

## **Schedule 4**

### **Independent Certifiers Appointment**



dated

2012

**The Mayor and Burgesses of the London Borough of Barnet**

and

**Countryside Properties (UK) Limited**

and

**London and Quadrant Housing Trust**

and

**[the Independent Certifier]**

and

**[the Funder]**

**Independent Certifier's Deed of Appointment**

relating to the regeneration of Dollis Valley

Trowers & Hamlins LLP  
3 Bunhill Row  
London  
EC1Y 8YZ

t +44 (0)20 7423 8000

f +44 (0)20 7423 8001

[www.trowers.com](http://www.trowers.com)

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# Independent Certifier's Deed of Appointment

dated

20[12]

## Parties

- (1) **The Mayor and Burgesses of the London Borough of Barnet** of North London Business Park, Oakleigh Road South, London, N11 1NP (the **Council**)
- (2) Countryside Properties (UK) Limited (the **Partner**), and
- (3) **London & Quadrant Housing Trust** of One Kings Hall Mews, London, SE13 5JQ (the **Registered Provider**)
- (4) [ ] (the **Independent Certifier**), and
- (5) **[The Funder]**

## Background

- (A) The Council the Partner and the Registered Provider have entered into an agreement dated on or about the date of this Deed (as amended, varied or replaced from time to time) (the **Regeneration Agreement**) for the redevelopment of the Regeneration Site (the **Regeneration**).
- (B) [The Partner and the [Funder] have entered into an agreement dated on or about the date of this Deed (as amended, varied or replaced from time to time) under which the [Funder] has agreed to provide finance to the Partner in relation to the Regeneration.]
- (C) The Independent Certifier is an independent adviser willing to provide services to the Council, the Partner and the Registered Provider [and for the benefit of the [Funder]].
- (D) The Agreement requires the Council and the Registered Provider jointly to appoint an independent certifier to perform certain services under the terms of this Deed.
- (E) The Independent Certifier has agreed to accept such appointment on the terms set out in this Deed.

## Operative Clauses

### 1 Definitions and interpretation

#### 1.1 In this Deed, unless the context otherwise requires:

**Adjudicator** means an adjudicator appointed in accordance with clause 11,

**Appointing Parties** means the Registered Provider and the Council,

**Cross-claim** has the meaning set out in clause 11.8,

**Fee** means the sum set out in schedule 2,

**Final Certificate** means the last Independent Certifier's Certificate issued by the Independent Certifier under this Deed,

**Notice of Intended Completion** means the notice issued by the Partner under clause 9.7 of the Regeneration Agreement,

**Notice of Non-Completion** means the notice issued under paragraph 13 of schedule 1,

**Services** means the services to be performed by the Independent Certifier as set out in schedule 1 as may be varied in accordance with the terms of this Deed.

1.2 Subject to clause 1.1 and unless the context otherwise requires or this Deed specifically provides otherwise, defined terms shall bear the same meanings ascribed to them in the Regeneration Agreement.

1.3 In interpreting this Deed:

1.3.1 references to the singular shall be deemed to include the plural (and vice versa) references to the masculine gender include the feminine and neuter genders and reference to a person shall be deemed to include any individual firm unincorporated association or body corporate,

1.3.2 references in this Deed to a clause or schedule are to a clause or schedule of this Deed except where expressly provided to the contrary,

1.3.3 any reference to any enactment includes any consolidation, re-enactment, amendment or replacement of it and any subordinate legislation under it,

1.3.4 headings to clauses are for the reference of the parties and do not affect interpretations.

## 2 **Appointment**

2.1 The Appointing Parties hereby appoint the Independent Certifier to act as Independent Certifier and the Independent Certifier agrees to act as Independent Certifier upon the following terms and provide the Services until the earlier of:

2.1.1 the date of issue of the Final Certificate; and

2.1.2 any termination of the Independent Certifier's appointment in accordance with clause 12.

2.2 All approvals, instructions, consents and directions to be given, and all requests, decisions and arrangements to be made by the Council, the Partner and/or the Registered Provider under this Deed shall be given or made in writing, signed by either the Council, the Partner or the Registered Provider (and shall provide the

other (as the case may be) [and the [Funder]] with a copy of the same) save where the same relate to:

- 2.2.1 any termination of the Independent Certifier's appointment under this Deed; or
- 2.2.2 any variation to the terms of this Deed; or
- 2.2.3 any suspension of the Services pursuant to clause 12.7

whereupon in each such case the signature of the Party shall be required.

- 2.3 The Council, the Partner and/or the Registered Provider have provided the Independent Certifier with (and the Independent Certifier acknowledges receipt of) a true copy of the Regeneration Agreement and the Independent Certifier is deemed to be aware of their content in so far as the same relate to the provision of the Services.
- 2.4 The Partner shall provide the Independent Certifier with true copies of the finalised Master Plan and Master Programme without delay following agreement of the same by the Council and the Partner pursuant to clause 3.6 of the Regeneration Agreement.
- 2.5 The Partner shall inform the Independent Certifier without delay of any Changes which impact upon the Services including but not limited to any amendments to the Master Programme agreed by the Council and the Partner pursuant to clause 3.8 of the Regeneration Agreement.
- 2.6 The Independent Certifier acknowledges that any breach by it of this Deed may result in any of the Appointing Parties becoming liable in damages or incurring costs, suffering reductions in payment, liabilities, deductions, losses, expenses claims or proceedings under the Regeneration Agreement and all damage, costs, reductions in payment, liabilities, deductions, losses, expenses, claims or proceedings are agreed to be within the contemplation of the parties as probable results of any such breach, act or omission or non performance by the Independent Certifier. The Independent Certifier will be liable to the Appointing Parties for all damages, costs, reductions in payment, liabilities, deductions, losses, expenses, claims or proceedings whatsoever arising as a consequence of any failure on the part of the Independent Certifier to properly undertake and perform his duties and obligations under this Deed.

### **3 Services**

- 3.1 The Independent Certifier shall provide the Services from the date of this Deed (unless the Council, the Partner or the Registered Provider notify the Independent Certifier in writing before that date that the performance of the Services should not commence on such date, in which case the performance of the Services shall commence on such other date as may be notified to the Independent Certifier by the Council the Partner or the Registered Provider).
- 3.2 The Independent Certifier undertakes and warrants to the Appointing Parties that in carrying out and performing the Services the Independent Certifier has exercised and will continue to exercise all such professional skill, care and

diligence to be expected of a competent and fully qualified member of the relevant consultancy discipline experienced in carrying out services similar to the Services for works of a similar nature, value, complexity and timescale to the Relevant Works.

- 3.3 The Independent Certifier acknowledges that each of the Appointing Parties is relying on the professional skill and judgement of the Independent Certifier and will continue to rely on the Independent Certifier in the performance of the Services and that it owes a duty of care to each of the Appointing Parties in relation thereto.
- 3.4 Where, in the performance of the Services, the Independent Certifier seeks or is obliged to seek the approval or agreement of any of the Appointing Parties to any matter or issue, the giving or confirming of the same shall not in any way derogate from the Independent Certifier's obligations under this Deed nor diminish any liability on his part for breach of such obligations and no enquiry, inspection, comment, consent, decision or instruction at any time made or given by or on behalf of the Appointing Parties shall operate to exclude or limit the obligations of the Independent Certifier to exercise all the skill care and diligence required by this Deed or to comply with the obligations contained in this Deed.
- 3.5 The Independent Certifier agrees that this Deed governs all Services provided by the Independent Certifier whether before or after the date of this Deed.
- 3.6 In addition (and without limitation to the above) the Independent Certifier shall:
  - 3.6.1 proceed regularly and diligently with the Services and in so doing the Independent Certifier will comply with all reasonable instructions and directions (provided the same do not prejudice the Independent Certifier's undertaking under clause 3.8) given to it by the Council, the Partner and/or the Registered Provider in accordance with this Deed on any matter connected with the Relevant Works save where the Independent Certifier reasonably considers that any such instructions and directions vary or might vary the Services whereupon the Independent Certifier shall immediately notify the Council, the Partner and the Registered Provider;
  - 3.6.2 co-operate fully with the other consultants and contractors employed or engaged in connection with the Regeneration and shall perform the Services in such manner and at such time so that no act, omission or default by the Independent Certifier shall cause any of the Appointing Parties to be in breach of the Regeneration Agreement save where to do so would give rise to a breach by the Independent Certifier of its obligations under this Deed; and
  - 3.6.3 keep the Council, the Partner and the Registered Provider [(and save where the [Funder] otherwise requests in writing the [Funder])] fully and properly informed on all aspects of the Services and provide them with such information and comments as they may from time to time reasonably require from the Independent Certifier with regard to the Services promptly and in good time so as not to delay or disrupt the progress of the Relevant Works.



- 3.7 The Independent Certifier shall not have authority to act on behalf of the Appointing Parties in relation to any matter in connection with the Relevant Works or otherwise and shall not hold itself out as having such authority to act on the behalf of the Appointing Parties. The Independent Certifier shall not express an opinion on and shall not interfere with or give any advice or opinion or make any representation in relation to any matters which are beyond its role and responsibilities under this Deed. Without prejudice to the foregoing, the Independent Certifier shall not make or purport to make any alteration or addition to or omission from the design of the Regeneration (including, without limitation, the setting of performance standards) or issue any instruction or direction to any consultant or contractor employed or engaged in connection with the Regeneration.
- 3.8 The Independent Certifier hereby undertakes to the Appointing Parties to perform all the duties to be performed by the Independent Certifier under this Deed independently, fairly and impartially as between the Appointing Parties. The Independent Certifier shall have due and proper regard to any representations made by or on behalf of any of the Appointing Parties but not as to exclude the exercise of independent judgement on the part of the Independent Certifier.
- 3.9 The duties and obligations of the Independent Certifier arising under or in connection with this Deed are separate and independent duties and obligations owed to the Appointing Parties both jointly and severally and the Appointing Parties may accordingly enforce the provisions of this Deed and pursue their respective rights under this Deed in their own name, whether separately or with each other.
- 3.10 Any rights and remedies provided for in this Deed are cumulative and in addition to any further rights or remedies which might otherwise be available to the Appointing Parties.
- 3.11 The Appointing Parties covenant with each other that they shall not waive any rights, remedies or entitlements or take any other action under this Deed which would or might reasonably be expected to affect adversely the rights, remedies or entitlements of another without the other's prior written consent (such consent not to be unreasonably withheld or delayed).
- 3.12 The Independent Certifier warrants to each of the Appointing Parties jointly and severally that in the provision of the Services it will comply with all statutory requirements including (without limitation) the CDM Regulations and shall when attending the Regeneration Site comply with all the rules and any other reasonable requirements relating to the Regeneration Site given or made by the Partner or the Building Contractor.
- 3.13 The Independent Certifier acknowledges that nothing contained in this Deed shall prejudice or affect its liability in tort to any of the Appointing Parties.
- 3.14 The Independent Certifier shall carry out his Services in a timely manner in accordance with the Master Programme or as required by the Partner.



#### **4 Entry and site inspection**

- 4.1 In the performance of the Services, the Independent Certifier may at all reasonable times, subject to clauses 4.2 to 4.5 enter any place where any of the Relevant Works are taking place in order to inspect the Relevant Works.
- 4.2 When carrying out an inspection under this clause 4, the Independent Certifier shall comply with all the health and safety requirements of the Partner and/or the Building Contractor.
- 4.3 When carrying out an inspection under this clause 4, the Independent Certifier shall use all reasonable endeavours to minimise disruption to the provision of the Relevant Works and shall not cause any loss or damage to any part of the Relevant Works.
- 4.4 Provided the Independent Certifier has failed to exercise reasonable skill and care, the Independent Certifier shall indemnify the Partner in respect of any loss or damage to the Relevant Works caused by the Independent Certifier during any inspection of the Relevant Works.
- 4.5 The Independent Certifier shall give as much notice as is reasonably practicable to the Appointing Parties of any inspection it intends to undertake and the Appointing Parties (including any of their representatives) shall be entitled to attend any inspection under clause 4.2 by the Independent Certifier.
- 4.6 The Partner shall attend to such matters as are set out in any Notice of Non-Completion issued pursuant to paragraph 13 of schedule 1 and shall procure that the Partner gives the Independent Certifier a further Notice of Intended Completion so that the procedures set out in paragraphs [11 to 13 (inclusive)] of Schedule 1 and this clause 4 are repeated as often as necessary to achieve the issue of an Independent Certifier's Certificate in respect of the relevant Regeneration Phase.
- 4.7 The Partner shall, at its own cost, as soon as reasonably practicable following receipt of a written request by the Independent Certifier, provide copies of such information as the Independent Certifier may reasonably require in connection with the carrying out of the Relevant Works.

#### **5 Remuneration**

- 5.1 The Fee shall be paid by the Partner and the Registered Provider to the Independent Certifier in the manner set out in schedule 2. Each party is only liable for their proportion of the Fee as set out in schedule 2 and there is no joint and several liability. The Fee shall be payable in full remuneration for the performance of the Services in accordance with this Deed. The Independent Certifier shall only be entitled to a reasonable additional fee (calculated with reference to the hourly rates set out in schedule 3 on an open book basis) in the event:
- 5.1.1 of any Additional Service instructed in accordance with clause 5.4, or

- 5.1.2 the Independent Certifier is required to re-inspect a Regeneration Phase in accordance with clause 4.6.
- 5.2 The Fee shall be deemed to be exclusive of VAT but inclusive of all expenses and disbursements.
- 5.3 If the Independent Certifier's employment is suspended by the Council and the Partner in accordance with clause 12.7, the Independent Certifier will be paid the amount which shall have become payable under clause 5.1 for the Services already provided prior to such suspension.
- 5.4 Subject to clause 2.2, the Independent Certifier shall carry out and perform any additional services required by the Council and the Partner which are not included in those Services set out in schedule 1 (the **Additional Services**) subject to:
- 5.4.1 prior agreement by the Council and the Partner to the costs of any such Additional Services (calculated with reference to the hourly rates set out in Schedule 3 on a fair and reasonable basis),
- 5.4.2 notification by the Independent Certifier to the Appointing Parties in advance of undertaking any such Additional Services that he or she is or may be entitled to payment in respect of such Additional Services.
- 5.5 Any such Additional Services shall be carried out in accordance with the provisions of this Deed and shall be part of the definition of Services. The Independent Certifier shall not carry out any Additional Services unless the Partner and the Council have both consented to the provision of the same.
- 5.6 For the avoidance of doubt neither the Council nor the [Funder] shall be responsible for nor shall either of them be held liable for any failure to make any payments properly due under this Deed unless the Council has agreed to make payments to the Independent Certifier in respect of Additional Services requested by the Council (which shall not include any Additional Services required pursuant to clause 5.1.2).
- 6 **Staff**
- 6.1 The Independent Certifier's employees with responsibility for the Services are:
- [ ] and such employees shall have full authority to act on behalf of the Independent Certifier for all purposes connected to this Deed or the Services.
- 6.2 The Independent Certifier shall use its reasonable endeavours to ensure that the above employees will retain their involvement in the Services until completion of the Services or earlier termination of this Deed unless otherwise agreed in writing with the Appointing Parties.

## **7 Assignment**

- 7.1 This Deed is personal to the Independent Certifier and the Independent Certifier may not assign the benefit or sub-contract or delegate the obligations under this Deed to any person.
- 7.2 Each of the Appointing Parties may assign its respective interests in this Deed and/or any rights arising under this Deed (whether accrued or not).

## **8 Copyright**

- 8.1 The copyright in all reports and other documents provided by the Independent Certifier in connection with the Services shall remain vested in the Independent Certifier but the Independent Certifier grants to each of the Appointing Parties and their respective nominees with full title guarantee a non-exclusive irrevocable royalty free licence to copy and use such documents for any purpose related to the Regeneration including (but without limitation) the construction, completion, maintenance, letting, promotion, advertisement, reinstatement, extension and repair of the Regeneration. Such licence shall include a licence to grant sub-licences and to transfer the same to third parties.
- 8.2 The Independent Certifier shall not be liable for any such use by the Appointing Parties or their nominees of any documents for any purposes other than those for which they were originally prepared by the Independent Certifier.
- 8.3 The Appointing Parties shall on written request and upon paying a reasonable copying charge be entitled to be supplied by the Independent Certifier with copies of the items referred to in clause 8.1.
- 8.4 Where a claim or proceedings is made or brought against the Appointing Parties which arises out of infringement of any copyright, unless such infringement has arisen out of the use of the Documents by or on behalf of the Appointing Parties otherwise than in accordance with the terms of this Deed, the Independent Certifier shall indemnify the Appointing Parties at all times from and against all such claims and proceedings.

## **9 Indemnity insurance**

- 9.1 Without prejudice to its obligations under this Deed or at law, the Independent Certifier confirms that it has and shall maintain at all times professional indemnity insurance covering (inter alia) all liability under this Deed upon customary and usual terms and conditions prevailing for the time being in the insurance market, and with reputable insurers lawfully carrying on such insurance business in the United Kingdom, in an amount of not less than £10,000,000 (ten million pounds) for each and every claim for the period from the date of this Deed and ending twelve (12) years after the date of the Final Certificate or termination of the Independent Certifier's appointment in accordance with clause 12 (whichever is earlier), provided always that such insurance is available at commercially reasonable rates. The said terms and conditions shall not include any term or condition to the effect that the Independent Certifier must discharge any liability (save in respect of any excess

/ deductible) before being entitled to recover from the insurers, or any other term or condition which might adversely affect the rights of any person to recover from the insurers pursuant to the Third Parties (Rights Against Insurers) Act 1930, or any amendment or re-enactment thereof. The Independent Certifier shall not, without the prior approval in writing of the Appointing Parties, settle or compromise with the insurers any claim which the Independent Certifier may have against the insurers and which relates to a claim by the Appointing Parties (or either of them individually) against the Independent Certifier, or by any act or omission lose or prejudice the Independent Certifier's right to make or proceed with such a claim against the insurers.

9.2 Increased or additional premium and any additional terms required by insurers by reason of the Independent Certifier's own claims record or other acts, omissions, matters or things particular to the Independent Certifier shall be deemed to be on reasonable terms and at commercially reasonable rates (as applicable).

9.3 The Independent Certifier shall, as soon as reasonably practicable, inform the Appointing Parties if such insurance ceases to be available at commercially reasonable rates in order that the Independent Certifier and the Appointing Parties can discuss means of best protecting the respective positions of the Appointing Parties and the Independent Certifier in respect of the Relevant Works in the absence of such insurance.

9.4 The Independent Certifier shall fully co-operate with any measures reasonably required by the Appointing Parties, including (without limitation) completing any proposals for insurance and associated documents, maintaining such insurance at rates above commercially reasonable rates if the Appointing Parties undertake in writing to reimburse the Independent Certifier in respect of the net cost of such insurance to the Independent Certifier above commercially reasonable rates or, if the Appointing Parties effect such insurance at rates at or above commercially reasonable rates, reimbursing the Appointing Parties in respect of what the net cost of such insurance to the Appointing Parties would have been at commercially reasonable rates.

9.5 On or before the date of this Deed and thereafter as and when reasonably requested to do so by the Appointing Parties the Independent Certifier shall produce for inspection documentary evidence of the maintenance of such insurance.

## 10 **Limitation on liability**

The Independent Certifier's total liability under or in connection with this Deed (whether in contract, tort or otherwise) shall be limited to £10,000,000 (ten million pounds) for each and every claim.

## 11 **Adjudication**

11.1 If a dispute or difference arises between the Appointing Parties (or the Council or the Partner [or the [Funder]] independently) and the Independent Certifier under this Deed a party may give notice of its intention to refer such dispute or



difference to adjudication at any time and the President for the time being of the Chartered Institute of Arbitrators shall appoint an Adjudicator to consider the dispute within five (5) Working Days of any application for such appointment by either party. The party referring such dispute shall be called the **Referrer** and the party responding shall be called the **Respondent**.

- 11.2 Upon the appointment of the Adjudicator the disputing parties shall comply with all the directions which he may issue for the purposes of fairly and expeditiously considering the facts and issues in the dispute and so that the Adjudicator shall reach a decision within 20 Working Days of the date of referral to him under clause 11.1 or such longer period as is agreed by the disputing parties after the dispute has been referred and the Adjudicator may extend the period of 20 Working Days by up to 10 Working Days with the Referrer's consent.
- 11.3 The Adjudicator shall:
  - 11.3.1 act fairly and impartially and shall take the initiative in ascertaining the facts and the law and shall reach his decision in accordance with the applicable law in relation to this Deed and shall publish his decision simultaneously in writing and with reasons to the disputing parties, and
  - 11.3.2 avoid incurring unnecessary expense.
- 11.4 In determining any dispute referred to him for a decision the Adjudicator:
  - 11.4.1 shall consider any written representations, statements and expert's reports submitted to him by the disputing parties (which shall be exchanged between the parties when the same are supplied to the Adjudicator),
  - 11.4.2 shall afford the disputing parties the opportunity to address him in a meeting or meetings at which the disputing parties must be present,
  - 11.4.3 shall permit the disputing parties to be represented by such legal or other representatives as they shall see fit,
  - 11.4.4 shall have the power to require the disputing parties to produce to him and to the other disputing party copies of any documents they are able to produce which may assist in the reference (save any which would be privileged from production in Court proceedings) between the disputing parties relating to the dispute,
  - 11.4.5 shall be entitled to instruct an expert and to take counsel's opinion as to any matter within their field of expertise raised by the reference, but shall not be entitled to delegate any decision to such expert or counsel, and
  - 11.4.6 subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments.
- 11.5 The Adjudicator's decision is binding upon the disputing parties until finally determined by legal proceedings or by agreement. If any disputing party is dissatisfied with or otherwise wishes to challenge the Adjudicator's decision, or the disputing parties agree, then, within twenty eight (28) Working Days following

receipt of the Adjudicator's decision, any disputing party may notify the others of its intention to commence legal proceedings.

- 11.6 The disputing parties hereby agree that the Adjudicator (including any employee or agent of the Adjudicator) appointed in accordance with this clause 11 shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith.
- 11.7 If a disputing party does not comply with the decision of the Adjudicator the other disputing party shall be entitled to take proceedings in the Courts to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 11.5.
- 11.8 Subject to the provisions of clauses 11.2, 11.3, 11.4 and 11.10, in deciding any dispute referred to him, the Adjudicator shall determine and take into account any matter (a **Cross-claim**) raised by the Respondent to the notice to refer by way of defence or set-off or counter claim, provided such Cross-claim arises under this Deed.
- 11.9 Clauses 11.2 to 11.7 (inclusive) shall apply to any Cross-claim as they apply to any dispute referred to the Adjudicator pursuant to clause 11.1.
- 11.10 Clauses 11.8 and 11.9 shall not apply to any Cross-claim if such Cross-claim is being decided or has been decided by an adjudicator other than the Adjudicator appointed pursuant to clauses 11.1 and 11.2 to determine the relevant dispute or difference.
- 11.11 The Adjudicator's reasonable fees and expenses shall be borne as the Adjudicator shall specify or, in default, equally by the Referrer and the Respondent. The Referrer and the Respondent shall each bear its own costs arising out of the reference, including legal costs and expenses of any witnesses.
- 11.12 The parties to the adjudication shall continue to comply with, observe and perform all their obligations under this Deed regardless of the nature of the dispute and notwithstanding the referral of the dispute for resolution under this Clause 11 and shall give effect immediately to every decision of the Adjudicator or the Courts delivered under this clause 11.

## 12 **Termination**

- 12.1 The Appointing Parties may terminate the Independent Certifier's appointment under this Deed at any time upon five (5) Working Days' joint notice in writing to the Independent Certifier.
- 12.2 If the Regeneration Agreement is rescinded, terminated or repudiated for any reason and, notwithstanding that the validity of such rescission, termination or repudiation may be disputed, the Independent Certifier's appointment under this Deed shall be terminated by written notice served jointly by the Appointing Parties.

- 12.3 The Independent Certifier may terminate its appointment under this Deed if the Partner or the Registered Provider fails to make a payment of any sum due to the Independent Certifier by the final date for payment in accordance with paragraph 5 in schedule 2 and no effective notice to withhold payment has been given in accordance with paragraph 6 of schedule 2 and such sum is in excess of £20,000 (twenty thousand pounds) (excluding VAT) and fails to remedy the same after receiving a thirty (30) Working Days' written notice from the Independent Certifier to each Appointing Party specifying the breach and requiring its remedy, provided that such sum is not the subject of any bona fide dispute or set-off.
- 12.4 The Council may elect to make payment to the Independent Certifier of the monies owed by the Partner or the Registered Provider pursuant to clause 5 (as more particularly described in schedule 2) before the expiry of the period set out in clause 12.3 (or at any time thereafter prior to the termination of this Deed by the Independent Certifier in accordance with clause 12.3) provided that the Council gives five (5) Working Days' notice to the Partner or the Registered Provider [and the [Funder]] of its election to make such payment to the Independent Certifier. Upon receipt of such payment the Independent Certifier's right to terminate this Deed under clause 12.3 shall cease.
- 12.5 If the Council elects to make payment to the Independent Certifier of the monies owed by the Partner or the Registered Provider pursuant to clause 5 before the expiry of the period set out in clause 12.3 (or at any time thereafter prior to the termination of this Deed by the Independent Certifier in accordance with clause 12.3), any such sums shall be deemed to be Council Expenditure.
- 12.6 The termination of the Independent Certifier's appointment under this Deed, howsoever arising, shall be without prejudice to the rights and remedies of any party in relation to any omission or default of the others prior to such termination.
- 12.7 The Appointing Parties may suspend the Services by joint written notice at any time. Upon suspension the Independent Certifier's fee entitlement shall be as provided in clause 5.3. There shall be an appropriate adjustment to the monthly payment schedule set out in paragraph 2 of schedule 2 following an instruction to recommence the Services.
- 12.8 If this Deed is terminated pursuant to clause 12.1, the Independent Certifier shall pay to the Appointing Parties any reasonable incremental loss, damage or additional costs suffered by each of them.
- 12.9 Each party's further rights and obligations shall cease immediately on termination except that termination of this Deed shall not affect the continuing rights and obligations of the Appointing Parties under clauses 9 (Indemnity insurance), 10 (Limitation on liability), 11 (Adjudication), 14 (Confidentiality) and this clause 12 or under any other clause which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination.

13 **Consequences of termination**



- 13.1 Upon any termination of the Independent Certifier's appointment in accordance with clause 12 the Independent Certifier shall:
- 13.1.1 take immediate steps to bring to an end the Services in an orderly manner but with all reasonable speed and economy; and
- 13.1.2 if requested within ten (10) Working Days deliver to the Council and the Partner copies of all reports, minutes of meetings and other documents (excluding internal memoranda, working papers and templates) prepared or in the course of preparation by the Independent Certifier pursuant to this Deed, and
- 13.1.3 in the event a replacement independent certifier is appointed to complete the performance of the Services, co-operate fully with such replacement for the orderly transfer or continuation of the Services, at the reasonable cost of the Partner, save where the termination has arisen as a consequence of any default by the Independent Certifier whereupon the Independent Certifier shall bear its own costs.
- 13.2 Subject always to clause 14, the Independent Certifier shall retain a copy of the documents referred to in clause 13.1 for a period of twelve (12) years from the date of termination of the Independent Certifier's appointment under this Deed. Upon the expiry of this period, if requested, all documents shall be delivered to the Council and the Partner, at the reasonable cost of the Partner and the Council, or as otherwise directed by the Council and the Partner.
- 13.3 If the Independent Certifier's appointment under this Deed is terminated, the Partner and the Registered Provider shall be liable (subject to any withholdings, deductions or set-off which the Partner is entitled to make) to pay to the Independent Certifier that part of the Fee which has accrued and is due prior to the date of such termination less the amount of any payments in respect of that part of the Fee previously made by the Partner and the Registered Provider to the Independent Certifier under this Deed.
- 13.4 Save in so far as the same arises from any accrued right arising under this Deed including the payment of any fees up to and including the date of termination of the Independent Certifier's appointment under this Deed, the Independent Certifier shall have no right to receive any compensation or remuneration by reason of the termination of the Independent Certifier's appointment under this Deed.
- 14 **Confidentiality**
- 14.1 Save as required by law or as may be necessary for the proper performance of its duties the Independent Certifier shall not during its appointment as Independent Certifier under this Deed or at any time after its expiry or termination disclose to any third party or make use of any information relating to the Regeneration whether contained in the Regeneration Agreement or otherwise unless with the prior written consent of each of the Appointing Parties.

- 14.2 The Independent Certifier shall comply with its obligations under the Data Protection Act 1998 and other such applicable legal requirements in respect of such data.

15 **Notices**

- 15.1 Any notice to be given under this Deed shall be given in writing and shall be delivered by hand or special delivery or sent by first class post or by facsimile transmission to the relevant parties at the relevant addresses for service set out below or to such other addresses in the United Kingdom as the relevant party may specify by notice in writing to the other parties:

**The Council**

[ ]

**The Partner**

[ ]

**The Registered Provider**

[ ]

**The Independent Certifier**

[ ]

**[The [Funder]**

[ ]]

- 15.2 Any notice given pursuant to clause 15.1 shall be deemed to be served, if delivered personally, at the time of delivery or, if sent by post two Working Days after posting, or, if sent by facsimile, the Working Day following its proper transmission evidenced by a confirmatory transmission sheet not indicating any transmission error and always provided that a copy of the notice is posted by special delivery post to the receiving party on the day of its transmission.

16 **Liability period**

16.1 No action or proceedings for any breach of this Deed shall be commenced against the Independent Certifier after the expiry of twelve (12) years from the earlier of:

16.1.1 the date of issue of the Final Certificate, or

16.1.2 any termination of the Independent Certifier's appointment in accordance with clause 12.

**17 Third party rights**

Whether under the Contracts (Rights of Third Parties) Act 1999 or otherwise, this Deed does not create any right enforceable by any person not a party to it except a person who is a successor or a permitted assignee shall be deemed to be a party to this Deed.

**18 Governing law**

This Deed and any non-contractual obligations arising out of or in connection with it shall be governed by English law and the parties hereby irrevocably submit to the exclusive jurisdiction of the English Courts.

**19 No partnership**

Nothing in this Deed shall be construed as creating a partnership between the Council and/or the Partner or the Registered Provider [and/or the [Funder]] and neither the Council[, the [Funder],] the Partner or the Registered Provider shall conduct itself in such a way as to create an impression that such a partnership exists.

**20 No waiver**

No waiver by any party of any default or defaults by any other party in the performance of any of the provisions under this deed shall operate or be construed as a waiver of any or further default or defaults whether of a like or different character.

**21 Variations**

All additions, amendments and variations to this Deed shall be binding only if in writing and signed by the duly authorised representative of each party.

**22 Whole agreement**

22.1 This Deed supersedes any previous agreement or arrangement between the parties in respect of the Services (whether oral or written) and represents the entire understanding between the Appointing Parties and the Independent Certifier in relation to the Services.

22.2 Nothing in this Deed is intended to, or shall operate so as to, exclude or limit any liability for fraud or fraudulent misrepresentation.

22.3 The rights set out in clause 12 are the sole and exclusive rights of the parties to terminate this Deed.

23 **Severability**

In the event that any term, condition or provision contained in this Deed shall be held to be invalid, unlawful or unenforceable to any extent, such term, clause or provision shall, to that extent, be omitted from this Deed and the remainder of this Deed shall remain valid and enforceable.

24 **Counterparts**

This Deed may be executed in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

25 **Force majeure**

None of the parties to this Deed shall be liable to the other for any failure to comply with their respective obligations during the occurrence of a Force Majeure Event save for the payment of any sums due and payable to the Independent Certifier up to the occurrence of the Force Majeure Event.

## **SCHEDULE 1**

### **Services**

The Independent Certifier shall perform all the functions and obligations attributed to the Independent Certifier in the relevant clauses of the Regeneration Agreement and this Deed and in particular shall perform all those functions and obligations attributed to the Independent Certifier in this schedule.

### **General Obligations**

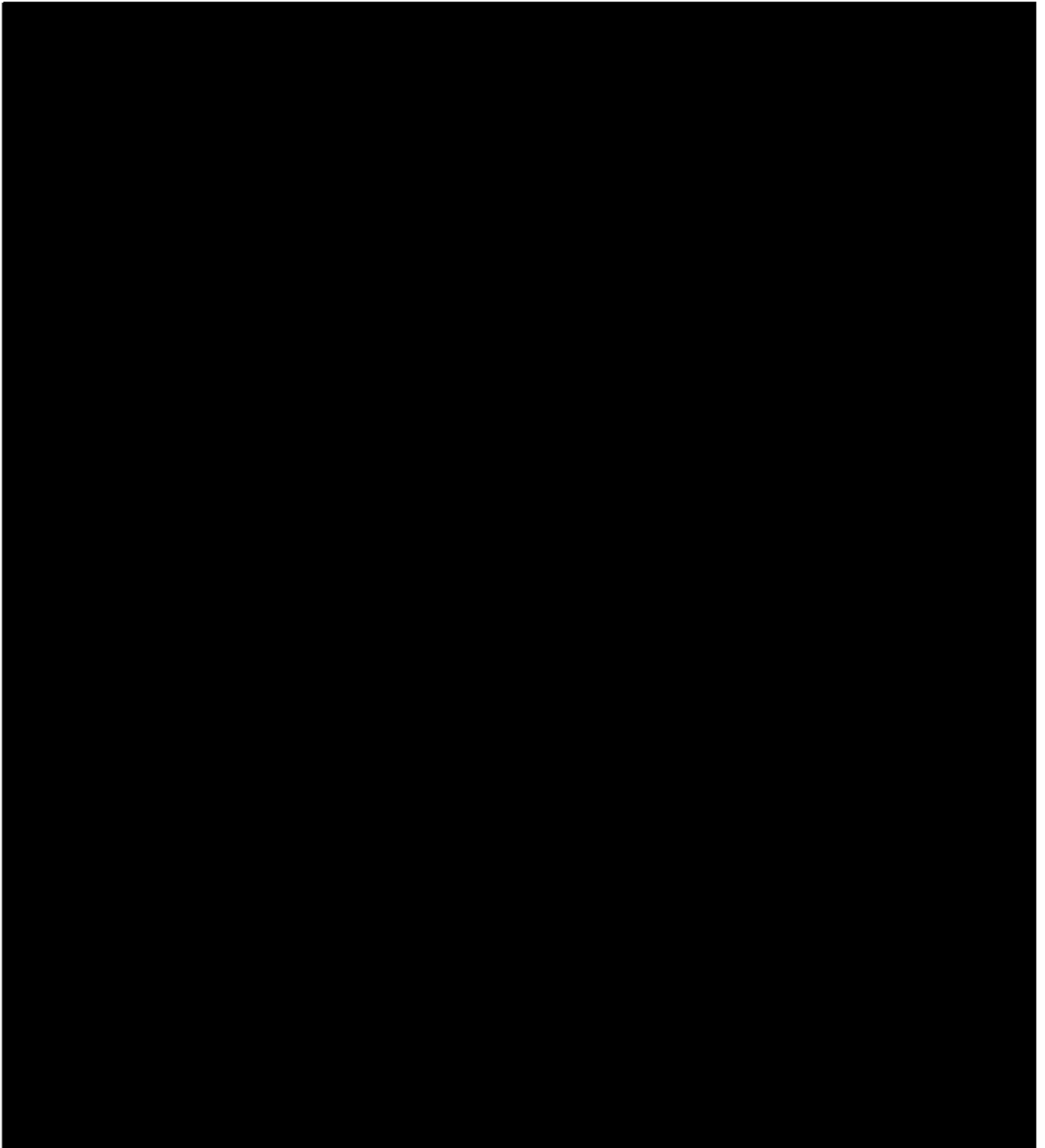
- 1 The Independent Certifier shall familiarise itself with the Regeneration Agreement, including, without limitation the Master Plan and the Master Programme together with any variations to the same as may be issued from time to time.
- 2 The Independent Certifier shall carry out such activities as are necessary for the Independent Certifier to determine, in accordance with the terms of the Regeneration Agreement and this Deed, whether or not the Relevant Works in each Regeneration Phase are Practically Complete.
- 3 The Independent Certifier shall visit the Regeneration Site as often as may be necessary in order to familiarise itself with the general nature of the Relevant Works and perform the Services.
- 4 The Independent Certifier shall familiarise itself and acquire a good understanding of the Partner's quality management system for the carrying out of the Relevant Works to the extent necessary to perform the Services (and periodically monitor and review the implementation of such quality management system to the extent necessary to perform the Services) and advise on whether the appropriate procedures appear to have been implemented correctly.
- 5 The Independent Certifier shall notify the Appointing Parties of any concerns it may have with the quality management system referred to in paragraph 4 provided always that this paragraph 5 shall not require the Independent Certifier to assume responsibility for the effectiveness of such quality management system.
- 6 The Independent Certifier shall review the Partner's proposed procedures and programmes for the testing and commissioning of the Relevant Works.
- 7 The Independent Certifier shall monitor the procedures for the identification, approval and recording of Changes made to the Relevant Works in accordance with the Regeneration Agreement.

## Construction Review and Inspection

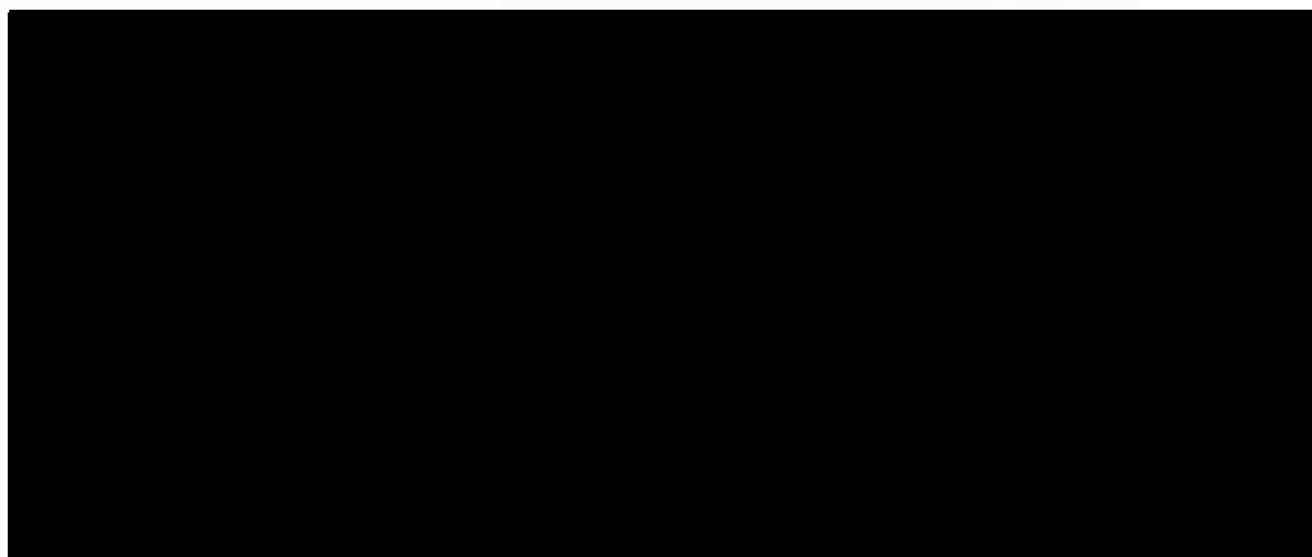
- 8 The Independent Certifier shall visit the Regeneration Site and monitor the Relevant Works for their compliance with the Regeneration Agreement. The frequency and timing of the Independent Certifier's visits are dependent on the progress of the Relevant Works. The Partner shall agree a programme with the Independent Certifier for the inspection of key construction processes and the completed Relevant Works and shall give the Independent Certifier advance notice of these Relevant Works being carried out within each Regeneration Phase. The Independent Certifier shall identify any aspects of the Relevant Works which need to be inspected before being covered over by subsequent activity so that he may satisfy himself that these have been constructed in accordance with the requirements of the Regeneration Agreement without the need for opening up.
- 9 The Independent Certifier shall from time to time check that the Relevant Works are being undertaken in accordance with the Partner's health and safety plan and in a workmanlike manner.
- 10 The Independent Certifier shall check the production of the relevant operating manuals, relevant approvals, consents, test results, inspection records and as-built drawings, or any other such documentation as required by The Construction (Design and Management) Regulations 2007.
- 11 The Independent Certifier shall inspect the relevant Regeneration Phase following receipt of the Notice of Intended Completion.
- 12 If after having carried out an inspection of a Regeneration Phase the Independent Certifier considers that the Relevant Works within that Regeneration Phase are Practically Complete, then the Independent Certifier shall within two (2) Working Days of completing the inspection issue an Independent Certifier's Certificate for that Regeneration Phase to the Partner with copies to the Council [and, if required by the [Funder], to the [Funder]].
- 13 If after having carried out an inspection of a Regeneration Phase the Independent Certifier considers that the Relevant Works within that Regeneration Phase are not Practically Complete, the Independent Certifier shall within two (2) Working Days of completing the inspection issue a notice of non-completion to the Partner (with copies to the Council [and, if required by the [Funder], to the [Funder]]) detailing outstanding matters which are required to be attended to before an Independent Certifier's Certificate can be issued (**Notice of Non-Completion**).

**SCHEDULE 2**

**Fee and Payment of Fee**







### SCHEDULE 3

#### Hourly Rates

<b>Partner</b>	£ [REDACTED] per hour
<b>Senior Surveyor</b>	£ [REDACTED] per hour
<b>Surveyor</b>	£ [REDACTED] per hour
<b>Assistant Surveyor</b>	£ [REDACTED] per hour

**EXECUTED AS A DEED** by the parties on the date which first appears in this Deed.

