SUPPLEMENTAL AGREEMENT UNDER SECTION 106A OF THE TOWN & COUNTRY PLANNING ACT 1990 RELATING TO LAND AT FORMER CRODA SITE, CARLISLE STREET, KILNHIRST

BETWEEN

ROtherham Metropolitan Borough Council

and

Gleeson Developments Limited

Chattertons
5 South Street
Horncastle
Lincs
LN9 6DS

Ref: JSP.RCH.GLEES003.264
THIS DEED is dated 11 October 2013

(1) ROTHERHAM METROPOLITAN BOROUGH COUNCIL of Council offices, Riverside House, Main Street, Rotherham, S60 1AE (Council).

(2) GLEESON DEVELOPMENTS LIMITED (Company Registration number 00848808) whose registered office is at Sentinel House Harvest Crescent, Ancells Business Park, Fleet, Hampshire, GU51 2UZ (Owner).

BACKGROUND

(A) The Council is the local planning authority for the purposes of the TCPA 1990 for the area in which the Property is situated.

(B) The Owner is the freehold owner of the Property registered under title number SYK195904 and subject to the following charges:

   (i) a charge in favour of Croda Distillates Limited dated 29 June 2012; and

   (ii) a charge in favour of the Homes and Communities Agency dated 10 October 2012.

Croda Distillates Limited and the Homes and Communities Agency have by the letters of consent dated 26.09.13 and 16.09.13 respectively appended to this Deed consented to the Owner entering into this Agreement in the manner hereinafter appearing

(C) On 28 May 2012 the Council, the Owner and Croda Distillates Limited entered into the Original Agreement. The Owner acquired the Property from Croda Distillates Limited on 29 June 2012.

(D) Without prejudice to the terms of the other covenants contained in the Original Agreement the parties have agreed to vary the terms of Original Agreement as set out in this deed.

(E) This agreement is made under section 106A of the TCPA 1990 and is supplemental to the Original Agreement.

AGREED TERMS

1. INTERPRETATION

1.1 The definitions and rules of interpretation in this clause apply in this deed.
1.2 All words and phrases defined in the Original Agreement shall have the same meaning in this deed save where the context otherwise dictates.

1.3 In this deed the following expression shall have the following meaning:

**Original Agreement:** the agreement made under section 106 of the TCPA 1990 dated 28 May 2012 between (1) Rotherham Metropolitan Borough Council (2) Gleeson Developments Limited and (3) Croda Distillates Limited.

1.4 All references in this deed to clauses in the Original Agreement are to clauses within the Original Agreement.

1.5 Clause headings shall not affect the interpretation of this deed.

1.6 A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.7 A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.

1.8 Unless the context otherwise requires, words in the singular include the plural and in the plural shall include the singular.

1.9 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

1.10 A reference to any party shall include that party’s personal representatives, successors or permitted assigns and in the case of the Council the successors to its respective statutory functions.

1.11 A reference to a statute or statutory provision is a reference to it as it is in force at the date of this deed provided that, as between the parties, no such amendment, extension or re-enactment shall apply to the deed to the extent that it would impose any new or extended obligation, liability or restriction, on, or otherwise adversely affect the rights of, any party.

1.12 A reference to a statute or statutory provision shall include any subordinate legislation made as at the date of this deed under that statute or statutory provision.
1.13 A reference to **writing** or **written** does not include e-mail.

1.14 References to clauses, Schedules and plans (unless the context otherwise requires) are to clauses, Schedules and plans of this deed.

1.15 An obligation in this deed on a person not to do something includes an obligation not to agree or allow that thing to be done.

1.16 Any phrase introduced by the terms **including**, **include**, **in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.

1.17 Where an obligation falls to be performed by more than one person, the obligation can be enforced against every person so bound jointly and against each of them individually.

2. **STATUTORY PROVISION**

This deed is made pursuant to the provisions of sections 106 and 106A of the TCPA 1990.

3. **VARIATIONS TO THE ORIGINAL AGREEMENT**

3.1 Schedule 2 of the Original Agreement shall be deleted and replaced with the following:

3.2

"Schedule 2

**Affordable/Nominated Housing Provision**

1. **Definitions and interpretation**

1.1 **Definitions**

For the purposes of this Schedule 2 the following expressions shall have the following meanings:

1.1.1 ‘Affordable Housing’ means subsidised housing that will be available to persons who cannot afford to rent or buy housing generally available on the open market in accordance with the definition in Annex 2 to the National Planning Policy"
1.1.2 Affordable Housing Provider' means an organisation constituted for the purpose of providing, owning and managing Affordable Housing to comply with The Housing and Regeneration Act 2008 or as redefined in any amendment replacement or re-enactment of such Act and reference to "Affordable Housing Provider" shall be construed accordingly.

1.1.3 'Market Value' means the value that equivalent Dwellings (meaning equivalent in size and house type) are being sold for at the relevant time on the Development by the Developer to private purchasers on the basis of arm length transactions between a willing buyer and a willing seller and disregarding the provisions of this Schedule 2.

1.1.4 Nomination Housing Plan' means the plan annexed hereto and marked "Nomination Housing Plan" and being drawing number PL-02 Revision X.

1.1.5 'the Nomination Units' means 9 Dwellings, being 7 two bed Dwellings (shown shaded pink on the Nomination Housing Plan) and 2 three bed Dwellings (shown shaded blue on the Nomination Housing Plan) such Dwellings to be available for nomination of purchasers by the Council in accordance with paragraph 2 of this Schedule 2.1.1.6 'the Set Price' means (net of any incentives) the sum equivalent to 80% of the Market Value of the Dwelling in question PROVIDED THAT any payments by the purchaser to the Developer of any extra consideration for improvements or additions to the basic Dwelling (to improve the Dwelling above the standard specification of the other Dwellings on the land) shall be in addition to the Set Price paid PROVIDED THAT the remaining 20% of the Market Value shall remain outstanding on completion of the sale to the purchaser and shall be secured by (and be repayable in accordance with the terms of) the Second Legal Charge in accordance with the Developer's shared equity scheme from time to time.
1.1.8 'the Second Legal Charge' means a shared equity second legal charge which (without limitation) must include the following principal terms:-

a. That it secures the value equivalent to 20% of the equity in the Dwelling in question from time to time;

b. That the borrower named in the legal charge may redeem the legal charge in full at any time and further may redeem the legal charge by installments subject to such installments not being less than the equivalent of the sum equal to 1/3rd of the equity secured by the charge at the date of the charge (meaning a maximum of three installment payments to redeem the whole);

c. That the sums owed under the charge will be interest free for a period of 4 years from the date of the charge thereafter interest will accrue on the basis of 4% above the base lending rate;

d. That the sum owing under the legal charge will fall due on the earlier of the following to occur:-

i. A disposition of the Dwelling by the borrower (whether by transfer, charge or lease for a term in excess of 7 years); and

ii. Redemption of the first legal charge secured against the Dwelling.

1.1.9 'the Social Rented Commuted Sum' means the sum of £468,500 (four hundred and sixty eight thousand five hundred pounds) to be paid to Council in accordance with paragraph 3 of this Schedule 2.

1.1.10 'Social Rented Dwellings' means Affordable Housing owned and managed by an Affordable Housing Provider which is available for rent and for which guideline target rents are determined through the central government national rent regime. It may also include rented housing owned or managed by other persons and provided under equivalent rental arrangements to the above, as agreed with the local authority and with the Homes and Communities Agency.
2. **Nomination Units**

The Developer covenants with the Council:-

2.1 To comply with the following provisions in respect of the Nomination Units:-

2.1.1 Subject to paragraph 2.1.3 nominations of prospective purchasers of the Nomination Units (the “Nominated Purchasers”) at the Set Price will be accepted by the Developer from the Council

2.1.2 a person or persons shall be nominated by the Council as a Nominated Purchaser (and for the avoidance of doubt all Nominated Purchasers must be a person or persons whose housing needs are not adequately served by the commercial housing market and that qualify for Affordable Housing) within 2 months of the date upon which the Developer notified the Council of the scheduled release of the Nomination Unit in question.

2.1.3 the Developer will offer the Nomination Unit to the Nominated Purchaser for purchase by the Nominated Purchaser at the Set Price PROVIDED THAT if:-

2.1.3.1 The Council fails to nominate a Nominated Purchaser within 2 months of the date of notification by the Developer to the Council of the scheduled release of the Nomination Units; or

2.1.3.2 Where the Council has nominated a Nominated Purchaser but that person has failed to reserve the Nomination Unit within 10 working days of the date of nomination and within 10 working days of the date of the notice provided for at paragraph 2.1.5 below that the Nominated Purchaser has failed to reserve the Nomination
Unit the Council has not nominated an alternative Nominated Purchaser (and for the avoidance of doubt the Council may repeat the nomination process an unlimited number of times until the occurrence of any of the dates provided for in paragraphs 2.1.3.1-2.1.3.3 (inclusive)) ; or

2.1.3.3 In any event a Nominated Purchaser has failed to enter into an agreement to purchase such Nomination Unit within the period of 6 months following a notification of the scheduled release of the Nomination Unit by the Developer to the Council;

Then in all of the above circumstances the Developer shall be free to dispose of the Nomination Unit to the general public as normal open market sales on the open market free from the restrictions set out in this Schedule 2.

2.1.4 the terms of the agreement and transfer of Nomination Units to Nominated Purchasers shall be no less beneficial than the terms on which the Developer generally offers residential dwellings for sale upon the Development.

2.1.5 the Developer having received notification from the Council of a Nominated Purchaser shall notify the Council as soon as practicable once a reservation of the Nomination Unit has been received from the Nominated Purchaser or that the Nominated Purchaser has not reserved the Nomination Unit

2.1.6 the Developer shall give the Council notice in writing of the scheduled release of the Nomination Units prior to commencing the construction of the Nomination Units provided that the Developer may give notice in respect of the scheduled release of any Nomination Units
individually or at the same time as all or any of the other Nomination Units.

2.1.7 time shall be of the essence in respect of all time periods provided for in the sub paragraphs 2.1.2 and 2.1.3 of this paragraph 2.

2.2 Subject to the provisions of sub paragraph 2.1.3 and subject to the Nomination Units(s) in question having been sold to a Nominated Purchaser(s) the Nomination Unit(s) in question shall not be used other than for Affordable Housing save that this obligation shall not be binding upon any purchaser of a Nomination Unit where the purchaser has subsequently purchased all of the equity in the Nomination Unit and discharged the Second Legal Charge in respect of that Nomination Unit and any mortgagee or chargee or any person deriving title from the said purchaser or any successor in title thereto and their respective mortgagees and chargees.

2.3 The Council will use its reasonable endeavours to ensure that those Nomination Units which have been sold on the open market in accordance with sub paragraph 2.1.3 shall never be classified as Affordable Housing and further shall use its reasonable endeavours and procure that such Nomination Unit(s) which are sold to a Nominated Purchaser and which are then subsequently sold as a result of which the Second Legal Charge is discharged shall at that time cease to be classified as Affordable Housing.

3. Social Rented Commuted Sum

3.1 In lieu of the onsite provision of 19 Social Rented Dwellings on the Development (that would have comprised 10 two bed dwellings and 9 three bed dwellings) the Developer shall pay the Social Rented Commuted Sum to the Council in the following manner:-

3.1.1 The sum of £156,166.66 (ONE HUNDRED AND FIFTY SIX THOUSAND ONE HUNDRED AND SIXTY SIX POUNDS AND SIXTY SIX PENCE) on or before 15 December 2013;

3.1.2 The sum of £156,166.67 (ONE HUNDRED AND FIFTY SIX THOUSAND ONE HUNDRED AND SIXTY SIX POUNDS AND SIXTY SEVEN PENCE) on or before 15 December 2014; and
3.1.3 The sum of £156,166.67 (ONE HUNDRED AND FIFTY SIX THOUSAND ONE HUNDRED AND SIXTY SIX POUNDS AND SIXTY SEVEN PENCE) on or before 15 December 2015 such payment which shall fully discharge the obligation on the Developer contained in this paragraph 3, Schedule 2.

3.3 The Council shall apply the Social Rented Commuted Sum towards the provision of Social Rented Dwellings within the Borough of Rotherham and if any or all such sums have not been expended by the Council for the said purpose within the period of 5 years beginning on the date they were paid to the Council then the Council shall refund all such unexpended sums to the Developer forthwith together with all interest accrued thereon."

3.2 The Original Agreement shall be varied by the annexing of the plan attached hereto and marked “Nomination Housing Plan” and being drawing number PL-02 Revision X.

3.4 After Clause 4.1.15 of the Original Agreement there shall be inserted the following:

"4.1.16 None of the obligations herein contained shall be enforceable against any person with a charge or a future charge over the Land and they shall have no liability under this Deed unless and until they take possession of any part of the Land as a mortgagee in possession in which case they will observe and perform the covenants and obligations under this Deed until such time of any sale of the Land".

3.4 The “POS Plan” as defined at clause 1.1. of the Original Agreement shall be replaced with the plan attached hereto, being plan reference POS-01 Rev E.

3.5 At the definition of “Public Open Space” at clause 1.1 of the Original Agreement the word “edged” shall be deleted and the word “shaded” shall be inserted in its place.
3.6 At paragraph 8 of Schedule 3 of the Original Agreement after the words “private concern” the following words shall be inserted “(including but without limitation a company registered in Scotland)”.  

3.7 At clause 1.1 of the Original Agreement the definition of “Management Company” shall be deleted and replaced with the following:-

"Management Company" means a limited company or companies:-

1. which is incorporated in England and Wales or Scotland;

2. which has its registered office either in England, Wales or Scotland; and

3. whose primary objects permit it to maintain and renew areas of public open space.”

3.8 At the definition of “Residential Units” at Clause 1.1 of the Original Agreement the words “Affordable Dwellings” shall be deleted and the words “Nomination Units” shall be inserted in their place.

4. COVENANTS TO THE COUNCIL

The Owner covenants to observe and perform the covenants, restrictions and obligations contained in the Original Agreement as varied by this deed.

5. LOCAL LAND CHARGE

This deed shall be registered as a local land charge.

6. ENDORSEMENT

Promptly following completion of this deed the Council shall endorse a memorandum of variation on the Original Agreement in the following terms:

"This Agreement has been varied by a supplemental agreement dated [] 2013 and made between Rotherham Metropolitan Borough Council and Gleeson Developments Limited."
7. **COUNCIL’S COSTS**

The Owner shall pay to the Council on or before the date of completion of this deed, the Council’s reasonable and proper legal costs together with all disbursements incurred in connection with the preparation, completion and registration of this deed.

8. **VALUE ADDED TAX**

8.1 All consideration given in accordance with the terms of this deed shall be exclusive of any VAT properly paid.

8.2 If at any time VAT is or becomes chargeable in respect of any supply made in accordance with the terms of this deed then to the extent that VAT has not been previously charged in respect of that supply the party making the supply shall have the right to issue a VAT invoice to the party to whom the supply was made and the VAT shall be paid accordingly.

9. **MORTGAGEE**

The Owner and the Developer agree that the Land shall be bound by the obligations contained in this deed and that the security of any charge over the Land shall take affect subject to this deed PROVIDED THAT any mortgagee shall otherwise have no liability under this deed unless and for so long as such mortgagee is in possession of the Land in which case it too will be bound by the obligations as if it were a person deriving title from the Owner but only to the extent it shall have caused such breach to have been occasioned and provided further for the avoidance of doubt it shall not in any event be liable for any breach of this deed arising prior to it becoming a mortgagee in possession of the Land regardless of whether or not such pre-existing breach shall continue for any period during which it is a mortgagee in possession of the Land.

10. **RELEASE**

No person or party shall be liable for a breach of the restrictions and obligations contained in this Deed after that person or party has parted with all of his interests in the Land or the part in respect of which the breach
occurs but without prejudice to any liability for any breach committed prior to such parting.

11. **THIRD PARTY RIGHTS**

A person who is not a party to this deed shall not have any rights under, or in connection with, it by virtue of the Contracts (Rights of Third Parties) Act 1999.

12. **GOVERNING LAW**

This deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.
EXECUTED as a DEED
the COMMON SEAL OF
ROtherham METROPOLITAN
BOROUGH COUNCIL
was hereunto affixed in the presence of

Signature of witness

Name (in block capitals)  JONATHAN ARCHER
Address  FORMEC, RIVERSIDE HOUSE
         MAIN STREET, ROTHERHAM S60 1AE

EXECUTED AS A DEED by
GLEESON DEVELOPMENTS LIMITED
acting by a Director in the presence of

Director

Signature of witness

Name (in block capitals)  STEVE GAMAGE
Address  65 DARTON LANE
         DARTON, BARNsLEY S75 5AR
Appendix

Letters of Consent
Rotherham Metropolitan Borough Council
Riverside House
Main Street
Rotherham
S60 1AE

Date: 26 September 2013

Dear Sirs

Land comprising the former Croda site at Carlisle Street, Kilnhurst ("the Land") Proposed Variation ("the Variation") of Section 106 Agreement dated 28 May 2012 and made between (1) Rotherham Metropolitan Borough Council (2) Gleeson Developments Limited and (3) Croda Distillates Limited

As mortgagees of part of the Land we hereby consent to the Variation on the terms set out in the attached draft S106A Agreement.

We trust this is in order.

Yours faithfully
Signed for and on behalf of Croda Distillates Limited

D S Hill (Mrs)
Director
Rotherham Metropolitan Borough
Council
Riverside House
Main St
Rotherham
S60 1AE

16 September 2013

Dear Sirs

Land comprising the former Croda site at Carlisle Street, Kilnhurst ("the Land") Proposed Variation ("the Variation") of Section 106 Agreement dated 28 May 2012 and made between (1) Rotherham Metropolitan Borough Council (2) Gleeson Developments Limited and (3) Croda Distillates Limited

As mortgagees of part of the Land we hereby consent to the Variation on the terms set out in the attached draft S106A Agreement.

We trust this is in order.

Yours faithfully

Signed for and on behalf of Homes and Communities Agency

Judith Roberts
Head of Legal Services & Company Secretariat