



dated

2017

Clarion Housing Group Limited

and

The Mayor and Burgesses of the London Borough of Merton

CPO Indemnity Agreement DRAFT

in relation to High Path Estate, South Wimbledon, Ravensbury Estate
Morden, Eastfields Estate, Mitcham

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Agreement

dated 2017

Parties

- (1) **Clarion Housing Group Limited** (charitable registered society number 28038R) whose registered office is Level 6, 6 More London Place, Tooley Street, London SE1 2DA (the **Developer**); and
- (2) **The Mayor and Burgesses of the London Borough of Merton** of Merton Civic Centre, London Rd, Morden SM4 5DX (the **Council**).

Introduction

- (A) The Council is satisfied that it may be necessary in order for the Developer to carry out the Development to consider the need to exercise its CPO powers for those parts of the CPO Land that are not acquired by the Developer by private treaty and the Council accept that it may be necessary to make one or more CPO's to secure the acquisition of those parts of the CPO Land which have not been acquired by private treaty.
- (B) In March 2017 the Developer submitted the Planning Applications to the Council.
- (C) The Developer has agreed to indemnify the Council as provided for in this Agreement in respect of the CPO Costs that are required to promote any CPO in relation to the CPO Land.
- (D) In consideration of the indemnity referred to in Recital C, the Council has agreed to hold any Third Party Interests that are required on trust for the Developer and to transfer the same to the Developer subject to and in accordance with the provisions of this Agreement.

Agreed terms

1 Definitions and Interpretation

- 1.1 In this Agreement including the recitals the following expressions shall have the meanings respectively assigned to them as follows:

1976 Act means the Local Government (Miscellaneous Provisions) Act 1976;

1990 Act means the Town & Country Planning Act 1990;

Advance Payment means a payment which the Council is lawfully required to make under Sections 52 and 52A of the Land Compensation Act 1973;

Acquisition Cost means the purchase price and other disbursements incurred by the Council in connection with the acquisition of any Third Party Interests;

Blight Notice means a notice served under Part VI of the Town and Country Planning Act 1990 in respect of an interest in land;

Counsel means such other counsel with appropriate experience in compulsory purchase matters who may be agreed by the parties and appointed by the Council;

CPO means one or more compulsory purchase orders that may be made by the Council pursuant to Section 226 of the 1990 Act and/or such other appropriate power of acquisition as the case may be to acquire the Third Party Interests and New Rights;

CPO Costs means any compensation and/or administrative or acquisition costs incurred by the Council as a consequence of the making and implementation of the CPO as set out in Schedule 1 to this Agreement;

CPO Land means Third Party Interests contained within a CPO including any New Rights;

Development means the development granted pursuant to the Planning Applications;

Guidance means the guidance on compulsory purchase and the Crichel Down Rules for the disposal of land acquired by, or under the threat of, compulsion published in October 2015 by the Department for Communities and Local Government and any subsequent amendments and updates;

Interest means any interest payable by the Council in accordance with any Acquisition Costs;

Land Compensation Acts means all relevant legislation under which compensation may be payable as a consequence of compulsory acquisition;

New Rights means any right or easement not in existence at the date a CPO is made but identified in the schedule to the CPO when made or as modified when the CPO is confirmed that are required in order to implement the Development and which are capable of being acquired under Section 13 of the 1976 Act;

Orders mean together the Road Closure Order and Stopping Up Order;

Party means any party to this Agreement and "Parties" shall mean any two or more of them;

Planning Applications means the three planning applications submitted to the Council in March 2017 made by or on behalf of the Developer under the 1990 Act or any amendments or changes to those three applications to carry out the Development in relation to the Site;

Planning Permissions means the planning permissions granted by the Council pursuant to the Planning Applications;

Public Inquiry means a public inquiry called (if any) in respect of an objection to any CPO and related orders including a Stopping Up Order;

Road Closure Order means the Order made by the relevant authority for the closure of roads under Section 14 of the Road Traffic Regulations Act 1984 together with any additional or supplemental orders relating to or forming part of the Development;

SCPC means the Standard Commercial Property Conditions (Second Edition);

Secretary of State means the Secretary of State for Communities and Local Government or any successor and functions;

Site shall mean all that land together with the buildings or structures erected thereon and which is more particularly delineated and shown edged red on the Site Plan together with any other area of land as the Parties may from time to time agree is appropriate for inclusion within the Development;

Site Plan means plan 1 delineating High Path Estate, plan 2 delineating Ravensby Estate and plan 3 delineating Eastfields Estate all in red edging and together marked **Site Plan** and attached at Schedule 2 to this Agreement;

Specialist Land Referencing Agency means Persona Associates or such other Specialist Agency appointed by agreement between the Council and the Developer;

Stopping-Up Order means the Order made for the stopping-up or diversion of the highways together with the provision or improvement of other highways under Section 247 of the 1990 Act together with any additional or supplemental orders relating to or forming part of the Development;

Third Party Interests means any estates, rights, easements, encumbrances, covenants and other interests on over beneath or affecting any part of the Site not owned or controlled by or vested in the Developer or the Council that may be required to be acquired to facilitate the Development;

VAT means value added tax charged pursuant to the Value Added Tax Act 1990; and

Working Day means any day from Monday to Friday (inclusive) other than Christmas Day Good Friday and any statutory bank holiday and the term 'Working Days' shall be interpreted accordingly.

1.2 In this Agreement, unless the context otherwise requires:

1.2.1 obligations undertaken by more than one person are joint and several obligations, and where more than one person is bound to a condition in this Agreement each of those persons are bound jointly and severally;

1.2.2 words importing a person will include an individual, trust, government, governmental body, authority, agency, an incorporated body of persons, association, body corporate, firm, partnership and corporation and (in all cases) their successors and permitted lawful assignees or transferees;

1.2.3 a reference to any clause, sub-clause, paragraph, part, schedule, appendix or annex is a reference to such clause, part, schedule, appendix or annex of this Agreement;

1.2.4 any reference to this Agreement or to any other document shall include any permitted variation, amendment, or supplement to this Agreement and to such document;

1.2.5 words of the masculine gender will include the feminine and neuter genders;

1.2.6 references to statutes, bye-laws, regulations, orders and delegated legislation (including any EU instrument) will include any statutes, bye-laws, regulations,

orders or delegated legislation modifying, re-enacting, extending or made pursuant to them;

- 1.2.7 headings are for ease of reference only and will not affect the construction of this Agreement;
- 1.2.8 the expression “the Council” shall include its statutory successor in respect of functions to which this Agreement relates;
- 1.2.9 nothing in this Agreement or in the Contracts (Rights of Third Parties) Act 1999 operates to confer any rights or benefits on any persons, firms or companies who are not party to it (save for any permitted lawful assignees of the benefit of this Agreement);
- 1.2.10 any reference to indemnity or indemnify or other similar expression shall mean that the relevant Party indemnifies, shall indemnify, keep indemnified and hold harmless the other Party or Parties;
- 1.2.11 any reference to liability includes where the context so allows claims, demands, proceedings, damages, costs and expenses;
- 1.2.12 any consent, notification, approval or permission referred to in this Agreement shall not be deemed to be given unless provided in writing and such consent notification approval or permission shall not be unreasonably withheld or unreasonably delayed; and
- 1.2.13 nothing in this agreement shall require the Council to improperly fetter its discretion in the exercise of its statutory powers.

2 Statutory powers and administrative provisions

- 2.1 This Agreement is made pursuant to Section 1 of the Localism Act 2011, Section 111 of the Local Government Act 1972 and all other powers so enabling.
- 2.2 If any provision of this Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions of this Agreement shall continue in full force and effect as if this Agreement had been executed with the invalid, illegal or unenforceable provision omitted.
- 2.3 If the provision referred to in paragraph 2.2 as being omitted is fundamental to either the discharge of the obligations of the Parties under this Agreement or the accomplishment of its objective the Parties shall immediately commence negotiations in good faith to remedy such invalidity, illegality or unenforceability.

3 Commencement

The Parties agree that this Agreement shall come into immediate effect on the date hereof.

4 Developer's obligations

- 4.1 The Developer shall in full consultation and agreement with the Council procure and fund the appointment of suitably qualified independent professional advisors and experts to

advise and support the Council on all aspects of the CPO process including but not limited to legal, financial, marketing, surveying, publicity, specialist referencing advice and all or any advice which may be required in relation to the CPO process.

- 4.2 As soon as reasonably practicable the Developer shall appoint the Specialist Land Referencing Agency at its own cost.
- 4.3 The Developer shall in consultation with the Council negotiate directly with and use all reasonable endeavours to agree terms with the owner or owners of Third Party Interests and New Rights for the purchase of such interest by private treaty and the Council will permit the Developer to have the conduct of the negotiations with such owner or owners and to enter into contract options and to acquire such Third Party Interests and New Rights and the Developer shall retain or procure that such Third Party Interests and New Rights are retained.
- 4.4 The Developer will subject to first obtaining the Council's agreement on the method and structure of providing the information contained in 4.4.1, 4.4.2 and 4.3.3:
 - 4.4.1 consult liaise and hold meetings with the Council regarding the negotiations and to keep the Council fully informed of any significant progress with or obstacles encountered in connection with such negotiations;
 - 4.4.2 supply to the Council copies of all correspondence, minutes of meetings, reports, heads of terms, and any other documents and correspondence with third parties relating to the negotiations as reasonably required by the Council and by the CPO process; and
 - 4.4.3 if considered necessary and appropriate by the Council to allow the Council the opportunity to attend with the Developer any meetings with owners of any interests in the Site and give as much notice to the Council as is reasonably practicable of any such meetings.
- 4.5 The Developer covenants with the Council to:
 - 4.5.1 indemnify and keep indemnified the Council at all times during the currency of this Agreement from and against all the CPO Costs;
 - 4.5.2 pay within 28 Working Days to the Council any sum forming part of the CPO Costs upon receipt from the Council of the appropriate invoice and for the avoidance of doubt it is the intention of the Parties that the Developer shall make payment to the Council or to the person to whom payment is due before the Council makes payment of any invoice;
 - 4.5.3 consult with the Council in relation to the Development and provide the Council with all information it reasonably needs to carry out its obligations under the Agreement; and
 - 4.5.4 at its own cost give support and every assistance to the Council to promote the CPO including giving or procuring the giving of evidence at any Public Inquiry statutory challenge or judicial review into the CPO.

4.6 To carry out the Development in accordance with the Planning Permissions once the Council has transferred to the Developer the Third Party Interests and New Rights acquired pursuant to any CPO.

5 **The Council's covenants**

5.1 The Council shall consider the need for the use of its CPO powers and provided that it is satisfied that there is a compelling case in the public interest to pursue a CPO, the Council will use reasonable endeavours to seek authority from the relevant Council committee to make the CPO as soon as reasonably practicable provided that no part of this Agreement is the subject of legal proceedings.

5.2 The Council having considered the need to use its CPO powers in accordance with clause 5.1 of this Agreement and in consultation with the Developer shall proceed diligently and expeditiously to make the CPO provided that the exercise of such powers shall be without prejudice to the Council's unfettered discretion to make a CPO.

5.2 Insofar as the Council does not fetter its discretion or is being obliged to act unlawfully imprudently or improperly or where it would be materially prejudicial to the Council it agrees to provide to the Developer copies of all documents relevant to the CPO including any notices and correspondence received by the Council as soon as reasonably practicable.

5.3 The Council agrees to notify the Developer of and provide the Developer with a copy of all notices served by or received by the Council in respect of the CPO, the Road Closure Order and the Stopping-Up Order as soon as reasonably practicable following service/and or receipt.

5.4 If the Secretary of State declines to confirm the CPO and/or the Stopping-Up Order the Council and the Developer shall as soon as reasonably practicable consult with one another as to the appropriate manner in which to respond to such decision in order to facilitate the delivery of the Development.

5.5 If the Secretary of State does not confirm the CPO or the Stopping-Up Order or modifies the CPO so that it does not allow implementation of the Development then the Council will at the Developer's cost seek the written opinion of Counsel as to whether or not there is merit in challenging the Secretary of State's decision and if so as to the manner in which such challenge should be mounted.

5.6 If Counsel advises that there is a 50% or better chance of a successful challenge to the Secretary of State's decision not to confirm the CPO or Stopping-Up Order or to modify the CPO so that it allows implementation of the Development then the Council shall pursue such challenge diligently and expeditiously in consultation with the Developer and keeping the Developer informed.

5.7 If any challenge made to the Secretary of State's decision on the CPO or the Stopping-Up Order is unsuccessful then the Council and the Developer shall consult as to whether or not any further steps should be taken in respect of the CPO.

5.8 If Counsel advises that there is less than a 50% chance of a successful challenge to the Secretary of State's decision on the CPO or the Stopping-Up Order then the Council may in its absolute discretion elect to proceed with a challenge.

- 5.9 The Council will inform the Developer as soon as reasonably practicable of any legal proceedings (including the granting of leave by the court to institute the same) against the Council or the Secretary of State concerning the CPO and any Stopping-Up Order and the following provisions will apply:
- (a) the Council shall as soon as reasonably practicable deliver all proceedings documents and correspondence received relating to such challenge to the Developer;
 - (b) the Council and the Developer will keep each other fully and regularly informed of all progress and likely liabilities in relation to any costs or damages suffered or properly payable in any such challenge or proceedings;
 - (c) the Council shall as soon as reasonably practicable instruct Counsel (provided always that the Developer has been consulted and the Council has had due regard to the Developer's comments pursuant to this Agreement);
 - (d) if Counsel advises that there is a 50% or better chance of success in defending or contesting such challenge the Council shall defend such a challenge and take all procedural steps necessary to diligently defend or contest such challenge, and keep the Developer informed at all times of the costs incurred by the Council in connection with the same; and
 - (e) if Counsel advises that there is a less than 50% chance of successfully defending or contesting such challenge the Council may in its discretion elect to defend or contest the challenge
- 5.10 The Council agrees unless required by a court having competent jurisdiction not to take any action for the making of any vesting declaration or serve any notice to treat pursuant to the CPO (if confirmed) without the Developer's prior written approval.
- 5.11 The Council agrees to notify the Developer of the service of and provide the Developer with a copy of any Blight Notice served on the Council and where requested to do so in writing by the Developer within 20 Working Days of the delivery of the copy of the Blight Notice to them to serve a counter-notice.
- 5.12 The Council agrees insofar as the Council does not fetter its discretion or its obliging it to act unlawfully imprudently or improperly or where it would be materially prejudicial to the Council not to withdraw the CPO or otherwise exclude from the CPO any interest in land without prior notification to the Developer.
- 5.13 The Council agrees not to agree or certify the amount of any Acquisition Cost pursuant to this Agreement without first obtaining the Developer's consent in writing of the particular Acquisition Cost except in respect of any Acquisition Cost arising from a decision of the Upper Tribunal (Lands Chamber).
- 5.14 The Council agrees it will (at the request of the Developer and subject to the Developer underwriting the costs incurred in so doing) seek access to any interests in land required for surveying and taking levels under the Compulsory Purchase Act 1965 Section 11(3).

6 **Transfer of interests and declaration of trust**

- 6.1 Where applicable, the SCPC's shall apply to the sale of the CPO Land.
- 6.2 Within 20 Working Days of obtaining vacant possession of those parts of the Site that are within the CPO following the implementation of the CPO the Council will transfer to the Developer (or to such third party as the Developer may direct) the CPO Land (with such title as the Council obtain under the CPO) at nil consideration.
- 6.3 As soon as the Council shall become entitled to an interest in land for which the Developer has paid the Acquisition Costs the Developer may have the use of that land provided that the Council is entitled thereto with vacant possession.

7 **Leasehold interests**

- 7.1 The Council and the Developer covenant with each other in the terms set out in this clause in relation to every such interest in land as is to be held by the Council in trust for the Developer where such interest in land is leasehold and the Developer are entitled to the interest immediately reversionary thereon.
- 7.2 Forthwith upon the Council becoming entitled to a leasehold interest referred to in clause 7.1 the Council will use reasonable endeavours to merge the leasehold interest into its freehold reversionary interest and to close the leasehold title.
- 7.3 Where a leasehold interest referred to in clause 7.1 is registered at H M Land Registry the Council and the Developer will jointly apply to the Chief Land Registrar to give effect to the provisions of this clause.

8 **Council's powers and duties**

- 8.1 Nothing herein contained or implied shall prejudice or affect the rights powers duties and obligations of the Council in the exercise of its functions as a local planning highway or buildings regulation authority or as a local authority under any other statutory provision.
- 8.2 The Council shall be entitled at any time to cancel this Agreement and discontinue the CPO and recover any resulting losses if the Developer or their employees or agents with or without their knowledge in respect of this Agreement or any other contract between them and the Council:
- 8.2.1 do anything improper to influence the Council; or
- 8.2.2 offer any fee or reward the acceptance of which would constitute an offence under the Prevention of Corruption Acts 1889 to 1916 or Section 117(2) of the Local Government Act 1972 and the provisions of the Local Government Act 2000.

9 **Expert determination**

- 9.1 Except as otherwise specifically provided by this Agreement any dispute or difference arising between the Parties as to their respective rights duties or obligations or as to any matter or thing arising out of or in connection with this Agreement shall unless the Parties otherwise agree be referred on the application of either of them for determination by an independent person (the **Expert**) who shall have been qualified in respect of the general

subject matter of the dispute or difference for not less than ten years and who shall be a specialist in relation to such subject matter.

9.2 The Expert to be appointed shall be agreed between the Parties or in default of agreement shall be appointed on the application of either Party by or on behalf of the President for the time being of the Royal Institution of Chartered Surveyors on such terms as to the liability and remuneration of the Expert as such President or his nominee shall direct.

9.3 The Expert appointed shall act as an independent expert and not as an arbitrator.

9.4 The determination shall be conducted as follows:

9.4.1 the Expert shall afford to the Parties an opportunity to make representations in writing;

9.4.2 the Expert shall consider any written representations made by or on behalf of the Parties which are received by him within 15 Working Days of his appointment (each Party being entitled to receive a copy of any such written representations made by or on behalf of the other party and within 10 Working Days of such receipt to make written counter representations) and shall be entitled to call for such independent expert advice on such matters as he shall think fit;

9.4.3 the Expert shall have an unfettered discretion to determine the reference to him;

9.4.4 the Expert may be required by the Parties to give written reasons for his decision; and

9.4.5 the costs of the Expert including the costs of any such independent expert advice as aforesaid shall be in his award but the Parties shall bear their own costs in connection with the reference to the Expert.

10 **Supplemental**

10.1 Neither the Developer nor the Council shall assign or transfer or purport to assign or transfer any of its rights or obligations hereunder.

10.2 All notices and other communications required or permitted to be given hereunder shall be given in writing as follows:

10.2.1 to the Developer at Level 6, 6 More London Place, Tooley Street, London SE1 2DA;

10.2.2 to the Council the Future Merton team, Merton Civic Centre, London Rd, Morden SM4 5DX;

10.3 or in each case at such other address or place as such party may subsequently designate in writing.

10.4 Any notice sent by post shall be deemed (in the absence of evidence or receipt) to have been delivered two days after despatch and in proving the fact of despatch it shall be sufficient to show that the envelope containing such notice was properly addressed and posted.

10.5 Any notice delivered personally or sent by facsimile transmission shall be deemed to have been delivered on the day of its despatch if transmitted during or prior to business hours but otherwise on the next business day thereafter.

10.6 This Agreement shall expire upon agreement between the Parties.

11 **Good faith**

The Parties acknowledge a duty of good faith to each other in relation to all matters arising under this Agreement.

12 **Value added tax**

All sums payable or deemed to have been paid or payable under this Agreement that may be subject to VAT or VAT exclusive sums and (unless otherwise stated) VAT is payable in addition to such sums on production of a valid VAT invoice.

In witness whereof the Parties hereto have executed this Agreement as a Deed on the day and year first before written.

Schedule 1

CPO Costs

In respect of the CPO and any directly associated Blight Notice, Stopping Up Orders or other ancillary orders:

- 1 the Acquisition Costs plus any compensation (including payment for severance, injurious affection or disturbance) arising out of the Land Compensation Acts for any Third Party Interests or New Rights and the settlement of any claims as a result of the CPO including any arising as a result of any Blight Notice served under section 150 of the 1990 Act;
- 2 any payment made under the Compulsory Purchase Act 1965 or the Land Compensation Acts 1961 and 1973 made as a result of the acquisition or interference with any Third Party interests or New Rights arising from the making or implementation of the CPO;
- 3 any interest, statutory or awarded in proceedings, payable in connection with any sums payable under this Agreement, including (without prejudice to the generality of the foregoing) interest that may be payable by virtue of the Council taking possession of any Third Party Interests or New Rights before the amount of any payment has been agreed;
- 4 the costs of any warrant procedures necessary to obtain possession of any Third Party Interests or New Rights;
- 5 all of the Council's legal, valuation, planning, highways and administrative costs including but not limited to those of the professional team instructed in connection with the making of the CPO and its submission to the Secretary of State including any appeal or challenges (instigated or defended) made pursuant to the CPO and the making of any highway Stopping Up Orders, ancillary orders or licences requested by the Developer or any other matter which is an obligation of the Council pursuant to this Agreement. For the avoidance of doubt reference to legal costs in this Agreement shall include reference to any Counsel appointed;
- 6 the Council's administrative and housing costs incurred directly as a result of the CPO from those seeking assistance and accommodation under housing legislation subject to an agreed methodology and plan being agreed between the Parties in this regard in advance of each Phase of the Development being carried out;
- 7 any legal, valuation or other expenses the Council is required to pay to an owner of any Third Party Interests or New Rights in respect of it or in connection with the negotiation of compensation or the transfer of title or the grant of any Third Party Interests and New Rights;
- 8 the Council's costs (including any costs awarded against it) of any Public Inquiry or Upper Tribunal (Lands Chamber) reference in connection with the CPO and of any subsequent litigation related thereto;
- 9 all disturbance and home loss payments basic loss payments or occupier's loss payments to which any owner or occupier is entitled as a result of service of a Blight Notice,

Purchase Notice or the vesting or taking of possession of any Third Party Interests or New Rights;

- 10 the purchase price or compensation (including any payment for severance or injurious affection or disturbance) the Council is required to pay as the result of the severance of land in common ownership, and the cost of accommodation works the Council is required to carry out as a direct result of the CPO in respect of land not included in the CPO and not otherwise acquired by the Council for the Development;
- 11 any Advance Payment the Council is required to make in respect of all or any part of the CPO Land under the provisions of sections 52 and 52A of the Land Compensation Act 1973;
- 12 any compensation payable pursuant to the provisions of sections 236 or 250 of the 1990 Act or section 203 of the Housing and Planning Act 2016;
- 13 any payments required to be made by the Council under the Land Compensation Act 1973 Parts I and II arising directly from and in connection with the Development;
- 14 any payments due to the Council pursuant to the Land Compensation Act 1973 section 42 in relation to the rehousing of any residential occupier;
- 15 any stamp duty land taxes and Land Registry and associated fees arising out of the purchase of any Third Party Interests or New Rights and the transfer of the CPO Land to the Developer;
- 16 any money awarded to an owner of a Third Party Interest or New Rights in respect of any reference to the Upper Tribunal (Lands Chamber) and any costs awarded to such a person by the Upper Tribunal (Lands Chamber);
- 17 any other compensation or costs lawfully required to be paid by the Council to a third party in connection with any interest of that third party affected by the CPO, highway Stopping Up Orders or ancillary orders made pursuant to this Agreement; and
- 18 a sum equal to any VAT input tax incurred that is paid by the Council (for whatever reasons and whether directly or indirectly) in respect of any of the CPO Costs, save to the extent that the Council obtains repayment or credit in respect of the input tax or would have done so had it used reasonable endeavours.

Schedule 2

Site Plans

Executed as a deed by **CLARION HOUSING**)
GROUP LIMITED acting by a Director and a)
Secretary/two Directors:)

Director

Director/Secretary

Executed as a Deed by affixing the **COMMON**)
SEAL of THE MAYOR AND BURGESSES of)
THE LONDON BOROUGH OF MERTON in the)
presence of:)

Authorised Signatory

Authorised Signatory