

DERBYSHIRE COUNTY COUNCIL

Shareholder Board of Derbyshire Developments Limited

28 June 2017

Report of the Strategic Director Corporate Resources

MANAGEMENT AGREEMENT

1. Purpose of the Report

To consider changes to the Management Agreement between the County Council and Derbyshire Developments Limited proposed by the Board of Directors of Derbyshire Developments Limited.

2. Information and Analysis

At the first meeting of the Shareholder Board on 16 August 2016 a draft Management Agreement between Derbyshire County Council and Derbyshire Developments Limited which provides a framework for the work of the Board of Directors in meeting the company's strategic objectives was considered but was not formally approved.

The Board of Directors has since reviewed the Management Agreement and proposed that several amendments should be made to assist the Company in meeting its strategic objectives and to ensure consistency with the Articles of Association of the company.

Copies of the reports to the Board of Directors dated 10 April and 19 May 2017 which set out the rationale for the proposed amendments are attached as appendices 1 and 2 to this report.

The majority of the proposed amendments are in the interests of the company and the County Council and will assist in the efficient operation of the Company.

However, the proposed amendment to clause 8.18 – that if a quorum is not present within 30 minutes of the time specified for a Director's meeting the Chairman or acting Chairman should have discretion to adjourn the meeting, is not permissible as a meeting of the Board of Directors must be adjourned if it is not quorate. The amendments proposed by the Board of Directors have therefore been further amended to reflect this legal requirement.

In clause 13.1, which relates to the distribution of profits of the Company by way of dividend, the Board of Directors propose that the clause should be amended so that the Company will recommend to the County Council the amount of profit to be distributed each year and that it will then be for the Council to decide whether to accept the Board's recommendation or require a different amount of profit to be distributed in any particular financial year. The Board's rationale for the proposed amendment is that there will be dialogue between the Company and the Council regarding the Company's recommendations.

The Council's external legal advisers have advised that the changes proposed by the Board of Directors render the distribution clause ineffective as the amendment gives control over the distribution of profits to the Company. The legal advice is that the wording of clause 13.1 should remain as originally drafted.

The Shareholder Board is requested to consider the proposed changes to the Management Agreement and decide whether to accept the changes proposed by the Board of Directors as contained in the report.

3. Other Considerations

In preparing this report the relevance of the following factors has been considered; financial, prevention of crime and disorder, equality and diversity, human resources, environmental, health and transport considerations.

4. Call-in

Is it required that call-in be waived in respect of the decision proposed in the report? No

5. Key Decision

No

6. Officer's Recommendation

That the Shareholder Board considers the proposed amendments to the Management Agreement between the County Council and Derbyshire Developments Limited

**JUDITH GREENHALGH
STRATEGIC DIRECTOR CORPORATE RESOURCES**

Report to Board of Directors meeting..... 10th April 2017

Title: Management Agreement

Purpose of report:

To seek approval to an amended Management Agreement, to govern the relationship between DDL and the Shareholders

Author:

Aidan Kelly, Managing Director

Fit with Strategic Objectives

Social Value

The Management Agreement, as proposed, will work in addition to the Articles of Association and will provide a framework for the work of the Board of Directors, in meeting strategic objectives.

Background:

At its meeting, on 12th January 2017, the Board of Directors considered a previous draft Management Agreement and noted that several amendments were required. The attached draft incorporates the proposed amendments (highlighted in red) with the exception of certain items below, some of which are acknowledged to be inconsistent with the Articles of Association, lodged at Companies House.

The outstanding matters are:-

1. Clause 5.2.4 requires an agreed rent policy despite Clause 5.2.5 effectively stating what that policy should be. 5.2.4. should be deleted
2. The definition of "Set of Works" still assumes that DDL will let a contract for all construction works. Deletion of "the", before "works" will correct the error and permit DDL to let sub-contract packages of works
3. Clause 8.9 refers to the frequency of Board meetings and the previous assumption of monthly meetings. Directors are invited to consider the option of a minimum of 8 meetings pa (2 per quarter) with a maximum of 7 weeks between meetings.
4. Clause 8.12 provides for the calling of urgent Board meetings provided that "all the Directors agree in writing". This may prove to be cumbersome but does at least ensure that all directors are informed in advance of such a meeting.
5. Clause 8.13 seeks to allow Directors to decide upon matters raised under AoB or tabled as a matter of urgency but will not work in practice as it requires that "**all the directors agree in writing**". On the assumption that the meeting is quorate, it is suggested that this is amended to "all the directors present agree"
6. Clause 8.14 refers to a quorum of 2, as is specified in the Articles of Association. Directors are invited to consider whether the quorum should be increased to 3.
7. Clauses 8.16 and 8.18 seek to deal with delays in a meeting becoming quorate and states that the meeting "shall be adjourned" "If a quorum is not present within 30

minutes of the time specified". This is unnecessarily prescriptive and does not permit the Chair to agree a delayed start.

8. The Management Agreement does not provide for attendance by video-link, electronic meetings or service/notification by electronic means.
9. The Management Agreement makes no provision for the exercise of "Chair's Authority" on urgent matters between meetings

Points 3, 6, 7, 8 and 9 above reflect the Articles of Association which can be amended by a special resolution to be passed by DDL and agreed by the Council, as share-holder.

Options

There is a theoretical option not to sign the management Agreement pending agreement of all the points above. Directors are however asked to note

- The number of amendments already agreed
- That 3 of the above points are minor editing points, likely to be agreed
- That 5 of the above points will require amendments to the Articles of Association.

Risk

Further delay, in entering into a Management Agreement, may be a cause for concern by the Shareholders Board

Recommendation

That Directors:-

- Authorise the Managing Director to agree final amendments, to the draft, as outlined above
- Authorise the Chair to sign the final engrossed agreement
- Agree to consider, at a future meeting, a special resolution to address the outstanding issues on quorum and use of electronic communication.

Report to Board of Directors meeting..... 19th May 2017

Title: Amendments to Articles of Association and Management Agreement

Purpose of report:

To seek Director's approval to a request, to the Shareholders Board, to approve proposed changes to the Management Agreement and to pass a special resolution to accept amended Articles of Association

Author:

Aidan Kelly, Managing Director

Fit with Strategic Objectives

This is an enabling proposal to facilitate effective governance by the Board of Directors

Social Value

The proposal will enable effective, governance and decision making thereby enhancing Derbyshire Developments Limited's (DDL) ability to meet its corporate objectives

Background:

At its meeting, 10th April 2017, the Board of Directors approved a report proposing amendments to the draft Management Agreement. This agreement will govern the relationship between the Board of Directors and the Shareholders Board, a Cabinet sub-committee established to represent the interests of Derbyshire County Council (DCC), as sole shareholder.

It was noted that some proposed amendments would, of necessity, require amendments to the Articles of Association, which, in turn, will require a Special Resolution to be passed by the Shareholders Board. The Shareholders Board has absolute discretion, in this matter, and therefore the author has sought advice from DCC's Assistant Director of Legal Services.

As these documents are of fundamental importance, DDL's legal advisors, Shoosmiths, have also reviewed them.

The proposed versions, of the Articles of Association and the Management Agreement are attached, with the proposed amendments highlighted.

The intention, of the revised documents, is to:

- Accept communication by email
- Accept virtual attendance by electronic media or telephone
- Enable quorate meetings, of the Board of Directors, to consider and decide matters, raised under "Any Other Business", or urgent matters not on the agenda
- Revise the required frequency of meetings

- Allow the Chair (or acting Chair) discretion to delay meetings to enable a quorum to arrive within a reasonable period of time
- Formalise the Shareholders right to appoint an observer
- Clarify DCC's right to appoint and remove Directors
- Facilitate proceedings at general meetings

Options

The current Articles of Association may continue to apply and will do so if the Shareholders Board rejects, or fails to determine, the proposed recommendation. In this instance, Directors will have no option but to accept the existing rigidity concerning the workings of the Board of Directors.

The Management Agreement has not yet been signed but is being honoured, in good faith, by the actions of the Board of Directors. The latest draft, as considered at the 10th April 2017 meeting, does align with the current Articles of Association. The above deficiencies will remain, pending agreement to the amended Articles of Association, but the latest draft could and should be signed if the Shareholders Board rejects, or fails to determine, the proposed recommendation.

The latest draft Management Agreement will require the approval, of the Shareholders Board, and Directors are reminded that the original draft is deficient to the point of being unworkable.

Risk

All parties and officers are acting in good faith and in the spirit of seeking a positive outcome. Nonetheless, there is the hopefully hypothetical risk that discussions will become protracted, diverting time and energy from other priorities and undermining the positive, working relationship, which has been established between DCC and DDL.

Recommendation

That the Board of Directors recommend approval, of the attached and amended Articles of Association and Management Agreement, to the next available meeting of the Shareholders Board and request that the Shareholders Board pass a Special Resolution to accept the amended Articles of Association.

DATED

APPENDIX 3
2017

DERBYSHIRE COUNTY COUNCIL (1)

and

DERBYSHIRE DEVELOPMENTS LIMITED (2)

MANAGEMENT AGREEMENT RELATING TO
DERBYSHIRE DEVELOPMENTS LIMITED

brownejacobson

Browne Jacobson LLP
Mowbray House
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Nottingham
NG2 1BJ

Telephone: (0115) 976 6000
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This Agreement is entered into as a deed on

2017 between:

PARTIES

- (1) **DERBYSHIRE COUNTY COUNCIL** of County Hall, Matlock, Derbyshire DE4 3AG (the “Council”); and
- (2) **DERBYSHIRE DEVELOPMENTS LIMITED** a company registered in England and Wales with company number 10316015 and whose registered office is County Hall, Matlock, Derbyshire DE4 3AG (the “Company”),

each a "Party" and together the "Parties".

INTRODUCTION:

- (A) The Council is the sole shareholder of the Company.
- (B) The Company has been established with the primary objective of developing land within Derbyshire to increase the provision of housing for sale and rent both at market and affordable rent. **The company may also develop land in Derbyshire for commercial development and land outside Derbyshire for housing for sale and rent.**
- (C) The Company has been established to act independently of the Council but as the sole shareholder the Council has certain requirements as to the management of the Company. These requirements operate in addition to the Articles of Association of the Company.

IT IS AGREED THAT:

1 DEFINITIONS AND INTERPRETATION

In this Agreement:

- 1.1 except where the context otherwise suggests, these expressions have these meanings:

“Agreement”	Means this agreement and no other;
“Approvals”	means all approvals consents permissions and licences of any local or other competent authority or statutory undertaker which may

	from time to time be necessary to enable the Company to commence and carry out a Set of Works;
“Articles of Association”	mean the articles of association of the Company as lodged with Companies House and amended from time to time;
“Board”	means the board of directors of the Company from time to time;
“Building Contract”	means a contract in a form commonly used for the construction or redevelopment of residential or commercial Property;
“Business”	means the acquisition of land for development and the development of residential and commercial property;
"Business Day"	9am to 5pm on a day (other than a Saturday or Sunday) on which banks are generally open for business in the City of London;
“Business Plan”	means the business plan as defined in clause 0;
“CA 2006”	means the Companies Act 2006
“Council Representative”	the representative of the Council as notified from time to time to the Company;
“Financial Year”	means a year running from 1 April in one year to 31 March of the next year;
“Funding Agreement”	means the separate agreement to be entered into between the parties and in accordance with clause 0;

“Local Housing Authority”	means a local authority with the function of providing social housing within its area;
“Leasehold Agreement”	means an agreement for the disposal of the leasehold interest in a residential Property for a minimum of 99 years or in a commercial property on terms which are in the best interests of the Company.
“Managing Agent”	means a person acting on behalf of the Company in the management of properties belonging to the Company for sale or rent;
“Property”	means land or buildings that belong to the Company and are to be developed under a Set of Works;
“Property Management”	means the services to be carried out by a Managing Agent;
“Rent”	means rent payable to the Company for any Property occupied under a Tenancy Agreement or a Long Leasehold Agreement;
“Rent Policy”	means the Company’s policy for rent setting in its capacity as a landlord;
“Reserved Matters”	mean those matters set out in Schedule 1;
“Service Charge”	means a service charge payable to the Company for any Property that is occupied under a Tenancy Agreement or a Long Leasehold Agreement;
“Set of Works”	means works required for the construction or redevelopment of residential or commercial Property;

"Tenancy Agreement"	means an agreement for an Assured Shorthold Tenancy for an agreed term and such other tenancies as are permitted by law, as amended from time to time;
"Termination Date"	Has the definition set out in clause 0;

- 1.2 the masculine shall include the feminine and neuter and the singular shall include the plural and vice versa;
- 1.3 the expression "person" shall include any individual, firm or company;
- 1.4 the headings to clauses and schedules shall not affect their construction;
- 1.5 any reference to a statutory provision or regulation shall be construed as a reference to it as from time to time amended, consolidated, modified, extended, re-enacted or replaced;
- 1.6 any reference to a clause, schedule or appendix is a reference to a clause, schedule or appendix to this Agreement;
- 1.7 the provisions of the schedules and appendices shall have full force and effect as if they were set out in the operative part;
- 1.8 in the case of any inconsistency between the main body of this Agreement and the Schedules to this Agreement, the main body of this Agreement shall prevail.

2 **NO CONTRACT FOR SERVICES OR WORKS**

- 2.1 The Parties agree that this Agreement is to allow them to establish the detail of the management of the Company and is not a contract for services or works from one Party to the other.
- 2.2 Each Party covenants with the other that so long as this Agreement remains in place it will:
 - 2.2.1 be just and true to the other Party and act in good faith;
 - 2.2.2 as soon as practicable report to the other Party any matters of

which it becomes aware which may affect the effective delivery of this Agreement;

2.2.3 give all reasonable assistance to the other Party to allow the obligations to be carried out in the best possible way; and

2.2.4 whilst always respecting the need to maintain the obligations of confidentiality and the need to avoid conflicts of interest, facilitate best practice and the sharing of information and knowledge.

3 **DURATION**

This Agreement shall take effect on the date of this Agreement and, (subject to those provisions which continue after termination) shall continue until the Termination Date.

4 **MATTERS REQUIRING CONSENT OF SHAREHOLDER**

The Company shall not, without the prior written approval of the Council, carry out any of the Reserved Matters.

5 **OBJECTIVES OF THE COMPANY**

5.1 The parties acknowledge that the main objective of the Company is to develop housing within Derbyshire for rental or sale and the secondary objective is to develop commercial property within Derbyshire and housing outside Derbyshire both for rental or sale (the "Objectives").

5.2 The Company agrees that when carrying out the Objective it will:

5.2.1 agree a Set of Works with a contractor or developer in advance of commencing work for a Property;

5.2.2 ensure that all necessary Approvals are in place at the appropriate time during a Set of Works;

5.2.3 enter into a Building Contract before a Set of Works is commenced;

5.2.4 ~~establish the Rent Policy for the Council's approval;~~ ~~Note: is this needed in view of 5.2.5?~~

- 5.2.4 charge Rent and Service Charges that are comparable to rental and service charge values for similar properties in the area in which the Property is situated or, where lower than comparable rental values, not of a value that could put the Council at risk of acting as a Local Housing Authority;
- 5.2.5 ensure that any Property for sale is sold for a price comparable to sale prices for similar properties in the area in which the Property is situated; and
- 5.2.6 employ any Managing Agent on terms that are based on market norms and for Property Management functions that require expertise not within the Company.

6 **FUNDING**

- 6.1 The Parties acknowledge that the Funding Agreement will be entered into on or around the date of this Agreement.
- 6.2 The Council is under no obligation to provide any funding to the Company except in accordance with the Funding Agreement.
- 6.3 The Parties agree that, subject to clause 0, the Company shall be financed, if it requires any additional finance, and so far as practicable, from external funding sources and on terms to be agreed between the Board, the Parties and any relevant third parties. The Parties agree that any security required in relation to such external funding shall, if possible, be provided by the Company.
- 6.4 Should additional **finance be obtained as provided for by clause 6.3** (the "Facility") the Facility shall be provided on the basis that the lender will not acquire the right to participate in the share capital of the Company or otherwise in the Company's Business.

7 **THE PROPERTY MANAGEMENT PROVIDER**

The Company shall where it appoints a Managing Agent procure that the Managing Agent provides the Property Management in a timely and efficient manner and in accordance with this Agreement.

DIRECTORS AND MANAGEMENT

- 8.1 The Board has responsibility for the supervision and management of the Company and its Business, subject to clause 0.
- 8.2 There shall be a minimum number of 3 directors on the Board, one of whom shall be the Managing Director.
- 8.3 The post of chairman shall be held by a Ddirector appointed by the Board. The chairman shall not have a casting vote.
- 8.4 The Council shall have the right to appoint a representative to attend as an observer at each and any meeting of the Board and at each and any meeting of any committee of the Board. The observer shall have the right to receive copies of all notifications and documentation circulated to the Board in connection with any meeting of the Board or any committee of the Board.
- 8.5 The Council may shall have the right to appoint a two directors, and remove a director whom it appointed, by giving notice in writing to the Company and the other Party, and to the director being removed, in the case of removal of a director. The appointment or removal takes effect on the date on which the notice is received by served on the Company or produced to a meeting of the Board of Directors, whichever is earlier. If this meeting is not quorate, then the Ddirectors present at such meeting will form the quorum for the sole purpose of receiving the notice. If a later date is given in the notice, the appointment or removal will take effect on that date.
- 8.6 One Council director shall be the Council's Director of Property or a representative appointed by the Director of Property.
- 8.7 The Council directors and any observer appointed pursuant to clause 8.4 may, from time to time, make full but confidential disclosure to the Council of any information relating to the Company.
- 8.8 An observer appointed in accordance with clause 8.4 or a director appointed in accordance with clause 8.5 shall not be treated as having a conflict of interest in any matter to be discussed at a Board meeting or a meeting of any committee of the Board solely because the observer or director is an officer or elected member of the Council.

- 8.9 The Company acknowledges that a director appointed by the Council will automatically be removed from office if he or she is no longer an officer or elected member of the Council.
- 8.10 The Parties intend there to be a meeting of directors at least 8 times each year with a period of not more than 8 weeks between any two meetings, to be held at the Company's offices or such other venue as may be agreed by the Board.
- 8.11 A director may, and at the request of a director, the secretary (if any) shall, call a meeting of directors.
- 8.12 The Parties shall ensure that at least five Business Days' notice of a meeting of directors is given to all directors entitled to receive notice and any Board observer appointed in accordance with clause 0 accompanied by:
- 8.12.1 an agenda specifying in reasonable detail the matters to be raised at the meeting or the committee meeting; and
- 8.12.2 copies of any papers to be discussed at the meeting or the committee meeting.
- 8.13 A shorter period of notice of a meeting of directors to deal with urgent matters may be given if all the directors agree in writing.
- 8.14 Decisions cannot be made or business conducted in relation to matters not on the agenda of a meeting unless there is a quorum and all of the directors present agree, and with that agreement is recorded in the minutes of the meeting.
- 8.15 The quorum at any meeting of directors (including adjourned meetings) is shall be ~~two-three~~ directors one of whom must be the Managing Director or a representative appointed by the Managing Director.
- 8.16 The quorum shall include any Ddirector able to participate in real time via telephone or virtually and the meeting shall be deemed to be held irrespective of where Ddirectors are as long as they can each communicate instantly to the others.
- 8.17 No business shall be conducted at any meeting of directors unless a quorum

is present at the beginning of the meeting and at the time when there is to be voting on any business.

8.18 If a quorum is not present within 30 minutes of the time specified for a directors' meeting in the notice of the meeting then ~~the Chairman or acting Chairman the meeting~~ shall be adjourned ~~be adjourned for have the discretion to adjourn the meeting for no longer than 5 Business Days at the same time and place or such other the same time and place at a time and place to be agreed.~~ The Parties shall use their respective reasonable endeavours to ensure that any meeting of the Board (or meeting of a committee of the Board) and every general meeting of the Company has the requisite quorum.

8.19 A meeting of directors shall be adjourned to another time or date at the request of all the directors present at the meeting. No business may be conducted at a meeting after such a request has been made. No more than one such adjournment may be made in respect of a meeting.

9 ASSISTANCE AND COOPERATION

9.1 Each Party shall provide the other with such information and agree to attend any such meetings as the other may from time to time reasonably request in connection with the performance of its obligations under this Agreement.

9.2 Each Party shall, where it receives a reasonable request whether for information or for approval to any matter contemplated by this Agreement, either supply the information or give the approval (or give reasons for withholding the approval) within five (5) Business Days of the request or (where there is an objectively justifiable reason for being unable to comply with the request in full within five (5) Business Days) reply within five (5) Business Days stating the reasons for not being able to comply with the request and in that event the Party shall comply with the request, where it is legally able to do so, within a further ten (10) Business Days.

10 ANTI-CORRUPTION

10.1 The Company undertakes to the Council that:

- 10.1.1 it will not, and will procure that the Company will not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010;
- 10.1.2 the Council has provided a copy of its anti-corruption policies and procedures to the Company and these are in agreed form (the “Council’s Anti-corruption Procedures”). The Company will maintain in place, anti-corruption procedures in substantially the same form as the Council’s Anti-corruption Procedures, which the parties agree constitute Adequate Procedures; and
- 10.1.3 from time to time, at the reasonable request of the Council, it will confirm in writing that it has complied with its undertakings under clause 0 and clause 0 and will provide any information reasonably requested by the Council in support of such compliance.

10.2 Breach of any of the undertakings in this clause shall be deemed to be a material breach of the agreement.

11 **BUSINESS PLAN**

- 11.1 The Business Plan is an annual business plan for the Company prepared by the Board and it shall include in relation to the Financial Year to which it relates:
 - 11.1.1 a cashflow statement giving:
 - 11.1.2 an estimate of the working capital requirements; and
 - 11.1.3 an indication of the amount (if any) that it is considered prudent to retain, for the purpose of meeting those requirements, out of those profits of the previous Financial Year that are available for distribution to shareholders;
 - 11.1.4 a monthly projected profit and loss account;
 - 11.1.5 an operating budget (including capital expenditure requirements) and balance sheet forecast;

- 11.1.6 a management report giving business objectives and performance against those objectives for the year; and
- 11.1.7 a financial report which shall include an analysis of the estimated results of the Company for the previous Financial Year compared with the Business Plan for that year, identifying variations in sales, revenues, costs and other material items;
- 11.2 The Business Plan for the Financial Year in which the Company is formed shall be in agreed form and adopted by the parties ~~as soon as possible after~~ at the commencement of this Agreement.
- 11.3 The Business Plan for every other Financial Year shall be:
 - 11.3.1 prepared by the Board at least 90 days before the end of the preceding Financial Year; and
 - 11.3.2 adopted and approved by the Council as soon as possible after it has been prepared.

12 ACCOUNTING AND OTHER INFORMATION

- 12.1 The Parties shall procure that the Company shall at all times maintain accurate and complete accounting and other financial records including all corporation tax computations and related documents and correspondence with HM Revenue & Customs in accordance with the requirements of all applicable laws and generally accepted accounting principles applicable in the United Kingdom.
- 12.2 The Council and its authorised representatives shall be allowed access at all reasonable times to examine the books and records of the Company and to discuss the Company's affairs with its directors and senior management.
- 12.3 The Company shall supply the Council with the financial and other information necessary to keep the Council informed about how effectively the Business is performing and in particular shall supply the Council with:
 - 12.3.1 a copy of each year's Business Plan for approval in accordance with clause 0;

- 12.3.2 a copy of the audited accounts of the Company prepared in accordance with the laws applicable in and the accounting standards, principles and practices generally accepted in the United Kingdom, within 3 months of the end of the year to which the audited accounts relate;
- 12.3.3 monthly management accounts of the Company to be supplied within 21 days of the end of the month to which they relate and the accounts shall include a profit and loss account, a balance sheet and a cashflow statement and such other information as the Council may reasonably require; and
- 12.3.4 a copy of a report prepared by the Company in respect of each Financial Year, demonstrating the implementation by the Company of anti-corruption procedures in substantially the same form as the Council's Anti-corruption Procedures, such report to be provided within 30 days of the end of the Financial Year to which it relates.
- 12.4 The Company shall, as soon as possible, comply with any request made by the Council, to provide any documents, information and correspondence necessary (at the cost of the party making the request) to enable the Council to comply with filing, elections, returns or any other requirements of HM Revenue & Customs or of any other revenue or tax authority.

13 DIVIDEND POLICY

- 13.1 ~~Subject to the requirements of the CA 2006, and unless the Council agrees otherwise the Company shall recommend to the Council the amount of profit of the Company to be distributed by way of dividend in relation to each Financial Year, the company shall distribute by way of dividend 100% of the profit of the Company in relation to each Financial Year~~ but after making all necessary, reasonable and prudent provisions and reserves for taxation, for the repayment of borrowings by the Company (if any), and extraordinary items as shown in the audited accounts for that year ~~and the Council shall decide whether to accept the recommendation or require a different amount of profit to be distributed by way of dividend in any particular Financial Year.~~

13.2 A distribution under this clause in relation to any Financial Year shall be made within six months of the day to which the audited accounts of the Company for that year are made up.

14 **TAX MATTERS**

Unless the Council otherwise expressly agrees in writing, all of the Company's trading losses and all other amounts eligible for relief from taxation shall be carried by the Company and not surrendered (wholly or partly) to the parties.

15 **ISSUE OF FURTHER SHARES**

The Company shall not **without the prior written approval of the Council** issue any shares or other equity securities (within the meaning of section 560(1) of the CA 2006) to any person.

16 **DATA PROTECTION**

16.1 For the purposes of this **clause 0** the following expressions have the following meanings unless inconsistent with the context:

16.1.1 Data Controller: Shall have the same meaning as set out in the Data Protection Act 1998

16.1.2 Data Processor: Shall have the same meaning as set out in the Data Protection Act 1998

16.1.3 Personal Data: Shall have the same meaning as set out in the Data Protection Act 1998

16.1.4 Process: has the meaning given to it under the Data protection Legislation but, for the purposes of this agreement, it shall include both manual and automatic processing.

16.2 The Parties shall at all times comply with the Data Protection Act, including maintaining a valid and up to date registration or notification under the Data Protection Act, covering any data processing to be performed in connection with this Deed and their responsibilities as data

processors and/or data controllers.

- 16.3 Where one Party is acting as a data processor, the processor shall only undertake processing of Personal Data reasonably required in connection with the operation of this Deed or in accordance with clause 0 and the remainder of this clause 0.
- 16.4 Unless agreed otherwise in writing by the Parties the data processor shall process the Personal Data only in accordance with the Data Controller's instructions from time to time and shall not process the Personal Data for any purpose other than those expressly authorised by the Data Controller.
- 16.5 Notwithstanding the general obligation in Clause 0 the Data Processor shall ensure that it has in place appropriate technical, organisational and contractual measures to ensure the security of the Personal Data (and to guard against unauthorised or unlawful processing of the Personal Data and against accidental loss, disclosure or destruction of, or damage to, the Personal Data), these measures shall be appropriate to the harm which might result from unauthorised or unlawful processing of the Personal Data, accidental loss, disclosure or destruction of, or damage to, the Personal Data having regard to the nature of the personal data which is to be protected; and
 - 16.5.1 take reasonable steps to ensure the reliability of any of their employees who have access to the personal data
 - 16.5.2 ensure that all of their employees required to access the Personal Data are informed of the confidential nature of the Personal Data and comply with the obligations set out in this contract
 - 16.5.3 take reasonable steps to ensure that none of their employees publish, disclose or divulge any of the Personal Data to any third party unless directed in writing to do so by the Authority;
 - 16.5.4 provide the Data Controller with such information as the Data Controller may reasonably require to satisfy itself that the Data Processor is complying with its obligations under the Data Protection Act;

- 16.5.5 promptly notify the Data Controller of any breach of the security measures required to be put in place pursuant to this clause 0; and
- 16.5.6 ensure it does not knowingly or negligently do or omit to do anything which places the Data Controller in breach of the Data Controller's obligations under the Data Protection Act.
- 16.5.7 notify the other Party (within five Business Days), if it receives:
 - (a) a request from a Data Subject to have access to that person's Personal Data;
 - (b) or a complaint or request relating to the Party's obligations under the Data Protection Legislation;
- 16.5.8 provide the other Party with full co-operation and assistance in relation to any complaint or request made, including by:
 - (a) providing the other Party with full details of the complaint or request;
 - (b) complying with a data access request within the relevant timescales set out in the Data Protection Legislation and in accordance with the other Party's instructions;
 - (c) providing the other Party with any Personal Data it holds in relation to a Data Subject (within the timescales required by the Council); and
 - (d) providing the other Party with any information requested by the other Party;
- 16.6 The Data Processor shall not transfer any Personal Data to any country or territory outside the European Economic Area unless in accordance with the 8th Data Protection Principle as set out in the DPA.
- 16.7 The Data Processor may authorise a third party (a "Subcontractor") to process the Personal Data provided that the Subcontractor's contract:
 - 16.7.1 includes terms which are substantially the same as this

Clause 16; and

16.7.2 will terminate automatically on termination of this Deed for any reason.

16.8 The Data Processor shall not disclose Personal Data to any third parties other than:

16.8.1 in response to a data subject access request;

16.8.2 to employees and contractors to whom such disclosure is necessary in order to comply with their obligations under this Deed;

16.8.3 to the extent required to comply with a legal obligation; or

16.8.4 in accordance with written instruction from the data controller

16.9 The Data Processor shall permit the Data Controller or the Data Controller's representative (subject to reasonable and appropriate confidentiality undertakings), to inspect and audit, in accordance with clause 0 (Audit), the Data Processor's data processing activities (and/or those of its agents, subsidiaries and Sub-contractors) and comply with all reasonable requests or directions by the Data Controller to enable the Data Controller to verify and/or procure that the Data Processor is in full compliance with its obligations under this agreement and Provide a written description of the technical and organisational methods employed by the Data Processor for processing Personal Data (within the reasonable timescales required).

17 CONFIDENTIAL INFORMATION, FREEDOM OF INFORMATION ACT 2000 ENVIRONMENTAL INFORMATION REGULATIONS 2004 AND LOCAL GOVERNMENT OMBUDSMAN

17.1 Each Party shall keep strictly confidential all information concerning:

17.1.1 any individual whether an employee, agent, servant of the other party;

17.1.2 a member of the public; and

17.1.3 the business and affairs of the other Party.

obtained from the other Party either pursuant to this Agreement or prior to and in contemplation of it (“Confidential Information”), shall use the same exclusively for the purposes of and in accordance with this Agreement, and shall disclose the same only to those of its directors and employees or other persons to whom and to the extent that such disclosure is reasonably necessary for the purposes of this Agreement.

17.2 The obligations of clause 0 above shall survive the termination of this Agreement but shall not apply to any information which:-

17.2.1 either Party can demonstrate was already in its possession and at its free disposal prior to receipt under the circumstances mentioned at clause 0 above;

17.2.2 is subsequently disclosed to either Party without any obligation of confidence by a third party who has not derived it directly or indirectly from the other Party;

17.2.3 enters the public domain through no act or default of the recipient, its agents or employees; or

17.2.4 is required to be disclosed by any law or statutory or regulatory obligation including without limitation the Freedom of Information Act 2000 (the “FOIA”) and/or the Environmental Information Regulations 2004 (the “EIR”) (but only to the extent of such law or statutory or regulatory obligation) or as directed by the Local Government Ombudsman .

17.3 On termination of this Agreement the Company shall return to the Council all Confidential Information in all and any formats that the Company has held such Confidential Information and destroy all and any copies of Confidential Information.

17.4 The Company acknowledges that the Council is subject to the requirements of the FOIA, the EIR and the directions of the Local Government Ombudsman and each shall assist and cooperate with the other (at its own expense) to enable the other Party to comply with these information disclosure obligations.

- 17.5 If the Company receives a Request for Information from the Council, it shall:-
- 17.5.1 transfer the request for information to the Council as soon as practicable after receipt and in any event within five Business Days of receiving a request for information;
 - 17.5.2 provide the Council with a copy of all information in its possession or power in the form that the Council requires within five Business Days (or such other period as the Council may specify) of a request from the Council; and
 - 17.5.3 provide all necessary assistance as reasonably requested by the Council to enable the Council to respond to the request for information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the EIR or as directed by the Local Government Ombudsman.
- 17.6 Where either Party receives a request for information which relates to Confidential Information, it shall inform the other Party of the request for information as soon as practicable after receipt and in any event within five Business Days of receiving a request for information.
- 17.7 If the Council determines that information (including Confidential Information) must be disclosed under the FOIA and/or EIR or as directed by the Local Government Ombudsman, it shall use best endeavours to notify the Company of that decision at least Five Business Days before disclosure.
- 17.8 The Council shall be responsible for determining at its absolute discretion whether the Confidential Information and/or any other information:-
- 17.8.1 is exempt from disclosure under the FOIA or the EIR;
 - 17.8.2 is to be disclosed in response to a request for information;
 - 17.8.3 is to be disclosed to the Local Government Ombudsman.
- 17.9 The Company acknowledges that the Council may, acting in accordance with the Department for Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part I of the FOIA or

under the directions of the Local Government Ombudsman, be obliged under the FOIA or the EIR to disclose information:-

17.9.1 without consulting with the Company, or

17.9.2 following consultation with the Company and having taken their views into account.

18 **TERMINATION AND LIQUIDATION**

18.1 Subject to clause 0, this agreement shall terminate on the earlier of the date on which:

18.1.1 the Council ceases to be the sole shareholder of the Company; or

18.1.2 a resolution is passed by the Council or creditors, or an order is made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors or the Council; or

18.2 On termination of this agreement, the following clauses shall continue in force:

18.2.1 Clause 0 (Definitions and Interpretation);

18.2.2 Clause 0 (Matters Requiring Consent of the Shareholder);

18.2.3 Clause 0 (Assistance and Cooperation);

18.2.4 Clause 0 (Tax Matters);

18.2.5 Clause 0 (Data Protection);

18.2.6 Clause 0 (Confidential Information, Etc)

18.2.7 this clause;

18.2.8 Clause 0 (Notices);

18.2.9 Clause 0 (Miscellaneous);

18.2.10 Clause 0 (Assignment);

18.2.11 Clause 0 (Severability); and

18.2.12 Clause 0 (Jurisdiction).

18.3 Termination of this agreement shall not affect any rights, remedies, obligations or liabilities of the Parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination.

18.4 Where, following an event referred to in clause 0 the Company is to be wound up and its assets distributed, the parties shall agree a suitable basis for dealing with the interests and assets of the Company and the Company shall ensure that, before dissolution:

18.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;

18.4.2 no new contractual obligations are entered into;

18.4.3 the Company's assets are distributed as soon as practical; and

18.4.4 any assets transferred to the Company in relation to the Business shall be returned the Council.

19 **STATUS OF THE AGREEMENT**

If there is an inconsistency between any of the provisions of this Agreement and the provisions of the Articles of Association, the provisions of this Agreement shall prevail as between the Parties.

20 **NOTICES**

20.1 Any notice demand or communication to be given or served under this Agreement shall be in writing.

20.2 Any notice demand or communication to be given or served under this Agreement shall be given or served:

20.2.1 in the case of notice to be served upon the Council, by personal delivery or by sending it by pre-paid recorded postal delivery to:

Director of Legal Services Derbyshire County Council, County Hall,
Matlock, Derbyshire DE4 3AG; and

20.2.2 in the case of notice to be served upon the Company, by personal delivery or by sending it by pre-paid recorded postal delivery to the Company's registered address,

or to such other address as either party may notify to the other party from time to time in writing for such purposes.

20.3 Any such notice shall (where sent by post) be deemed to have been served and received on the second Business Day following the day of posting and where delivered personally be deemed to have been given when delivery is made.

21 **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

A person who is not party to this Agreement is not intended to have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

22 **MISCELLANEOUS**

22.1 Nothing in this Agreement shall constitute a partnership or joint venture between the Parties to this Agreement or constitute either Party to act as agent of the other Party for any purpose whatsoever.

22.2 This Agreement may only be amended in writing and signed by authorised representatives of the Parties.

22.3 No failure or delay on the part of either Party in exercising any right or power and no course of dealing between the Parties shall operate as a waiver nor shall any single or partial exercise of any right, power or remedy of either Party prevent any other or further or other exercise of it or the exercise of any other right, power or remedy of the Party. The rights and remedies available to either Party under this Agreement are cumulative and are in addition to and not in substitution for any other rights or remedies which either Party would otherwise have, however arising.

22.4 Nothing contained in or done under this Agreement and no consents given by either Party shall prejudice either Party's rights, powers or duties and/or obligations in the exercise of its functions or under any statutes, bye laws, instruments, orders or regulations.

22.5 Nothing in this Agreement nor any other document shall impose any obligation or liability on either Party with respect to any actions of or obligations or liabilities assumed or incurred by either Party or its agents, contractors or employees whether under contract, statute or otherwise.

22.6 In the event that the Council in whole or in part changes its public body status it shall be entitled to freely assign any or all of its rights or obligations hereunder.

22.7 Nothing in this Agreement shall operate as an obligation upon, or in any other way fetter or constrain the Council in any other capacity including any statutory or function related obligation, nor shall the exercise by the Council of its duties and powers in any other capacity lead to any liability under this Agreement (howsoever arising) on the part of the Council.

23 **ENTIRE AGREEMENT**

This Agreement shall constitute the entire agreement between the Parties relating to the subject matter of the Agreement. The Agreement supersedes all prior negotiations, representations and undertakings, whether written or oral, except that this clause 0 shall not exclude liability in respect of fraudulent misrepresentation.

24 **ASSIGNMENT**

The Company shall not assign any of their rights or duties under this Agreement without the Council's prior written consent.

25 **SEVERABILITY**

If any provision of the Agreement is held, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions of the Agreement shall continue in full force and effect as if the Agreement had been executed with the invalid, illegal or unenforceable provision eliminated. In the

event of a holding of invalidity so fundamental as to prevent the accomplishment of the purpose of the Agreement, the Parties shall immediately commence negotiations in good faith to remedy the invalidity.

26 **JURISDICTION**

This Agreement shall be governed exclusively by and construed in accordance with the law of England and each party submits to the exclusive jurisdiction of the English Courts.

EXECUTED BY DERBYSHIRE COUNTY COUNCIL)

Authorised Officer

EXECUTED BY DERBYSHIRE DEVELOPMENTS)
LIMITED)

Director

Director/Witness

SCHEDULE 1

RESERVED MATTERS

The following are classed as Reserved Matters that shall require approval by the Council before they are carried out:

1. Altering in any respect the Articles or the rights attaching to any of the shares in the Company
2. Increasing the amount of the Company's issued share capital, granting any option or other interest (in the form of convertible securities or in any other form) over or in its share capital, redeeming or purchasing any of its own shares or effecting any other reorganisation of its share capital.
3. Issuing any loan capital in the Company or entering into any commitment with any person with respect to the issue of any loan capital.
4. Making any borrowing other than the initial loan for working capital purposes from its bankers in the ordinary and usual course of business.
5. Applying for the listing or trading of any shares or debt securities on any stock exchange or market.
6. Passing any resolution for the Company's winding up or presenting any petition for its administration (unless it has become insolvent).
7. Altering the name of the Company or its registered office.
8. Adopting or amending the Business Plan in respect of each Financial Year.
9. Changing the nature of the Company's Business or commencing any new business by the Company which is not ancillary or incidental to the Business.
10. Forming any subsidiary or acquiring shares in any other company or participating in any partnership or joint venture (incorporated or not).
11. Amalgamating or merging with any other company or business undertaking.
12. Making any acquisition or disposal by the Company of any material asset(s).
13. Creating or granting any Encumbrance over the whole or any part of the Business, undertaking or assets of the Company or over any shares in the Company or agreeing to do so.
14. Making any loan (otherwise than by way of deposit with a bank or other institution the normal business of which includes the acceptance of deposits or in the ordinary course of business) or granting any credit (other than in the normal course of trading) or giving any guarantee (other than in the normal course of trading) or indemnity.

15. Altering any mandate given to the Company's bankers relating to any matter concerning the operation of the Company's bank accounts.
16. Appointing any agent or other intermediary to conduct any of the Company's Business.
17. Entering into any arrangement, contract or transaction outside the normal course of the Company's Business or otherwise than on arm's length terms.
18. Giving notice of termination of any arrangements, contracts or transactions which are material in the nature of the Company's Business, or materially varying any such arrangements, contracts or transactions.
19. Adopting or amending any standard terms of business (including prices) on which the Company is prepared to provide goods or services to third parties.
20. Granting any rights (by licence or otherwise) in or over any intellectual property owned or used by the Company.
21. Factoring or assigning any of the book debts of the Company.
22. Changing the auditors of the Company or its Financial Year end.
23. Making or permitting to be made any change in the accounting policies and principles adopted by the Company in the preparation of its audited and management accounts.
24. Establishing or amending any profit-sharing, share option, bonus or other incentive scheme of any nature for directors or employees.
25. Establishing or amending any pension scheme or granting any pension rights to any director, officer, employee, former director, officer or employee, or any member of any such person's family.
26. Dismissing any director, officer or employee in circumstances in which the Company incurs or agrees to bear redundancy or other costs.
27. Agreeing to remunerate (by payment of fees, the provision of benefits-in-kind or otherwise) any officer of, or consultant to, the Company or increasing the remuneration of any such person.
28. Entering into or varying any contract of employment providing for the payment of remuneration (including pension and other benefits) or increasing the remuneration of any staff (including pension and other benefits).
29. Instituting, settling or compromising any legal proceedings (other than debt recovery proceedings in the ordinary course of business) instituted or threatened against the Company or submitting to arbitration or alternative dispute resolution any dispute involving the Company.
30. Making any agreement with any revenue or tax authorities or making any claim, disclaimer, election or consent for tax purposes in relation to the Company or its business.