index last published before the said contribution has been paid

C is the increased sum to be paid

\$Y is the amount of the contribution to be paid

IN WITNESS of which this document has been duly executed as a deed and delivered on the date stated at the beginning of this document.
SCHEDULE 1

Owner’s Obligations

1 AFFORDABLE HOUSING CONTRIBUTION

1.1 The Owner Covenants with the Council as follows:

1.1.1 to pay the Affordable Housing Contribution to the Council on or before the Occupation of the ninth 60% of the Dwellings and, subject to paragraphs 1.1.2 to 1.1.4 below, to pay to the Council the Affordable Housing Contribution uplift in addition to the Affordable Housing Contribution on or before the Occupation of the 50% of the 10th Dwelling unless and until the Affordable Housing Contribution has been paid to the Council;

1.1.2 that in the event that Shell and Core Finish has not been achieved within 18 (eighteen) months of the date of the Planning Permission being granted, to submit a Viability Appraisal to the Council within 1 (one) month of that date;

1.1.3 not to allow the Occupation of more than 50% of the Dwellings until such time as the Council has determined any Revised Affordable Housing Contribution having received the Viability Appraisal PROVIDED THAT, the Revised Affordable Housing Contribution shall be deemed to be that in the Viability Appraisal if the Council has not approved it, formally rejected it (with full explanation of refusal) or requested such further information as is reasonably required within 2 (two) months of receipt of the Viability Appraisal;

1.1.4 to submit to the Council such further information or evidence as it reasonably requires in order to assess the Viability Appraisal and determine the Revised Affordable Housing Contribution; and

that where the Viability Appraisal determines a Revised Affordable Housing Contribution that is greater than the Affordable Housing Contribution, to pay to the Council the Affordable Housing Contribution uplift in addition to the Affordable Housing Contribution paid pursuant to paragraph 1.1.1 above.

2 OVERAGE PROVISIONS

2.1 The Owner Covenants with the Council as follows:

2.1.1 To provide the Development Account to the Council within fourteen (14) days of the Disposal of the last Dwelling

2.1.2 In the event of the Council providing written confirmation that the Development Account is agreed and where the Development Account demonstrates that [there is a positive Overage Value or the Overage Value exceeds the Overage Trigged], the Overage Cap

Comment [H4]: Looks like it will be the former of these options.
SCHEDULE 2

Council’s Obligations

1.1 The Council agrees to use the Affordable Housing Contribution and any moneys payable under paragraph 2 of schedule 1 (Overage Payment) towards the provision of Off-Site Affordable Housing required as a consequence of the Development the purposes set out in this Agreement and for no other purposes within 5-10 years of receipt.

1.2 The Council agrees to repay to the party that pays the Affordable Housing Contribution and any Overage Payment any part of the Affordable Housing Contribution or Overage Payment that has not been spent or committed in accordance with this Agreement within 50 days of the end of the 5-10 year period referred to in paragraph 1.1.

1.3 The Council agrees to repay to any party that pays moneys under paragraph 2 of schedule 1 those moneys that they have paid under paragraph 2 of schedule 1 that have not been spent or committed in accordance with this Agreement within 50 days of the end of the 5 year period referred to in paragraph 1.1.
Signed as a deed by

CHURCHILL RETIREMENT LIVING LIMITED

acting by:

Director

Director/Secretary

Sealed as a DEED by affixing the COMMON SEAL of

DEVON COUNTY COUNCIL

in the presence of:

Authorized Signatory

Sealed as a DEED by affixing the COMMON SEAL of

EAST DEVON DISTRICT COUNCIL

in the presence of:

Authorized Signatory