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- email: planning.admin@ashfield.gov.uk
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**ASHFIELD DISTRICT COUNCIL
MEMORANDUM**

TO: LOCAL LAND CHARGES
**FROM: PLANNING AND BUILDING CONTROL SUPPORT TEAM
LEADER**
**SUBJECT: LAND AND PREMISES ADJACENT 34 KIRKBY FOLLY
ROAD, SUTTON IN ASHFIELD**

DATE: 09/07/2013

REF: V/2009/0587

Would you please register the above Deed of Variation Agreement (Town & Country Planning Act 1990) between:

i) Millers Homes Ltd

ii) The Royal Bank of Scotland PLC

and

Ashfield District Council as a Local Land Charge

THIS AGREEMENT is made the 27th day of June 2013

BETWEEN:

- (1) **MILLER HOMES LIMITED** (Company Registered Number SC255429) whose registered office is at Miller House, 2 Lochside View, Edinburgh Park, Edinburgh, EH12 9DH ('the Owner')
- (2) **THE ROYAL BANK OF SCOTLAND PLC** (Scottish Company Registered Number 090312) of 36 St Andrews Square, Edinburgh EH2 2YB as trustee, agent and security agent ('the Mortgagee')
- (3) **ASHFIELD DISTRICT COUNCIL** of Council Offices, Urban Road, Kirkby-in-Ashfield, Nottinghamshire, NG17 8DA ('the Council')

1. **Definitions**

IN THIS AGREEMENT the following words and phrases shall have the following meaning:-

- 1.1 "the Act" means Town and Country Planning Act 1990 (as amended) and terms not otherwise defined in this Agreement have the meaning ascribed to them in the Act unless a contrary intention appears
- 1.2 "agreed" or "approved" means agreed or approved in writing and given for the purpose of this Agreement and where this Agreement requires any matter to be approved by the Council such approval shall not be unreasonably withheld or delayed
- 1.3 "the Application Site" means the land edged red on the Plan but excluding the plots of any individual dwelling house which has been conveyed to a purchaser for value prior to the date of this Agreement
- 1.4 "the Existing Permission" means the planning permission 2006/0046 issued by the Council on 29th November 2006

- 1.5 "the Outstanding Obligations" means the obligations in the Third Schedule of the Principal Agreement and the obligations in the Third Agreement
- 1.6 "the Plan" means the plan attached to this Agreement
- 1.7 "the Principal Agreement" means an agreement pursuant to section 106 of the Act made between the parties in respect of the Application Site (and other land) dated 29th November 2006 as previously amended by the Second and Third Agreement
- 1.8 "the Second Agreement" means an agreement made pursuant to Section 106A of the Act made between (1) Fairclough Homes Limited and (2) the Council hereto on 8th January 2008
- 1.9 "the Second Permission" means the conditional full planning permission which was granted by the Council under reference 2009/0587 on 12th January 2011 and to which the Third Agreement relates
- 1.10 "the Substituted Obligations" means the planning obligations contained or referred to in Clause 6.1 and the First Schedule to this Agreement
- 1.11 "the Third Agreement" means an agreement made pursuant to Section 106 and Section 106A of the Act made between (1) Fairclough Homes Limited and (2) the Council hereto on 12th January 2011
- 1.12 Any term not otherwise defined in this Agreement has the meaning ascribed to it in the Principal Agreement unless the context requires otherwise

2. **Recitals**

WHEREAS:-

- 2.1 The Owner is registered at H.M. Land Registry as the proprietor of the Application Site with title absolute under title number NT437

- 2.2 The Mortgagee is mortgagee of the Application Site under a legal charge dated 29th February 2012 and made between the Owner and the Mortgagee
- 2.3 The Owner wishes to be released from the Outstanding Obligations and to substitute for them the Substituted Obligations
- 2.4 The Council is the Local Planning Authority for the purposes of the Act for the area in which the Application Site is situated and is prepared to consent on the terms of this Agreement to discharge the Outstanding Obligations in consideration of the Owner entering into the Substituted Obligations
- 2.5 By the Principal Agreement the Owner undertook (inter alia) a planning obligation binding upon the Application Site (and other land) to provide off-site industrial units as more fully detailed in the Third Schedule of the Principal Agreement. The Owner became bound to perform that earlier planning obligation upon Commencement of Development pursuant to the Existing Permission on land adjacent to the Application Site but has not done so and the Council have taken no steps to enforce the requirements of the Third Schedule of the Principal Agreement. The Existing Permission was originally implemented in part and then the Application Site layout varied by the Second Permission, which has also been implemented. Only the obligations in the Third Schedule of the Principal Agreement (as amended only by the Second Agreement at that time) were outstanding at the time the Second Permission was granted. The Third Agreement therefore varied the Third Schedule of the Principal Agreement so that the requirement to provide the industrial units applied to the Second Permission.
- 2.6 As the Owner then implemented the Second Permission, the requirement to provide the industrial units would, in the absence of this Agreement, be triggered following the occupation of the 88th dwelling as set out in the Third Agreement
- 2.7 However, the Owner and the Council have agreed to enter into this Agreement for the purpose of securing the Substituted Obligations in

substitution of the Outstanding Obligations so that the sum of £400,000 is paid as an employment contribution in accordance with the First Schedule hereof instead of having to provide industrial units.

3. **Enabling Powers**

The parties hereto enter into this Agreement under and pursuant to Section 106A of the Act.

4. **Consent**

The Mortgagee hereby consents to the execution of this Agreement as a Deed and declares that subject as herein provided the Application Site shall be bound by the obligations in this Deed and that its legal charge upon the Application Site shall take effect subject to this Deed PROVIDED THAT the Mortgagee shall otherwise have no liability under this Deed unless it takes possession of the Application Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner

5. **Planning Obligations**

5.1 In exercise of its powers under Section 106A of the Act the Council has agreed that the Principal Agreement shall be varied with effect from the date of this Agreement (but insofar only as its Third Schedule) and that the Third Agreement shall be varied so that the Schedules of this Agreement shall apply with immediate effect instead of the Outstanding Obligations

5.2 The Council is the Authority entitled to enforce the obligations in this Agreement.

6. **Covenants**

6.1 The Owner hereby covenants with the Council pursuant to Section 106A of the Act that the Application Site shall be subject to the Substituted Obligations and that the Owner will at his own expense duly carry out and perform the Substituted Obligations

- 6.2 The Council hereby covenants with the Owner to perform and comply with the obligations in the Second Schedule to this Deed and that upon completion of this Deed the Outstanding Obligations shall be discharged and cease to have effect

7. **Agreements and Declarations**

It is agreed and declared as follows:

- 7.1 Any reference to a party to this Agreement shall where the context so admits include their successors in title and assigns
- 7.2 Words importing one gender shall be construed as importing any gender, and words importing the singular shall be construed as importing the plural and vice versa
- 7.3 No person shall be liable for breach of covenant contained in this Agreement after he shall have parted with all interest in the Application 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
- 7.4 With effect from the date hereof the Outstanding Obligations shall be discharged and the Owner shall be released from the further performance thereof meaning that the Third Schedule of the Principal Agreement and the obligations in the Third Agreement are revoked, withdrawn and of no effect
- 7.5 The provisions of the Second Schedule shall apply to any monies paid pursuant to the First Schedule
- 7.6 Nothing in this Agreement or the Principal Agreement shall prohibit or limit the right to develop any part of the Application Site in accordance with a planning permission granted (whether or not on appeal) after the date of this Agreement

- 7.7 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 against each individually
- 7.8 The Agreement is a Local Land Charge and shall be registered as such
- 7.9 Notwithstanding anything to the contrary contained or referred to elsewhere in this Deed the obligations required under this Deed shall not be enforceable against: -
- 7.9.1 any subsequent owner, occupier, tenant, mortgagee or chargee (or any receiver appointed by such mortgagee or chargee) of a dwelling constructed on the Application Site nor against those deriving title from them;
- 7.9.2 any service companies in respect of the usual service facilities or any person with an interest in the sub soil of any public highway on the Application Site or to be created on the Application Site.

8. **Costs**

The Owner shall on the execution of this Agreement pay the Council's costs incurred in the preparation and settlement of this Agreement in the sum of £1,650.00 only

IN WITNESS whereof the parties have executed this Agreement as a Deed the day and year first before written



Deed of Variation
Land at Kirkby Road,
Sutton in Ashfield



Ashfield



FIRST SCHEDULE

SUBSTITUTED OBLIGATIONS

1. The Owner shall pay to the Council for the promotion, provision or sustaining of employment opportunities within the District of Ashfield the sum of FOUR HUNDRED THOUSAND POUNDS (£400,000) ("the Employment Payment") in the following instalments:

1.1 Forthwith upon the execution of this Agreement by the Council the sum of TWO HUNDRED THOUSAND POUNDS (£200,000) and

1.2 Not later than 10th January 2014 the further sum of TWO HUNDRED THOUSAND POUNDS (£200,000)

PROVIDED ALWAYS that if such sum(s) or any part thereof shall not be paid before the due date for payment it shall carry interest at 8% per annum from the due date until actual payment

For the avoidance of doubt, no payment under this First Schedule shall be index linked in any way.

SECOND SCHEDULE

The following provisions shall apply to any sum paid pursuant to the First Schedule:-

1. The Council shall ring fence the Employment Payment in a bank deposit account and all interest thereon is to be credited to the Employment Payment and be spent only in accordance with the following provisions of this Schedule.
2. The Council shall use the Employment Payment only for purposes which will in the opinion of the Council tend to promote, provide or sustain employment opportunities within the District of Ashfield so as to mitigate the loss of the Application Site as land for B1, B2 or B8 uses under the Town & County Planning (Use Classes) Order 1987.
3. Without prejudice to the generality of Paragraph 3 the Council may out of the funds for the time being comprising the Employment Payment held by it:
 - 3.1 Spend any part of the funds on the improvement of any employment facilities owned by the Council within the District of Ashfield
 - 3.2 Spend any part of the funds on the acquisition of any property within the District of Ashfield to be owned by the Council and let or managed for employment purposes
 - 3.3 Make a loan of any part of the funds (whether or not on commercial terms and with or without interest) or a grant to any person or public or private body for the purpose only of creating employment or providing training for employment within the District of Ashfield provided that any repayment of such loan (including interest where applicable) shall be paid into the account mentioned in Paragraph 1 and be held as part of the Employment Payment

4. The Council shall prepare an annual account of all expenditure from the Employment Payment which shall be disclosed to the Owner upon a request being made to the Council.
5. Should the Employment Payment or any part of it not have been spent or committed for expenditure within 5 years of receipt by the Council it shall upon a request in writing being made repay it to the person or entity that made the payment together with any accrued interest.

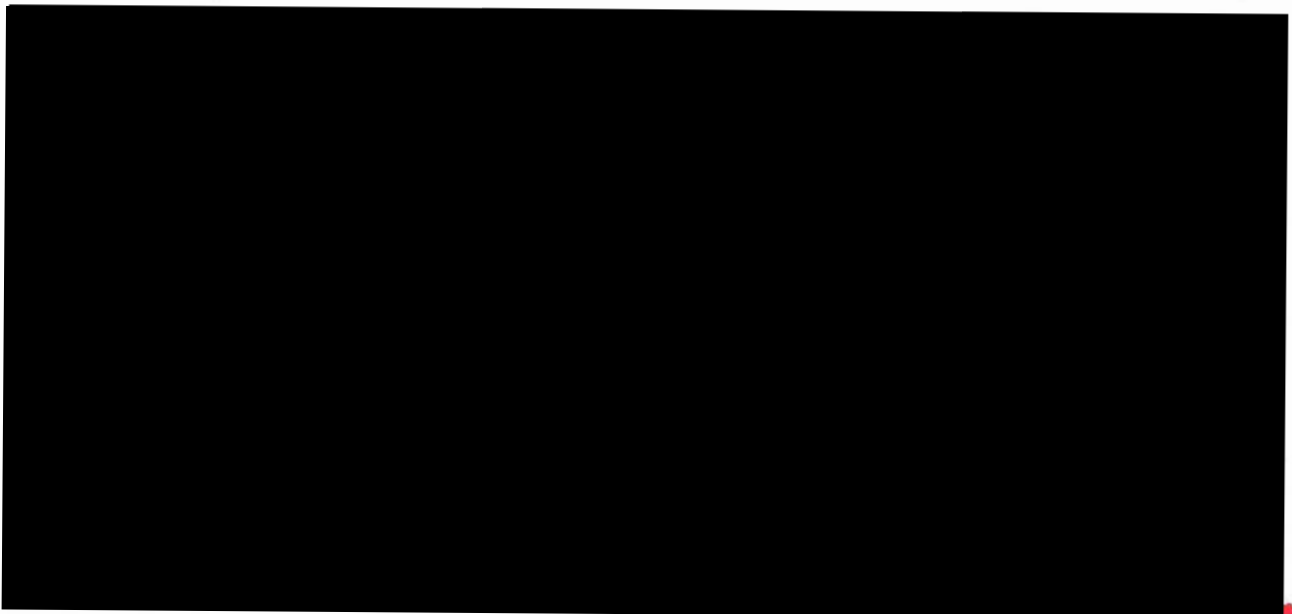
EXECUTED AS A DEED by the said
MILLER HOMES LIMITED
acting by two Directors or a
Director and its Secretary



Director

Director / Secretary

EXECUTED AS A DEED by



EXECUTED AS A DEED by
ASHFIELD DISTRICT COUNCIL
having affixed its **COMMON SEAL**
to this deed in the presence of

