Third schedule

The Owner’s Covenants with the Council

Transfer of property/open space/play areas/public squares/amenity space

Definitions (to be included in Clause 1):

“Open Space Land” means the land shown for identification purposes coloured [ ] on the Plan

“Open Space Works” works to be carried out under paragraph [ ] to the Third Schedule in accordance with the Open Space Works Specification

“Open Space Works Specification” a specification for the carrying out of Open Space Works and the maintenance specification to be agreed in writing between the Owner/Developer and the Council prior to Commencement of the Development

“Open Space Contribution” means the sum of £........ towards the provision and/or improvement of open space facilities payable in accordance with paragraph 1 of the Third Schedule

Transfer of property

It is often necessary to provide for the transfer of property as a precondition of the grant of planning permission. For example, there may be play areas to be created in a residential development which the Council requires, or a community centre or public open space. Affordable housing usually also requires land to be transferred to a Registered Social Landlord. Section 106 does not expressly contemplate the transfer of land. Accordingly, either there must be a contract for the sale of land, which can be incorporated in the same document but made under other powers, or a restriction on the use or development of land must be imposed until the land has been transferred. In that case, the Owner will often wish to establish the terms for the transfer and have a commitment from the Council to acquire the land at the appropriate time, so as not to be prevented from continuing with the development should the Council fail to complete the transfer. Those provisions will constitute a contract for the sale of land and must therefore comply with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. The example clauses also address the situation where the transferee has yet to be identified. LPAs may wish to secure areas of land to be retained for public use as amenity areas through a planning agreement. This model agreement cannot address drafting for all of them. They include:

• an area of Open Space to be dedicated for public use can be specified without identification of its exact location on the Site, but with a mechanism for its later determination
• a specified area of the Development Site may be identified within the overall site and dedicated for public use with or without a financial contribution towards its subsequent maintenance
• a specified area of the Development Site may be identified laid out as open space to a defined specification and dedicated for public use
• a financial contribution may be payable to the local planning authority for provision of off-site open space, or improvement and maintenance of existing open space within a defined proximity to the Development Site, and with a positive obligation by the local planning authority to use the monies within a specified period of time, otherwise such monies or the balance of such monies should be returned to the developer.

In all cases care should be taken to ensure the obligations will run with the land.
A  Where property to be transferred to Council

1  No more than [...] specify no. of dwellings/square metres as applicable [...] within the Development shall be Occupied unless the Owner shall have transferred to the Council the Open Space Land on the terms set out in the Seventh Schedule and paid the Open Space Contribution to the Council.

2  Prior to the transfer referred to in paragraph 1 the Owner shall carry out the Open Space Works to the satisfaction of the Council.

B  Alternative approach where property is to be transferred to the Council

1  The Owner and the Council hereby agree as follows:

1.1  The Owner shall sell and the Council shall buy the Open Space Land on the terms set out in the Seventh Schedule.

1.2  Completion of the transfer of the Open Space Land referred to in paragraph 1.1 above shall take place on or before Occupation of [...] specify no. of dwellings/square metres as applicable [...] within the Development.

C  Where the transferee of land has not been identified; this is often the case for example where the land is for a nature reserve or affordable housing

1  No more than [...] specify no. of dwellings/square metres as applicable [...] within the Development shall be occupied unless prior thereto the Owner shall (by signing and sending the Agreement to the Transferee) offer to sell to the Transferee the Open Space Land which offer may be accepted by the Transferee signing and returning the Agreement to the Owner within [...] specify appropriate period [...] from the date of the offer in respect of which time shall be of the essence.

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23  The Seventh Schedule should set out the conveyancing terms of the sale, title, price which (will usually be a nominal amount), any provisions needed for decontamination and environmental liability, any commuted sum to be paid to the Council and the terms of the transfer. It must comply with s.2 Law of Property (Miscellaneous Provisions) Act 1989. Under this approach the restriction in this paragraph is within section 106(2) with a contract for the purchase of land which can be protected by registration at the Land Registry. This contract in the Seventh Schedule should be made under s.2 Local Government Act 2000 and s.111 Local Government Act 1972.

24  If B or C is adopted, similar wording for Open Space Works and Open Space Contribution may be included.

25  Again, the Seventh Schedule should set out the terms and the transfer. Under this approach, an estate contract is created by paragraph 1 which can be protected by registration at the Land Registry. This approach is not within the powers of section 106 and should be made under s.2 Local Government Act 2000 and s.111 Local Government Act 1972.

26  Under this approach, a restriction within s.106(2) is created. The Seventh Schedule will set out the contract and transfer.
Community Facilities

Definitions (to be included within clause 1):

“Community Facilities Land” means the site of the Community Facilities shown for identification purposes only coloured [ ] on the Plan having an area of [ ] hectares and referred to in paragraph [ ] of the Third Schedule.

“Community Facilities” means the provision of a community hall/health centre as shall be agreed with the local planning authority, as provided in paragraph [ ] of the Third Schedule.

“Community Facilities Floorspace” means not less than [ ] square metres of floorspace (gross external) to be provided within the Development for the purposes referred to in paragraph [ ] of the Third Schedule in accordance with the Specification.

“Community Facilities Contribution” means the sum of [ ] pounds (£[......]) towards the provision of the Community Facilities.

“Community Uses” means

[.................................................................]

“Specification” means the specification set out in the Ninth Schedule.

The Owner [and/or the Developer] covenants and agrees:

2.1 to provide and lay out (including construction of buildings to at least a shell state) the Community Facilities Land in accordance with the Specification and to the Council’s satisfaction for the purpose of accommodating the Community Facilities.

2.2 to complete the works of provision and laying out on or before […]specified number…] Dwelling[s] [is/are] made available for occupation.

2.3 The Community Facilities Land shall only be used for one or more of the Community Uses.

OR

2.1 to provide the Community Facilities Floorspace in the following phases:

(a) not to Occupy more than […]specified number…] Residential Units until […]specified area…] square metres of Community Facilities Floorspace has been provided.

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27 Generally, where a large residential development is to be carried out, some social infrastructure may be necessary. If it is necessary to secure those by the planning agreement (remember that conditions should be considered first) standard clauses are provided. In this example, Community Facilities can include a community hall, a health centre or cultural facilities, such as a library. The Community Facilities can be provided in a number of ways, for example:

1 (i) Identification of a site within the overall Development Site, with its subsequent transfer to the local planning authority, or other identified body;
(ii) Identification of site and construction at the Owner’s expense of necessary buildings;
(iii) Financial contribution;
Where the facilities are to be transferred to the LPA, use the provisions in paragraph 1.
(b) not to Occupy […] specified number […] Residential Units until […] specified number […] square metres of Community Facilities Floorspace has been provided

2.2 The Community Facilities Floorspace shall only be used for one or more of the Community Uses
CCTV Definitions (to be included in clause 1):

"CCTV" means closed circuit television covering the [...] to be provided in accordance with paragraph [ ] of the Third Schedule.

"CCTV Contribution" means the sum of [...] indexed to be paid by the Developer/the Owner to the Council and expended by the Council in accordance with paragraph [ ] of the Third Schedule.

"Public Realm" means the areas open to the public [within the town centre] which shall be subject to surveillance by CCTV.

3 Prior to the Commencement of the Development the Developer shall agree with the Council a detailed scheme for the installation of CCTV to monitor the [...] [the Public Realm] which scheme shall include details of:

(a) the number and location of the CCTV cameras to be installed;
(b) the specification of the CCTV cameras to be installed which shall be of similar standard to that of the Council’s cameras;
(c) phasing of the installation
and shall thereafter install the CCTV in accordance with the agreed scheme [and connect it to the Council’s existing CCTV system] OR

3 Prior to the Commencement of the Development the Developer shall pay the CCTV Contribution to the Council which shall be used by the Council to increase the CCTV monitoring capacity within the Public Realm.

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28 With urban development sites it may be appropriate to seek a contribution towards street safety by means of the provision of CCTV.

29 Developers may wish to have covenants from the Council to permit connection and to transfer ownership to the Council.
Affordable Housing

Definitions (to be included in clause 1)

“Affordable Housing” subsidized housing that will be available to persons who cannot afford to rent or buy housing generally available on the open market;

“Affordable Housing Units” that part of the Development comprising [[.....] residential units [...describe mix of units...]] together with [[.....] car parking spaces shown on drawing numbers [drawing references]; or any one or more of them

“Chargee” any mortgagee or chargee of the Registered Social Landlord or the successors in title to such mortgagee or chargee or any receiver or manager (including an administrative receiver) appointed pursuant to the Law of Property Act 1925;

“Chargee’s Duty” the tasks and duties set out in paragraph 4.4 to the [Affordable Housing] Part of the Third Schedule

“Market Housing Units” that part of the Development which is general market housing for sale on the open market and which is not Affordable Housing;

“Practical Completion” issue of a certificate of practical completion by the Owner’s architect or in the event that the Development is constructed by a party other than the Owner the issue of a certificate of practical completion by that other party’s architect;

“Protected Tenant” any tenant who:

(a) has exercised the right to acquire pursuant to the Housing Act 1996 or any statutory provision for the time being in force (or any equivalent contractual right) in

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30 See also the Affordable Housing Drafting Notes.

21 This is a mortgagee of the RSL’s interest, not a mortgagee of an the interest of a shared owner of an Affordable Housing Unit
respect of a particular Affordable Housing Unit

(b) has exercised any statutory right to buy (or any equivalent contractual right) in respect of a particular Affordable Housing Unit

(c) has been granted a shared ownership lease by a Registered Social Landlord (or similar arrangement where a share of the Affordable Housing Unit is owned by the tenant and a share is owned by the Registered Social Landlord) by the Registered Social Landlord in respect of a particular Affordable Housing Unit and the tenant has subsequently purchased from the Registered Social Landlord all the remaining shares so that the tenant owns the entire Affordable Housing Unit;

“Registered Social Landlord” a registered social landlord as defined in Part 1 of the Housing Act 1996 who is registered with the Housing Corporation pursuant to Section 3 of that Act and has not been removed from the register pursuant to Section 4 of that Act and who is approved by the Council (such approval not to be unreasonably withheld or delayed).

4 Affordable Housing

4.1 No more than [......] of Market Housing Units shall be Occupied until all of the Affordable Housing Units have been constructed in accordance with the Planning Permission and made ready for residential occupation and written notification of such has been received by the Council.

4.2 From the date of Practical Completion of the Affordable Housing Units they shall not be used other than for Affordable Housing save that this obligation shall not be binding on:

4.2.1 any Protected Tenant or any mortgagee or chargee of the Protected Tenant or any person deriving title from the Protected Tenant or any
successor in title thereto and their respective mortgagees and chargees; or

4.2.2 any Chargee provided that the Chargee shall have first complied with the Chargee’s Duty

4.2.3 any purchaser from a mortgagee of an individual Affordable Housing Unit pursuant to any default by the individual mortgagor.

4.3 No more than […] of the Market Housing shall be Occupied until the Affordable Housing Units have been transferred to the Registered Social Landlord on terms that accord with relevant Housing Corporation funding requirements current at the date of construction of the Affordable Housing Units. 32

4.4 the Chargee shall prior to seeking to dispose of the Affordable Housing Units pursuant to any default under the terms of its mortgage or charge shall give not less than [ ] months’ prior notice to the Council of its intention to dispose and:

(a) in the event that the Council responds within [ ] months from receipt of the notice indicating that arrangements for the transfer of the Affordable Housing Units can be made in such a way as to safeguard them as Affordable Housing then the Chargee shall co-operate with such arrangements and use its best endeavours33 to secure such transfer

(b) if the Council does not serve its response to the notice served under paragraph 4.4(a) within the [ ] months then the Chargee shall be entitled to dispose free of the restrictions set out in this Part of the Third Schedule

(c) if the Council or any other person cannot within [ ] months of the date of service of its response under paragraph 4.4(a) secure such transfer then provided that the Chargee shall have complied with its obligations under paragraph 4.4(a) the Chargee shall be entitled to dispose free of the restrictions set out in this Part of the Third Schedule

PROVIDED THAT at all times the rights and obligations in this paragraph 4.4 shall not require the Chargee to act contrary to its duties under the charge or mortgage and that the Council must give full consideration to protecting the interest of the Chargee in respect of moneys outstanding under the charge or mortgage

32 See land transfer provisions if this clause is adopted.

33 It is recognised that there can be room for negotiation on this standard. As with any property acquisition it will be necessary to consider whether any other easements and provisions will be necessary, for example obligations to maintain roads pending adoption
OR

Definition (to be included in Clause 1)

"Affordable Housing Land" means the land shown edged [green] on the Plan.

4.1 No more than […] insert % […] of the Market Housing Units shall be Occupied until the Affordable Housing Land has been transferred to the Registered Social Landlord for nil value with the benefit of the following:

4.1.1 full and free rights of access both pedestrian and vehicular from the public highway to the Affordable Housing Land;

4.1.2 full and free rights to the passage of water soil electricity gas and other services through the pipes drains channels wires cables and conduits which shall be in the adjoining land up to and abutting the boundary to the Affordable Housing Land all such services to be connected to the mains.

54 See land transfer provisions if this clause is adopted.
Public Art
Definitions (to be included in clause 1):

“Public Art Contribution” means a financial contribution of [.....] pounds (£[......]) towards the provision of public art such provision to be entirely at the discretion of the Council in terms of size nature artistic influence and geographical location within the [Council area, or specified area]

Alternative definition:

“Public Art Contribution” means a financial contribution of [.....] pounds (£[......]) towards the provision of Public Art which will include where appropriate sculpture, street furniture, landscaping and/or architectural detailing within [specify area] [within or within the vicinity of the Development as the Owner and Council may agree]

“Public Art” means [.................................................................]

5. To pay the Public Art Contribution within […]insert number to be specified […] days of the Commencement of Development

OR

5.1 To include as part of the Development a permanent work of Public Art to the value of the Public Art Contribution which is integral to the Development and permanently affixed to the Development Land the precise nature of the work of art and its precise location on the Development Land to be approved by the Council prior to Occupation of any part of the Development

5.2 The said work shall be provided on or before […]specify date or event…]
Highways Works

6 Not to Commence the Development prior to entering into the Highways Agreement with the County

New highways for both vehicular and/or pedestrian use, or improvements to existing public highways are frequently required as part of a development involving building operations, and whilst separate statutory powers to enter into agreements to secure either new highways which are subsequently adopted as maintainable by the public or to permit alterations to existing public highways exist in highways legislation, it is normal to include the principles of these highway obligations in a Section 106 Agreement, with the form of the necessary agreement under the highways legislation set out in a Schedule to the Section 106 Agreement. It may be desirable to include this covenant in the Fourth Schedule as a covenant with the County.