

Dated _____ 2015

(1) [TUNBRIDGE WELLS BOROUGH COUNCIL]

- and -

(2) [TUNBRIDGE WELLS PROPERTY HOLDINGS
LIMITED]

Operational Agreement

DRAFT – NOT AVAILABLE FOR ACCEPTANCE

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THIS AGREEMENT is dated2015

PARTIES

- (1) **[TUNBRIDGE WELLS BOROUGH COUNCIL]** of [Town Hall, Royal Tunbridge Wells, Kent TN1 1RS] (the "**Council**"); and
- (2) **[TUNBRIDGE WELLS PROPERTY HOLDINGS LIMITED]** a private limited company registered in England and Wales with registered number {●} and registered office at [Town Hall, Royal Tunbridge Wells, Kent TN1 1RS] (the "**Company**").

WHEREAS:

- (A) The Company is a newly incorporated company and is a wholly owned subsidiary of the Council.
- (B) The Company agrees that it shall carry on its business in accordance with the terms and conditions of this Agreement and the Council agrees that it shall exercise its rights in relation to the Company in accordance with the terms and conditions of this Agreement.

IT IS AGREED as follows:

1. INTERPRETATION

- 1.1 In this Agreement, including the recitals and the Schedule, the following words and expressions shall, unless expressly stated to the contrary, have the following meanings:

"Annual Business Plan"	has the meaning given to it in clause 4.2.3;
"Articles"	means the articles of association of the Company as amended from time to time;
"Board"	means the board of directors of the Company as constituted from time to time;
"Business"	has the meaning given to it in clause 2.1;
"Business Day"	a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business;
"Parties"	means the parties to the Agreement and " Party " means either of them;
"Reserved Matters"	means the matters set out in Parts 1 and 2 of the Schedule;
"Council Policies"	means the policies and procedures of the Council; and
"Council Representative(s)"	means the persons holding, from time to time, the positions listed in clause 3.1 and " Council Representative " means any of them.
- 1.2 In this Agreement, unless the context otherwise requires:
 - 1.2.1 words denoting one gender include the other genders and words denoting the singular include the plural and vice versa;
 - 1.2.2 references to a "**person**" include a corporate or unincorporated body or association;

- 1.2.3 references to "**writing**" or "**written**" include faxes but not email;
- 1.2.4 any obligation on a Party not to do something includes an obligation not to allow that thing to be done;
- 1.2.5 any words following the terms "**including**", "**include**", "**in particular**", "**for example**" or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms;
- 1.2.6 subject to clause 9.4, references to the Parties include their respective successors and assignees or transferees (immediate or otherwise);
- 1.2.7 references to clauses, the Schedule or paragraphs are to clauses of, the Schedule to or paragraphs of the Schedule to this Agreement;
- 1.2.8 the Schedule forms an integral part of this Agreement and references to this Agreement include the Schedule; and
- 1.2.9 the headings to clauses and the Schedule and paragraphs shall not affect the construction or interpretation of this Agreement.

2. BUSINESS OF THE COMPANY

- 2.1 The Company is in the business of purchasing, acquiring, and owning freehold, leasehold or any real property, and to improve, develop, manage, grant rights or privileges in respect of, construct, repair, let on lease or otherwise, exchange, mortgage, charge, dispose of, sell, grant licences in respect of, turn to account, or otherwise deal with all or any part of the real property of the Company (the "**Business**").
- 2.2 The Board has responsibility for the supervision and management of the Company and its Business, subject to clauses 2.3 and 2.4.
- 2.3 Other than to the extent required or permitted by this Agreement, the Company undertakes to the Council that it shall not carry out any of the Reserved Matters without the Council's prior written consent.
- 2.4 The Company undertakes to the Council that it shall comply with the Council Policies as notified by the Council to the Company from time to time.

3. COUNCIL REPRESENTATIVES

- 3.1 Any consent or approval given by the Council pursuant to this Agreement may be given by the [Council Cabinet Member for Property and Major Projects], or any person nominated in writing by such persons (either to act as a Council Representative generally or in respect of any specific matter) (each a "**Council Representative**").
- 3.2 Any consent or approval given pursuant to this Agreement may be given upon such terms and subject to such conditions (if any) as a Council Representative may in his or her absolute discretion determine.

4. THE BOARD

- 4.1 The Company shall ensure that, notwithstanding anything to the contrary in the Articles, to the contrary, no person shall be appointed to the Board of the Company without the prior approval of the Council.
- 4.2 Subject to those events specified in Article 18.1 of the Articles, the Company shall ensure that no person is removed from the Board without the prior written consent of the Council.

4.3 Unless otherwise specified by the Council in writing, the Board shall consist of the following persons:

4.3.1 [the Council's Head of Economic Development who shall be the Managing Director; and

4.3.2 such additional persons as shall be nominated by the Council.]

4.4 Subject to Article 11.3 of the Articles and unless otherwise agreed by the Council, the quorum of any meeting of the Board shall be three Eligible Directors (as defined in the Articles) of whom at least two shall be non-executive directors and one shall be an executive director, provided that if the Company has less than three Eligible Directors, the quorum shall be such number of Eligible Directors as are then in office.

4.5 Unless otherwise specified by the Council in writing the [Council {●}] shall be the Company Secretary of the Company.

5. **CONFLICTS OF INTEREST**

Notwithstanding the generality of clause 2.4, the Board shall not authorise any 'conflict' as defined in Article 14.1 of the Articles where such authorisation conflicts or is otherwise inconsistent with any Council Policy.

6. **INFORMATION**

6.1 The Company undertakes to the Council that the Company shall keep the Council informed of all material matters relating to the progress of its business to such extent and in such form and detail as a Council Representative may from time to time reasonably require and shall supply to the Council such written particulars of any matters concerned with and arising out of the activities of the Company as a Council may from time to time reasonably require.

6.2 Without limiting the generality of clause 6.1, the Company shall:

6.2.1 deliver to the Council, within [5] Business Days of the end of each monthly accounting period, draft profit and loss account for such accounting period and year to date with comparison to budget;

6.2.2 deliver to the Council, within [7] Business Days of the end of each monthly accounting period (unless otherwise stated below), an information pack in relation to the Company comprising:

(a) management accounts for each accounting period including:

(i) profit and loss account for such accounting period and year to date with comparison to budget;

(ii) cash flow for such accounting period and year to date with comparison to budget;

(iii) balance sheet with comparison to budget;

(iv) a comparison between actual capital expenditure including part payments and commitments of capital expenditure and budgeted expenditure to date;

(v) an analysis of the key performance indicators for the Company as identified from time to time by the Council;

(b) reports by the directors from time to time specified by the Council;

- (c) at the end of each annual accounting period only, projected cash-flows for the next twelve months;
- (d) at the end of each quarter only, a projected profit and loss account for the remainder of the then current financial period;
- (e) a copy of any management letters to the Company which may have been issued by their auditors (in the case of the first information pack) since incorporation and (in the case of subsequent information packs) since the delivery of the previous information pack;
- (f) at the end of each quarter only, a quarterly milestone report in the form reasonably required from time to time by the Council; and
- (g) such other reports and/or information in a form specified by the Council, as the Council shall reasonably require from time to time,

all in such form and detail as the Council shall reasonably require from time to time;

6.2.3 deliver forthwith upon them becoming available and not in any event later than four months after the end of each relevant financial year to the Council copies of the audited profit and loss accounts and audited balance sheets of the Company in respect of each financial year of the Company; and

6.2.4 prepare and deliver to the Council at least 90 days before (but not earlier than 120 days before) the commencement of each of its financial years an annual business plan in respect of the forthcoming financial year (the "**Annual Business Plan**") and the Company shall endeavour to agree the content of the Annual Business Plan with the Council prior to delivering it and shall in any event procure that the budget included in each such Annual Business Plan shall be in such form and detail as the Council shall reasonably require from time to time.

6.3 The Company shall notify the Council in writing promptly upon its becoming aware of any violation by the Company of any law, statute, regulation or ordinance of any government entity, or any agency thereof, applicable to the Company which violation in any respect may materially and adversely affect the business of the Company.

6.4 On reasonable notice in writing by the Council, the Company shall permit any accountant, auditor, solicitor, valuer or other professional adviser authorised by the Council to have at all reasonable times during normal business hours, access to its premises and accounting books and records (whether for the purpose of an audit of such books and records or otherwise), to make extracts from and take copies of its accounting books and records and to discuss any matter with any of its personnel and officers and make such investigations and raise such enquiries as the Council may require from time to time.

6.5 The Company shall give written notice to the Council immediately:

6.5.1 upon becoming aware of the same of any occurrence which would or would be likely to affect its ability to achieve the projected profits before interest and tax for the current financial year set out in the then applicable Annual Business Plan;

6.5.2 in the event that the Company exceeds its then fixed overdraft limit; or

6.5.3 without prejudice to the terms of clause 2.3, in the event that the Company incurs any expenditure in excess of that permitted by the then current Annual Business Plan approved by the Council.

6.6 As soon as the same are instituted or, to its knowledge threatened, the Company shall provide written details to the Council of any litigation, arbitration or administrative proceedings or claim which might be itself or together with any other such proceedings or claim either have a material adverse effect on the financial condition of the Company.

7. TERMINATION

7.1 Subject to clause 7.2, this Agreement shall immediately terminate in the event that a resolution is passed by shareholders or creditors, or an order is made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, shareholders or other contributors.

7.2 The provisions of clause 11 shall survive termination or expiry of this Agreement.

8. WARRANTIES

Each Party warrants that it has the corporate power and capacity to enter into this Agreement and to perform its obligations hereunder.

9. DISPUTES

9.1 All disputes arising in connection with this Agreement (including its interpretation, validity, effectiveness, and termination) shall, if possible, be finally settled amicably by negotiation between the Parties. If any such dispute is not so settled within 10 Business Days after it has arisen (i.e. where either Party has formally notified the other Party in writing of their desire to resolve such dispute), either Party may, by giving further written notice to the other Party, cause the dispute to be referred to a meeting of higher management of the Parties, such higher management to consist of individuals at senior management level. The meeting shall be held within 10 Business Days following the giving of such written notice at a place to be agreed by the Parties.

9.2 If the dispute is not settled within a further period of 10 Business Days after the date of the notice referring the dispute to appropriate higher management, then the dispute shall be finally settled by reference to a mediation procedure which either Party shall be entitled to initiate. If the matter has not been resolved by a mediation procedure within 28 days of the initiation of such procedure, or if either Party refuses to participate in a mediation procedure, the dispute shall be referred to the Courts in England for resolution.

9.3 The provisions of this clause 9 will be without prejudice to either Party's rights to apply to any court of competent jurisdiction for any interim relief whatsoever and without notice.

10. NOTICES

10.1 Any notice or other communication given under, or in connection with, this Agreement shall be signed by a person duly authorised by the sending Party and shall be addressed to the person in respect of the Party to which the notice is to be sent, as set out below:

10.1.1 for notices to the Council:

Marked for the attention of: John Scarborough, Head of Legal Partnership

Address: Town Hall, Royal Tunbridge Wells, Kent
TN1 1RS

10.1.2 for notices to the Company:

Marked for the attention of: The Directors

Address: {●}

or as otherwise notified in writing from time to time (in accordance with the provisions of this clause 10) by the relevant Party to the other Party.

10.2 Notices may be delivered personally or sent by first class pre-paid recorded delivery or registered post (or by air mail to an address outside the United Kingdom) to the Party to be served at his or its address set out in this Agreement or at such other address notified from time to time by that Party by written notice to the other Party.

10.3 In the absence of evidence of earlier receipt, and subject to clause 10.4, notice shall be deemed to have been served:

10.3.1 if delivered personally, when left at the address of the relevant Party;

10.3.2 if sent by first class post, two Business Days after posting it; and

10.3.3 if sent by air mail, five Business Days after posting it.

10.4 If a notice is given or deemed to have been given on a day which is not a Business Day, it shall be deemed to have been served on the next Business Day.

10.5 Any demand, notice or other communication given or made under or in connection with this Agreement shall be in writing.

11. GENERAL

11.1 If there is any conflict or inconsistency between the provisions of this Agreement and the Articles, this Agreement shall prevail and the Parties shall, so far as they are legally able, exercise all rights and powers available to them to procure the amendment of the Articles to the extent necessary to permit the Company and its affairs to be regulated as provided for in this Agreement. Nothing in this Agreement shall be deemed to constitute an amendment to the Articles.

11.2 This Agreement constitutes the entire agreement and understanding of the Parties and supersedes any and all previous representations, arrangements, understandings and/or agreements (whether written or oral) between the Parties in relation to the subject matter of the Agreement.

11.3 Nothing in this Agreement shall be construed as establishing or implying a partnership or joint venture between the Parties or shall be deemed to constitute either Party as the agent of the other or to allow either Party to hold itself out as acting on behalf of the other.

11.4 No variation of this Agreement shall be effective unless made in writing and signed by or on behalf of each Party.

11.5 The Company may not assign or transfer any of its rights or benefits under this Agreement. The Council shall be entitled to, from time to time, assign or transfer any of its rights or benefits under this Agreement without Company's prior consent but shall as soon as reasonably practicable following any such assignment or transfer, provide the Company with written notice of the same.

- 11.6 This Agreement shall be binding on and enure to the benefit of each Party and its lawful successors.
- 11.7 Any failure or delay by a Party in exercising any right or remedy under this Agreement will not in any circumstances operate as a waiver of it, nor will any single or partial exercise of any right or remedy in any circumstances preclude any other or further exercise of it or the exercise of any other right or remedy.
- 11.8 Any waiver of any breach of, or any default under, any of the terms of this Agreement will not be deemed a waiver of any subsequent breach or default and will in no way affect the other terms of this Agreement.
- 11.9 The rights and remedies expressly provided for by this Agreement will not exclude any rights or remedies provided by law.
- 11.10 Each Party shall pay its own costs, charges and expenses in relation to the negotiation, preparation, execution and implementation of this Agreement
- 11.11 If any provision of this Agreement is prohibited by law or judged to be illegal, void, invalid or unenforceable (in whole or in part) by any court or administrative body of competent jurisdiction for any reason, that provision shall to that extent be deemed not to form part of this Agreement but the enforceability of the remainder of this Agreement shall not be affected and shall remain in full force and effect.
- 11.12 This Agreement may be executed in one or more counterparts and by the Parties on separate counterparts, but shall not be effective until each Party has executed and delivered at least one counterpart. Each counterpart, when executed and delivered, shall constitute an original of this Agreement, but all the counterparts shall together constitute the same instrument.

12. GOVERNING LAW AND JURISDICTION

- 12.1 This Agreement 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.
- 12.2 The Parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims) and submit to the jurisdiction of those courts.

This Agreement has been entered into, and delivered, by the Parties as a Deed on the date stated at the beginning of this Agreement.

SCHEDULE

Reserved Matters

Part 1

The Company shall not without the prior written consent of the Council:

1. Financial

- 1.1 make any material change to the accounting policies of the Company unless such change is required by law or by virtue of a new statement of standard accounting practice;
- 1.2 make any alteration to the Company's accounting reference date;
- 1.3 appoint or remove, or approve the remuneration for, the auditors of the Company;
- 1.4 change the bankers of the Company;
- 1.5 make any material amendment to any Annual Business Plan which has been approved by the Council or adopt any plan or take any action materially inconsistent with any such Annual Business Plan;
- 1.6 borrow any monies;
- 1.7 factor any debts or enter into invoice discounting;
- 1.8 create issue or allow to come into being any encumbrance over the whole or any part of the undertaking or assets of the Company (save for charges arising by operation of law in the ordinary course of business or under retention of title covenants with suppliers to the Company);
- 1.9 make any loan or advance (other than trade credit on normal arm's length terms) or grant any guarantee or indemnity of the obligations of any person;

2. Director's Arrangements

- 2.1 enter into any service contract with, or contract for services for, any directors of the Company or any person connected with them or vary in any material respect any existing service contract with, or contract for services for, any of their respective directors or any person connected with them;
- 2.2 enter into any service contract with, or contract for services for, any person or vary in any material respect any existing service contract with, or contract for services for, any person, which in each case would result in the Company paying such person total emoluments that exceed the amount budgeted in the then current Annual Business Plan approved by the Council by 10 per cent or more;
- 2.3 enter into any transaction, agreement or arrangement with or for the benefit of any directors of the Company;
- 2.4 terminate the directorship or employment or consultancy of any director of the Company;
- 2.5 delegate any powers of the directors to any committee of the directors of the Company;

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- 2.6 agree (or vary the terms of) the remuneration of any member of the Board, including any benefits or emoluments that might become payable by the Company to such person;

3. Material Contracts

- 3.1 effect or permit to be effected any variations or amendments to or waivers or compromises or releases under or in connection with or enter into any agreement inconsistent with any contract which is material to the Company's business;
- 3.2 enter into any contract or series of connected contracts under which the consideration payable represents more than £50,000, the consideration receivable represents on average in excess of £250,000 per annum, unless such contract or series of connected contracts is envisaged by the then current Annual Business Plan approved by the Council;
- 3.3 make any material change in the nature of the Company's business otherwise than in accordance with the Annual Business Plan approved by the Council;
- 3.4 enter into any contract which is not on arms' length terms;
- 3.5 enter into any transaction outside of the ordinary course of business of the Company;
- 3.6 make any material change to the level, scope or extent of the Company's insurance cover;
- 3.7 save as required within the normal course of business in relation to financing trade, make an application to or submit any business plan or other information to, any financial institution or other third party with a view to obtaining capital or any financial facility;
- 3.8 enter into discussions or negotiations with a view to carrying on a new business or changing any business materially, dispose of any substantial part of its assets and/or business, purchase the assets, business or share capital of any company, wind up any company, list any share capital on any stock exchange or refinance of any of its borrowings;
- 3.9 enter into, vary or terminate any agreement or arrangement which commits the Company to enter into any joint venture, licensing agreement, exclusive marketing or any other agreement that is material in the context of the business of the Company, otherwise than in the ordinary course of business or as set out in the Annual Business Plan;

4. General

- 4.1 engage any professional advisers (other than advisers in relation to matters within the normal course of its business);
- 4.2 commence or settle any litigation or other legal proceedings (other than actions to recover debts in the ordinary course of business);
- 4.3 make any charitable contributions exceeding £500 in aggregate per year;
- 4.4 acquire any interest in the share capital or instruments convertible into share capital of any other company or body corporate;
- 4.5 acquire the assets and undertaking of any other business entity or dispose of the assets and undertaking of, or any substantial part of, the Company (other than as contemplated by the Annual Business Plan approved by the Council);

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- 4.6 issue any shares in the Company or grant any options or other right to subscribe for shares in the Company;
 - 4.7 form, enter into, terminate or withdraw from any partnership, consortium, joint venture or any other unincorporated association carrying on a trade or business or any other similar arrangement whether or not with a view to profit;
 - 4.8 consolidate, amalgamate or merge the Company with any company, association, partnership or legal entity;
 - 4.9 acquire any asset where the asset to be acquired is a fixed or capital asset not budgeted for in the Annual Business Plan which has been approved by the Council if the result of so doing would be that the aggregate net book value of all such assets acquired in all such transactions by the Company in the financial period to which the Annual Business Plan relates would exceed £5,000;
 - 4.10 dispose of any asset where the asset to be disposed of is a fixed or capital asset not budgeted for in the Annual Business Plan which has been approved by the Council if the result of so doing would be that the aggregate net book value of all such assets disposed of in all such transactions by the Company in the financial period to which the Annual Business Plan relates would exceed £5,000;
 - 4.11 create, consolidate, sub-divide, convert, cancel, reduce, purchase or redeem any share capital of the Company;
 - 4.12 apply for, or pass any resolution to approve, the reorganisation, liquidation or winding-up of the Company;
 - 4.13 incorporate any subsidiary; or
 - 4.14 enter into, vary or terminate, any agreement by the Company to do any of the matters or actions listed in this Schedule.

Part 2

The Company undertakes that, unless the Council otherwise agrees in writing:

- 1.1 any expansion, development or evolution of the business of the Company will only be effected through the Company;
- 1.2 the Company shall insure with a reputable insurance office and keep so insured at all times:
 - 1.2.1 all its insurable assets and undertakings which a prudent company would insure against loss (including loss of profits), damage and such other risks as a prudent company would insure against; and
 - 1.2.2 all its insurable potential liabilities in respect of which a prudent company would insure,

all in such manner and to such extent as shall be in accordance with good commercial practice with regard to assets and liabilities of a similar character and in comparable circumstances;
- 1.3 the Company shall take all reasonable steps within its powers to protect its intellectual property rights and shall make such patent, registered design, trademark and other such applications and effect such renewals or extensions thereof as are required to keep the same in force;
- 1.4 the Company shall take all reasonable steps within its powers to protect information which is confidential to it and the Council;

- 1.5 the Company shall in connection with the environment comply with all applicable legislation and regulations and maintain all required consents, licences and permits and shall notify the Council immediately if it loses any such consent, licence or permit if any such consent or licence or permit expires; and
- 1.6 the Company shall procure that all decisions made by or on behalf of the Company which are material to the Company are approved either at a properly convened meeting of the board of directors or by a resolution in writing signed by or otherwise approved in writing by all of the directors of the Company.

SIGNATURE PAGE

SIGNED by)
for and on behalf of **[TUNBRIDGE WELLS** (Signature)
PROPERTY HOLDINGS LIMITED])
..... (Date)

WITNESS:
Signature
Name
Address
.....
.....
.....
Occupation
(PLEASE COMPLETE IN CAPITALS)

SIGNED by)
for and on behalf of **[TUNBRIDGE WELLS** (Signature)
BOROUGH COUNCIL])
..... (Date)

WITNESS:
Signature
Name
Address
.....
.....
.....
Occupation
(PLEASE COMPLETE IN CAPITALS)