

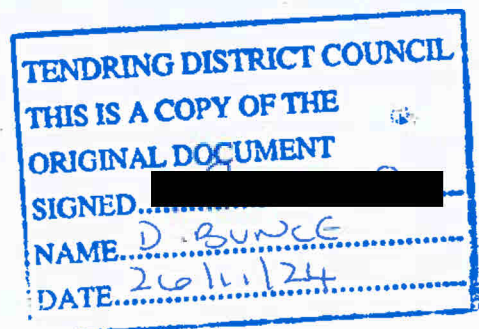
DATED 26th November 2024

NEWELL HOMES LIMITED
and
PAVILLION VIEW MANAGEMENT COMPANY LIMITED
and
TENDRING DISTRICT COUNCIL
and
ESSEX COUNTY COUNCIL

DEED OF VARIATION

under section s106 and s106A of the Town and Country Planning Act 1990
Land on the west side of Church Road, Elmstead, Colchester

Planning Permission ref: 23/00594/DOVU5 (relating to planning permission
reference 18/01884/FUL)



THIS DEED OF VARIATION is made on 26th November 2024

BETWEEN

- 1) **NEWELL HOMES LIMITED** (Co. Regn. No. 05532632) whose registered office is 47 Butt Road, Colchester, Essex, CO3 3BZ ("the First Owner");
- 2) **PAVILLION VIEW MANAGEMENT COMPANY LIMITED** (Co. Regn. No. 13451973) whose registered office is 47 Butt Road, Colchester, Essex, England, CO3 3BZ ("the Second Owner");
- 3) **TENDRING DISTRICT COUNCIL** of Town Hall, Station Road, Clacton-on-Sea, Essex C015 1 SE ("the District Council"); and
- 4) **ESSEX COUNTY COUNCIL** of County Hall Chelmsford Essex CMI 1QH ("the County Council")

Hereinafter referred to as 'the Parties'

RECITALS

- A. The District Council and the County Council are the Local Planning Authorities for the purposes of the Town and Country Planning Act 1990 as amended ("the Act") for the area within which the Site is situated and the District Council is the authority by whom the planning obligations varied by this Deed are enforceable.
- B. The County Council is also the local authority for statutory age education and pre-school age education and highway authority for the area in which the Site is situated.

- C. The First Owner is registered as the freehold owner of part of the Site under title number EX963225 free from any encumbrances that would prevent the Owner from entering into this Deed.
- D. The Second Owner is registered as the freehold owner of part of the Site under title number AA36320 free from any encumbrances that would prevent the Second Owner from entering into this Deed.
- E. Planning permission with reference 18/01884/FUL ('the Planning Permission') was granted by the District Council on 28 May 2020 subject to conditions and a deed of undertaking made pursuant to Section 106 of the Act dated 27 May 2020 (the "Section 106 Undertaking") and is referred to in the Section 106 Undertaking as the Planning Permission.
- F. Part of the Site has been transferred into the individual ownership of some of the Dwellings constructed pursuant to the Planning Permission and a statutory undertaker which are now registered at H M Land Registry under new title numbers and in accordance with clause 7.6 of the Section 106 Undertaking the restrictions and requirements of the Section 106 Undertaking are not enforceable against those transferees and so they are not a party to this Deed.
- G. The parties agree that the First Owner has submitted and the District Council has approved the Open Space Works Specification in accordance with paragraph 1.1 of Part 2 of Schedule 1 of the Section 106 Undertaking as varied by this Deed.
- H. The Owner and the District Council and the County Council have agreed to enter into this Deed in order to vary the Section 106 Undertaking so as to make alterations to the covenants relating to the transfer of the Allotment Land under Part 2 of Schedule 1 of the Section 106 Undertaking.

1. INTERPRETATION

In this Deed all words and phrases defined in the Section 106 Undertaking shall have the same meanings in this Deed save where the context otherwise dictates and save for the following words and phrases which shall have the following meanings:

‘Section 106 Undertaking’ means the unilateral undertaking made pursuant to section 106 of the Act dated 27 May 2020 by Newell Homes Limited to Tendring District Council and Essex County Council in respect of the Planning Permission.

“Allotment Land” means the area shown coloured green on the Open Space Plan appended to the Section 106 Undertaking.

“Allotments Works Specification” means the specification for the laying out, monitoring and remedial measures for the Allotment Land approved by the Council called ‘Allotment Soil Specification’ by Kirsten Bowden Chartered Landscape Architect dated August 2023 and attached to this Deed as Appendix A.

“Owner” means the First Owner and the Second Owner.

2. CONSTRUCTION

- 2.1 Where in this Deed reference is made to any clause, paragraph or schedule such reference (unless the context otherwise requires) is a reference to a clause, paragraph or schedule in this Deed.
- 2.2 Words importing the singular meaning where the context so admits include the plural meaning and vice versa.
- 2.3 Words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, corporations and firms and all such words shall be construed interchangeably in that manner.

- 2.4 Wherever there is more than one person named as a party and/or where more than one party undertakes an obligation all their obligations can be enforced against all of them jointly and severally unless there is an express provision otherwise.
- 2.5 "Including" means including without limitation or prejudice to the generality of any preceding description defined term phrase or word(s) and "include" shall be construed accordingly.
- 2.6 Words denoting an obligation on a party to do any act or matter or thing include an obligation to procure that it is done and words placing a party under a restriction include an obligation not to cause permit or allow infringement of that restriction.
- 2.7 Any reference to an Act of Parliament shall include any modification, extension or re-enactment of that Act for the time being in force and shall include all instruments, orders, plans regulations, permissions and directions for the time being made, issued or given under that Act or deriving validity from it and "statutory requirement" shall be construed accordingly.
- 2.8 Reference to any party to this Deed shall include the successors in title to that party and to any deriving title through or under that party and in the case of the District Council and or the County Council the successors to its statutory functions and any duly appointed employee or agent of the District Council and or the County Council or such successor.

3. LEGAL BASIS

- 3.1 This Deed is made pursuant to Sections 106 and 106A of the Act.
- 3.2 To the extent that the covenants, restrictions and requirements imposed upon the Owner under this Deed and which vary the Section 106 Undertaking fall within the terms of Section 106 of the Act such covenants, restrictions and requirements are planning obligations pursuant to Section 106 of the Act and

are enforceable by the District Council and the County Council as planning authorities against the Owner and its successors in title and assigns in respect of the Site.

- 3.3 To the extent that any of the obligations contained in this Deed are not planning obligations within the meaning of the Act they are entered into pursuant to the powers contained in Section 111 of the Local Government Act 1972 and Section 1 of the Localism Act 2011 and all other enabling powers.

4. VARIATION OF THE SECTION 106 UNDERTAKING

The Owner and the District Council and the County Council agree that the Section 106 Undertaking shall be varied in accordance with the terms of this Deed and as set out in Schedule 1 of this Deed and for the avoidance of any doubt the Section 106 Undertaking shall continue to have full force and effect save as varied by this Deed.

5. MISCELLANEOUS

- 5.1 No provisions of this Deed shall be enforceable under the Contracts (Right of Third Parties) Act 1999 (other than by the parties and their successors in title and assigns and any successor to the District Council's and or the County Council's functions).
- 5.2 This Deed shall be registrable as a local land charge by the District Council.
- 5.3 Insofar as any provision of this Deed is found (for whatever reason) to be invalid illegal or unenforceable then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed and insofar as reasonably practicable the Parties shall amend that provision in such reasonable manner as achieves the intention of the Parties without illegality.

- 5.4 No person shall be liable for any breach of any of the planning obligations or other provisions of this Deed after it shall have parted with its entire interest in the Site or the part to which the breach relates but without prejudice to liability for any subsisting breach arising prior to parting with such interest.
- 5.5 The District Council has approved the Allotments Works Specification as approval of the "Allotments Works Specification" in respect of the Allotment Land as required under Schedule 1, Part 4 of the Section 106 Undertaking as varied by this Deed.

6. WAIVER

No waiver (whether expressed or implied) by the District Council and or the County Council of any breach or default in performing or observing any of the covenants terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the District Council and or the County Council from enforcing any of the relevant terms or conditions or from acting upon any subsequent breach or default.

7. NO FETTER

Nothing in this Deed shall prejudice or affect the rights powers duties and obligations of the District Council and or the County Council in the exercise of their respective functions in any capacity.

8. JURISDICTION

This Deed is governed by and interpreted in accordance with the law of England and Wales and the Parties submit to the exclusive jurisdiction of the courts of England and Wales.

9. DELIVERY

The provisions of this Deed (other than this clause which shall be of immediate effect) shall be of no effect until this Deed has been dated.

IN WITNESS whereof the Parties hereto have executed this Deed on the day and year first before written.

FIRST SCHEDULE

Variation of the Section 106 Undertaking

The Section 106 Undertaking shall be varied as follow:

1. In Clause 1 'Definitions' the definition of "Open Space and Allotments" shall be deleted in its entirety and replaced with the following definitions:

"Open Space" means the informal open space and landscaping for use by the general public to be provided on the Site in the location shown on the Open Space Plan in accordance with the Planning Permission and the Open Space Works Specification.

"Allotments" means the allotment land to be let and used as allotments for use by the general public to be provided on the Site in the location shown coloured green on the Open Space Plan in accordance with the Planning Permission and the Allotments Works Specification.

2. In Clause 1 'Definitions' the definition of "Open Space and Allotments Works Specification" shall be deleted in its entirety and replaced with the following definitions:

"Open Space Works Specification" means a specification for the laying out of the Open Space which shall include details of future management and a commitment to include signage within the Open Space to promote it for recreation and leaflets for new residents (unless otherwise agreed by the District Council and the Owner in writing such agreement not to be unreasonably delayed or withheld by either party) such specification to be agreed in writing between the Owner and the District Council before Commencement of Development"

"Allotments Works Specification" means the specification for the laying out, monitoring and remedial measures for the Allotments approved by the Council called 'Allotment Soil Specification' by Kirsten Bowden Chartered Landscape Architect dated August 2023 attached to this Deed.

3. In Schedule 1 there shall be a new Part 4 included as follows:

'PART 4 – ALLOTMENTS TRANSFER AND WORKS

1. The Owner covenants with the District Council as follows:

- 1.1 Not to Occupy nor permit or allow the first Occupation of the last Dwelling that forms part of the Development until the Allotments has been physically laid out on the Site in complete accordance with the Allotments Works Specification which has been confirmed in writing by the District Council.

- 1.2 Upon completion of the laying out of the Allotments in accordance with the Allotments Works Specification to notify the District Council of completion in writing and to request that the District Council inspects the Allotments within thirty (30) Working Days of such notification.
- 1.3 If upon inspection of the Allotments the District Council identifies any works which are necessary to bring the Allotments up to the standard required by the Allotments Works Specification to complete such works as soon as reasonably practicable following which paragraph 1.2 of this Part 4 will continue to apply until the District Council gives confirmation in writing as required by paragraph 1.1 of this Part 4.
- 1.4 Following the provision and laying out of the Allotments in accordance with paragraphs 1.1 to 1.3 of this Part 4 Schedule 1 to transfer the Allotments to Elmstead Parish Council in accordance with the terms set out in Part 4 and Part 5 of Schedule 1 and not to Occupy nor permit or allow the first Occupation of the last Dwelling which forms part of the Development until the Allotments have been transferred in accordance with this paragraph.
- 1.5 To pay Elmstead Parish Council's reasonable legal fees for such transfer up to a limit of Two Thousand pounds (£2,000.00).
- 1.6 To provide a copy of the transfer to the Council within Two (2) months of completion of the transfer to Elmstead Parish Council.
- 1.7 That the Allotments will be used for no purpose other than for public recreation and amenity in perpetuity.'

4. In Schedule 1 there shall be a new Part 5 included as follows:

'PART 5 – PROVISIONS RELATING TO THE TRANSFER OF THE ALLOTMENTS

1. The transfer of the Allotments to Elmstead Parish Council shall:
 - 1.1 be a transfer of the entire freehold interest in the Allotments;
 - 1.2 be free from any pre-emption or option agreement;
 - 1.3 be free from any mortgage, charge, lien or other such incumbrance;
 - 1.4 be free from any lease, licence or any other third-party interests;
 - 1.5 be subject to a covenant which prohibits the use of the Allotments for any purpose other than for public recreation and amenity in perpetuity;
 - 1.6 include all usual and necessary rights of way with or without vehicles for the benefit of the Allotments;
 - 1.7 reserve in favour of the Owner any usual and necessary rights and easements to enable the proper construction, maintenance and use of the Development

and to existing services in so far as they are necessary based upon the final approved layout of the Development and location of the Allotments;

1.8 reserve in favour of the Owner the right to lay and use new services subject to the prior written agreement of the District Council together with any rights of entry to inspect, repair, renew, cleanse and maintain the same;

1.9 not require consideration in excess of one pound (£1.00)

5. In Schedule 1 'PART 4 – COMMUNITY HALL CONTRIBUTION' and 'PART 5 – THE RAMS CONTRIBUTION' shall be renumbered Part 6 and Part 7 respectively.
6. The 'Allotments Works Specification' shall be attached to the Section 106 Undertaking as varied by this Deed.
7. In Schedule 1 Part 2 paragraph 1.3 the words 'thirty one' shall be deleted and replaced with the words '20 (twenty)'.
8. In Schedule 1 Part 2 paragraph 1.6 the word 'twenty' shall be deleted and replaced with the words '31 (thirty one)'.

APPENDIX A
ALLOTMENTS WORKS SPECIFICATION

ALLOTMENT SOIL SPECIFICATION

Land on the West Side of Church Road, Elmstead

August 2023

Kirsten Bowden

CHARTERED LANDSCAPE ARCHITECT

07790 907241

Kirsten.bowden@hotmail.co.uk

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1.0 Introduction

- 1.1 This allotment specification has been prepared in order to meet the requirements of the new development on Land on the West Side of Church Road, Elmstead.
- 1.2 The planning application was for residential units and associated infrastructure on land to the west Side of Church Road, Elmstead.
- 1.3 The green infrastructure (GI) forming part of the development is an important and integral part of the proposals, that defines and characterises the new development. The allotments are a key element of the GI amenity and will form a focal point for community.
- 1.4 This specification will focus on the construction of the Allotments. It will set out the implementation aspects of the allotment.

2.0 Softworks – Preparation

Topsoil

- 2.1 Existing site topsoil shall be used if the quality is satisfactory and fit for purpose.
- 2.2 The contractor is to obtain a report for approval from a soil scientist who is a member of the Institute of Professional Soil Scientists in order to ascertain it is satisfactory for re-use within the soft landscape areas including allotment plots.
- 2.3 All handling of topsoil and collection of samples are to comply with BS 3882. with the material being of a satisfactory quality, soil handling should be undertaken with care to minimise damage to the structure of the soil. Movement should not be undertaken in poor weather conditions, i.e. when wet/raining/snowing/frozen.
- 2.4 Imported topsoil shall be provided as necessary to make up any deficiency of topsoil existing on site and to complete the work. A soil scientist will be required to provide an analysis of the proposed soil stock before any soil is brought onto site. The soil analysis will contain a statement describing the soil, its present use, location, condition and horticultural parameters such as:
 - Chemical analysis and contaminants
 - Maximum stone content, stone size and pH level
 - Nutrient content, pH value and textural classification
 - Phytotoxic and CCLEA elements.
- 2.6 The report shall also detail the soil analyst's recommendations in order to confirm it is satisfactory to provide a growing medium for the healthy establishment of the proposed planting and allotment plots. Imported topsoil shall be in accordance with BS 3882. 2.7 Topsoil shall be free from rubbish or other materials that are:
 - Corrosive, explosive or flammable
 - Hazardous to human or animal life
 - Detrimental to healthy plant growth.

Subsoil

- 2.7 Subsoil material shall be re-used from earthwork operations on site or imported as required. If subsoil is to be imported, samples are to be provided and analysed by a soil scientist for approval and to confirm suitability on site.
- 2.8 Subsoil shall be excavated and/or placed to required levels and graded to provide smooth flowing contours prior to receiving topsoil. The loosening of subsoil shall be carried out in order to avoid compaction and to promote free drainage. This should be undertaken when ground conditions are reasonably dry to a depth of up to 450mm of naturally occurring clay soils.
- 2.9 Subsoil shall not be used where contaminated with arisings, debris, contaminants or other materials that are:
 - Detrimental to healthy plant growth
 - Hazardous to human or animal life
 - Corrosive, explosive or flammable.
- 2.10 Any such material shall be removed from site.

Topsoil spreading

2.10 Topsoil shall be uncompacted, cultivated to provide a friable texture and graded to provide smooth and flowing contours and shall achieve the required falls for adequate drainage.

2.11 The spreading of topsoil shall be to the following depths after firming and settlement:

- Grass areas 150mm
- Shrub/herbaceous areas 300mm
- Tree pit depths - To cover root ball 400mm
- Shrub and hedgerow planting 300mm
- Allotment plots 400mm

2.12 The finished levels of topsoil after settlement:

- Above adjoining paving or kerbs 30 mm
- Shrub areas higher than adjoining grass areas 50 mm

3.0 Monitoring and remedial measures

Monitoring and Review

- 3.1 In order to monitor standards and make amendments where required, it is expected that the Allotments will be reviewed at least quarterly with the maintenance team for the first two years and annually thereafter.
- 3.2 It is anticipated that, annual update reviews be held to discuss:
- The works undertaken in the last period;
 - The results of monitoring and observations undertaken;
 - The success of management undertaken to date; and
 - Any required revisions to the maintenance and monitoring to ensure that objectives are being attained.
- 3.4 Annual management reviews should be held in October.

Remedial measures

- 3.5 In the event of management problems becoming apparent the Management Company will be responsible for ensuring appropriate remedial measures are taken. This could include modifying the management procedures.

