

EAST AYRSHIRE COUNCIL

CABINET – 2 DECEMBER 2009

CUMNOCK TOWN CENTRE REGENERATION – OFFICE DEVELOPMENT PROJECT UPDATE AND PROPOSED ALTERATION OF CONTRACTUAL ARRANGEMENTS

Report by Depute Chief Executive/ Executive Director of Corporate Support

1 PURPOSE OF REPORT

- 1.1** The purpose of this report is to apprise cabinet of the current status of the Cumnock Town Centre Regeneration Project proposed office development and to seek the approval of Cabinet in relation to the restructuring of existing contractual arrangements with the Council's development partner Deanway Muir Limited (Deanmuir) in respect of the joint venture company Cumnock Regeneration (Office) Limited.

2 INTRODUCTION AND BACKGROUND

- 2.1** At the meeting of the now obsolete Development Services Committee on 28 November 2006 it was agreed to appoint Deanway Development Ltd, in association with the Muir Group, as the Council's development partner for the regeneration of Cumnock Town Centre. The appointment came at the conclusion of a lengthy and detailed tendering exercise carried out under the then newly established Competitive Dialogue Procedure. In addition to the proposed appointment of Deanway-Muir, the Solicitor to the Council was authorised to proceed with the preparation of all necessary legal documentation.
- 2.2** On 24 October 2007, Cabinet approved the Council's participation and membership in two separate joint venture companies namely Cumnock Regeneration (Office) Limited and Cumnock Regeneration (Retail) Limited which companies were designed to be the contractual structure between the Council and its development partners for delivery of the principal individual constituent parts of the Cumnock Town Centre Regeneration Project. Cabinet approval was given after consideration of the principal aspects of the structure of a joint venture agreement which necessarily were of a detailed and complex nature. At that time, it was also specifically identified that definitive conclusions had still to be arrived at as to whether the Council wanted to own or lease the new office development.
- 2.3** Thereafter, on 19 December 2007, in accordance with the Cabinet decision of 24 October 2007, Cabinet approved the appointment of Elizabeth Morton, Depute Chief Executive/ Executive Director of Corporate Support and, subject to Council ratification (which subsequently occurred on 28 February 2008),

Councillor Douglas Reid as the Council's nominated directors for both joint venture companies.

- 2.4 In addition it should also be noted that, at the meeting of the now obsolete Emergency Powers Committee, on 5 July 2007 it was agreed to approve the location of the proposed office development on a site lying to the south of Greenholm Road, Cumnock. At that time, various other approvals were also given in respect of the acquisition of any heritable interests deemed necessary to facilitate delivery of the project.
- 2.5 Since the above dates matters pertaining to the Cumnock Regeneration Project have been ongoing and on 18 February 2009 Cabinet were provided with update information including details of the lodgement of the detailed planning application for the office development. It was also identified at that time that a number of issues still required to be resolved to allow construction of the office development to commence.

3 THE CURRENT POSITION

- 3.1 Full planning permission for the office development was granted on 5 May 2009. Unfortunately, notwithstanding the approval by Cabinet on 20 May 2009 of the promotion of a compulsory purchase order in respect of an area of ground extending to 2631 square metres lying to the south of Greenholm Road, the statutory procedures following therefrom have not been completed. The principal reason for this is due to an objection having been lodged to the CPO by the owners of the area of ground, CPD Developments LLP, with the likely consequence being that if the CPO route to acquisition continues to be followed the entire matter is likely to require consideration and determination at a Public Local Inquiry which, at best, would not take place until late spring/early summer of 2010. Before the CPO process began the owners rejected a final offer to purchase the land in the sum of £220,000 and have consistently advised that they value the property at a significantly higher figure which is not supported by independent advice on the issue of valuation obtained by the Council.
- 3.2 With reference to issues pertaining to the Council's ultimate tenure of the office development outlined at paragraph 2.2 above, detailed consideration has also been ongoing as to whether the Council intends to own or lease the new office development. At the outset, all indicators were to the effect that in proceeding with the office development under the auspices of the joint venture agreement, the Council would provide the Council with two principal options, namely:-
- (i) **Purchase of the Office Development from the JVCo** – this option would have involved the Council purchasing the office development from the JVCo for an agreed price. This course of action would also have potentially resulted in any profits from the transaction being distributed between the Council and its development partners in accordance with an agreed formula as detailed within the joint venture

agreement. However, a considerable detrimental consequence of proceeding in this manner would have been the necessary conveyance of all of the heritable property for the development from the Council to the JVCo and thereafter to the Council once again. Accordingly, the ultimate consequence of proceeding in this manner would have been that the entire process would attract significant legal fees and also stamp duty in the region of £320,000.

- (ii) **Sale of the office development and subsequent lease-back by the Council** – at the outset this was an option which the Council wished to retain. However, members will be very much aware that since the project was originally conceived global financial markets have changed dramatically with the consequence that the economy is now in the midst of recession. The knock on effect of this situation is that potential purchasers of such an office development are currently no longer in the market and consequently this option is no longer considered to be viable.
- (iii) After consideration of these options attention turned to the formulation of a third option which is **to restructure the contractual arrangements** – this option would effectively require the complete reconfiguration of the Council's contractual arrangements with its development partners. Ultimately, the resultant contractual relationship could perhaps best be equated with a design and build contract. The principal benefits to the Council would be the absence of any requirement to convey any of the heritable interests already held by the Council to a third party, the resultant project cost savings of a minimum of £320,000 and the Council being the ultimate outright owner of the office development. Ultimately, it is considered this is now the preferred option to be exercised. After discussion, it is proposed that the reconfiguration of the contractual arrangements by the completion of an alliance agreement.

4 THE PROPOSED ALLIANCE AGREEMENT

- 4.1** As indicated above, one of the principal outcomes of proposed alliance agreement is that the Council would not require to convey any of the heritable interests in respect of the office development to a third party. The principal consequence of this is that it would obviate the requirement for payment of stamp duty. Although the amount of any stamp duty would require to be assessed at the time of transfer of the land it is estimated that the costs involved would be in the region of £320,000. In addition, in any conveyance various other legal costs (such as land register fees) would be unavoidable.
- 4.2** In terms of the current contractual arrangements Deanmuir are responsible for the provision of services to the JVCo which can be summarised as being the day to day management of the development and effectively the provision of all services pertinent to the construction of the office development. Participation in the alliance agreement would result in these services being

provided directly to the Council by Deanmuir. Whilst Deanmuir would remain responsible for delivery of these services the restructured agreement would also result in the Council entering into direct contractual relationships with the construction company and professional team including architects, engineers and cost consultants. Under the existing arrangements these contracts would also be with the JVCo.

- 4.3** In relation to financial matters, under the current JVCo structure, the Council is ultimately responsible for all costs incurred, including Deanmuir's developers fee, in the construction of the office development. The only exception to this being any sums designated as "additional profits" which may have been realised had a sale of the completed development to a third party been feasible. Project costs would also include the cost of obtaining commercial finance which could be as high as £500,000. Under the terms of the proposed restructured agreement the Council would remain responsible for all such costs but a phased or monthly payment agreement by the Council would also eliminate the need for borrowing costs. The proposed restructured arrangements in terms of overall cost are, with the exception of the SDLT saving as detailed in paragraph 4.1 above, not intended or designed to result in the Council having to meet additional expenditure. The finalised draft alliance agreement is enclosed herewith for consideration at Appendix 1.

5 LEGAL IMPLICATIONS

- 5.1** In respect of the JVCo which has been created namely, Cumnock Regeneration (Office) Limited, the intention would be that this company simply fall into dormancy and accordingly it would simply be removed from the company register. The company has no assets and any liabilities it has in terms of existing loan stock with Deanmuir would be resolved under the proposed financial arrangements of the restructured alliance agreement.
- 5.2** The restructured agreement could be reasonably be equated with a standard design and build contract. However, the Council's proposed direct contractual relationships with the members of the professional team would result in the Council having greater overall control of all matters pertaining to the development.

6 FINANCIAL IMPLICATIONS

- 6.1** The total estimated expenditure of the office development under existing arrangements is currently estimated at £8million which figure would include all development costs including the costs of the flood prevention works which will be to the benefit of the entire town centre regeneration project. Under the proposed restructured arrangements it is not anticipated that that this figure will increase but rather, taking account of some decrease in general construction costs, that a favourable variance in the Council's favour could be achieved.

- 6.2** The restructured agreement would also result in all development payments being made on phased basis commencing on the completion of the alliance agreement. These proposed financial arrangements have been fully considered by the Executive Head of Finance and Asset Management who has confirmed that the financial proposals are acceptable both in terms of the phasing of payments and overall project expenditure.
- 6.3** In summary, the proposed move from the current JVCo arrangement to the proposed alternative alliance agreement will, if approved, give rise to a total expenditure reduction of £820,000 comprising £320,000 of stamp duty which will no longer require to be paid and approximately £500,000 of debt charges which will not require to be incurred.

7 COMMUNITY PLANNING AND POLICY IMPLICATIONS

- 7.1** The regeneration of Cumnock Town Centre remains one of the major aspects of the Council's policy agenda and will impact directly on the achievement of the Improving Opportunities, Improving the Environment and Eliminating Poverty aims of the East Ayrshire Community Plan.

8 RECOMMENDATIONS

8.1 It is recommended that Cabinet:

- (i)** Agree the proposed change of approach from a Joint Venture arrangement to an Alliance Agreement, as set out in Appendix 1;
- (ii)** Remit to the Solicitor to the Council to conclude the proposed Alliance Agreement on behalf of the Council; and
- (iii)** Otherwise, to note the contents of this report.

ELIZABETH MORTON

Depute Chief Executive / Executive Director of Corporate Support

19 November 2009

LIST OF BACKGROUND PAPERS

- (i) Report to Emergency Powers Committee – 5 July 2007
- (ii) Report to Cabinet – 24 October 2007
- (iii) Report to Cabinet – 19 December 2007
- (iv) Report to Cabinet – 18 February 2009

(v) Report to Cabinet – 20 May 2009

For further information please contact David Mitchell, Solicitor to the Council on 01563 576161.

Implementation Officer: David Mitchell, Solicitor to the Council

**CUMNOCK REGENERATION (OFFICE) ALLIANCE
AGREEMENT**

amongst

EAST AYRSHIRE COUNCIL

and

DEANWAY MUIR LIMITED

and

DEANWAY DEVELOPMENT LIMITED

and

J.W. MUIR GROUP PLC

re: Cumnock Town Centre

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CUMNOCK REGENERATION (OFFICE) ALLIANCE AGREEMENT

between

- (1) **THE EAST AYRSHIRE COUNCIL**, a local authority constituted and incorporated under the Local Government etc. (Scotland) Act 1994, having its principal offices at Council Headquarters, London Road, Kilmarnock KA3 7BU (who and, in substitution therefor, whose permitted assignees are hereinafter referred to as “EAC”);
- (2) **DEANWAY MUIR LIMITED**, a company incorporated under the Companies Acts (registered number SC316556) and having its registered office at 3 Glenfinlas Street, Edinburgh, EH3 6AQ (who and, in substitution therefor, whose permitted assignees are hereinafter referred to as “Deanmuir”);
- (3) **J.W. MUIR GROUP PLC**, incorporated under the Companies Acts under number SC05878 and having its registered office at Muirhouse, Bellknowes Industrial Estate, Inverkeithing KY11 1HY (who and, in substitution therefor, whose permitted assignees are hereinafter referred to as “Muir”); and
- (4) **DEANWAY DEVELOPMENT LIMITED**, incorporated under the Companies Acts under number 03393410 and having its registered office at 27 New Dover Road, Canterbury, Kent CT1 3DN (who and, in substitution therefor, whose permitted assignees are hereinafter referred to as “Deanway”).

WHEREAS

- (1) EAC and Deanmuir are currently parties to a shareholders' agreement in relation to JVCo (as defined below) formed for the purpose of enabling the development and regeneration of the Office Land (as defined below).
- (2) EAC and Deanmuir have agreed instead to work together for the purpose of enabling the development and regeneration of the Office Land in terms of this Agreement.
- (3) Under the new arrangement, the Office Land to be developed will remain in the possession and ownership of EAC and, in connection therewith, EAC wishes to appoint Deanmuir to carry out the Services on the terms of this Agreement.
- (4) [Relevant Professionals, a Legal Adviser and a Building Contractor] (as defined below) have been selected in principle by the Parties prior to the date of this Agreement and were originally expected to be engaged by JVCo. Conditional on the continuing involvement of such persons in

the proposed Development, Deanmuir has agreed to be appointed on the terms of this Agreement.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. **INTERPRETATION**

1.1 In this Agreement unless the context otherwise requires the following words and expressions shall have the following meanings:-

- “Affiliate”** of any person means any other person that directly or through one or more intermediaries, controls, is controlled by, or is under common control with, such person;
- “Agreed Fee”** means 12.5% of all Development Costs incurred in each Monthly Period;
- “Agreement”** means this alliance agreement including the recitals hereto and the Schedules as the same may be amended from time to time by the written agreement of the Parties;
- “Alliance”** means the relationship between EAC and Deanmuir constituted by this Agreement;
- “Alternative Supplier”** has the meaning ascribed to it in Clause 16.3;
- “Architects”** means Comprehensive Design Group Limited, 299 West George Street, Glasgow, G2 4LF;
- “Building Contract”** has the meaning ascribed to it in paragraph 10.3 of Schedule 2;
- “Building Contractor”** means Muir Construction Limited or such other contractor as EAC and Deanmuir agree acting reasonably in terms of paragraph 10.3 of Schedule 2;
- “Business Days”** means Mondays to Fridays inclusive except for days which are bank or public holidays in England and/or Scotland;
- “CDM Co-ordinator”** means Halcrow Group Limited, City Park, 368 Alexandra Parade, Glasgow, G31 3AU;
- “CDM Regulations”** has the meaning ascribed to it in Schedule 1;

“Confidential Information”

means all information relating to the terms of this Agreement and all material and information (whether oral, written or in any other form) of a confidential and/or commercially sensitive nature made available by or on behalf of a Disclosing Party to a Recipient Party (whether before or after this Agreement is entered into) pursuant to or in connection with this Agreement, together with any information derived from such information and any analyses, compilations, studies and other material prepared by the Recipient Party which contain or otherwise reflect or are generated from such information, but shall not include information which:

- (a) is publicly available at the time it is made available to the Recipient Party or subsequently becomes generally available to the public other than as a result of disclosure or other act or omission by the Recipient Party; or
- (b) was available (as can be demonstrated by its written records) to the Recipient Party prior to the supply of Confidential Information, and which is free of any restrictions as to its use or disclosure; or
- (c) the Disclosing Party has agreed in writing not to treat as Confidential Information; or
- (d) is reasonably required to be disclosed by a Recipient Party to give effect to this Agreement;

“control”

(including, with correlative meaning, the terms **“controlled by”** and **“under common control with”**) means the possession, direct or through one or more intermediaries or together with persons acting in concert (as such term is defined for the purposes of The City Code on Takeovers and Mergers), of the power to direct or cause the direction of the management or policies of any person and, without limitation, for the purposes of this Agreement, an interest in shares in the capital of a company conferring in the aggregate 50% or more of the total voting rights conferred by all the issued shares in the capital of that company shall be deemed to confer control of that company;

- “Cost Consultant”** means Davis Langdon LLP, Aurora Building, 120 Bothwell Street, Glasgow, G2 7JS;
- “Date of Commencement”** means the last date of execution of this Agreement;
- “Development”** means the development and regeneration of the Site for office purposes and for flood compensatory storage space in accordance with such planning permissions therefor obtained by or on behalf of EAC;
- “Development Costs”** means the aggregate of:
- (a) all costs and expenses incurred in relation to the Development, including but not limited to, insurance, surveyors fees, legal fees, third party contractors fees, architects fees, building contractors fees, project managers fees, surveyors fees, planning consent fees; building warrant fees, Scottish Water’s fees, the Scottish Environmental Protection Agency’s fees; and
 - (b) all costs and expenses incurred in connection with: (i) the preparation and negotiation of all agreements and documentation in relation to JVCo; (ii) the establishment of JVCo; (iii) the preparation and negotiation of this Agreement; and (iv) the termination of the previous arrangements relating to JVCo,
- but excluding any legal fees incurred by Burness LLP in connection with the establishment of JVCo and/or the negotiation of the original Joint Venture Agreement;
- “Disclosing Party”** means the relevant party disclosing Confidential Information;
- “Encumbrance”** means any interest or equity of any person (including, without limitation, any right to acquire, option or right of pre-emption) or any mortgage, charge, pledge, lien or assignation or other encumbrance, priority or security interest or arrangements of any kind;

“Engineer”	means Halcrow Group Limited (Halcrow Yolles), City Park, 368 Alexandra Parade, Glasgow, G31 3AU;
“Extended Land Pre-Condition Longstop Date”	has the meaning ascribed to it in Clause 4.4.2;
“Force Majeure Event”	means any cause beyond the reasonable control of a Party including (insofar as regard such control but without prejudice to the generality of the foregoing expression) strikes, lock-outs, rebellion, act of any government or supranational body or any other competent authority, labour disputes, act of God, war damage, enemy action, riot, civil commotion, malicious damage, compliance with any law or government order, rule, regulation or direction, accident, fire, flood, storm or, where the relevant party has taken all reasonable care to avoid the same occurring, breakdown, failure or malfunction of any telecommunications, computer or other electrical or technological service or systems or computer virus (expressly excluding any cause arising from the financial position of that Party);
“Guarantors”	means each of Muir and Deanway;
“Indemnified Party”	has the meaning ascribed to it in Clause 22.2;
“in the agreed terms”	means in a form and in terms agreed or to be agreed among, or on behalf of, the Parties in writing;
“Joint Venture Agreement”	means the agreement dated 17 January 2008 entered into between, <i>inter alia</i> , EAC and Deanmuir in relation to JVCo as amended from time to time;
“Joint Venture Agreement Termination”	means the termination agreement in the agreed terms terminating the Joint Venture Agreement to be entered into between EAC, Deanmuir, JVCo, Muir and Deanway on the date of this Agreement;
“JVCo”	means a joint venture company, Cumnock Regeneration (Office) Limited, incorporated under the Companies Acts under company number SC334274 and having its registered office at Quartermile

One, 15 Lauriston Place, Edinburgh, EH3 9EP;

- “Land Pre-Conditions”** means each of the following conditions:
- (a) EAC having obtained valid and legally marketable title to the Office Land to the satisfaction of Deanmuir acting reasonably;
 - (b) detailed planning permission in respect of the Office Land having being obtained to the satisfaction of the Parties acting reasonably;
 - (c) all necessary consents in respect of the Office Land having been obtained to the satisfaction of the Parties acting reasonably; and
 - (d) a master plan in respect of the Office Land having been finalised and agreed to the satisfaction of the Parties acting reasonably;
- “Land Pre-Condition Longstop Date”** means the first anniversary of the date of this Agreement or such other date as may be agreed between the Parties;
- “Legal Advisers”** means Maclay Murray & Spens LLP, Quartermile One, 15 Lauriston Place, Edinburgh EH3 9EP;
- “Losses”** means any and all losses, liabilities, damages, compensation awards, payments made under settlement arrangements, claims, costs and expenses including (without limitation) fines, penalties and any legal obligation to effect remedial action;
- “Master Plan”** means the master plan of the Development;
- “Monthly Period”** means:
- (a) the Date of Commencement to ●; and
 - (b) each calendar month thereafter, as applicable;
- “Office Land”** means the area marked “Office Site” and delineated in red on the plan annexed at Part 1 of Schedule 4 and signed as relative to this

Agreement;

- “Parties”** means EAC and Deanmuir and the expression **“Party”** shall be construed accordingly;
- “Prescribed Rate”** means four per cent (4%) above the base lending rate of ● from time to time or such other rate of interest as may be agreed from time to time;
- “Project Manager”** means Davis Langdon LLP, Aurora Building, 120 Bothwell Street, Glasgow, G2 7JS;
- “Quantity Surveyor”** means ●;
- “Recipient Party”** means the relevant party receiving Confidential Information;
- “Relevant Professionals”** means together the Architect, the Engineer, the CDM Co-ordinator, the Cost Consultant, the Project Manager and the Quantity Surveyor;
- “Right”** has the meaning ascribed to it in Clause 23 of this Agreement;
- “Schedules”** means the schedules annexed hereto;
- “Services”** means the services set out in Schedule 1;
- “Services Agreement”** means the services agreement dated 17 January 2008 entered into between JVCo and Deanmuir as amended from time to time;
- “Services Agreement Termination”** means the termination agreement in the agreed terms terminating the Services Agreement to be entered into between JVCo and Deanmuir on the date of this Agreement;
- “Site”** means the area marked “Site” and delineated in red on the plan annexed at Part 2 of Schedule 4 and signed as relative to this Agreement;
- “Survey Pre-Condition”** means the conclusion of site and soil level measurement and environmental surveys in respect of the Office Land to the reasonable satisfaction of the Parties;
- “Survey Pre-Condition** means the date which is six months from the satisfaction or waiver

Longstop Date of the Land Pre-Conditions or such other date as may be agreed between the Parties;

“Termination Compensation” means the sum calculated in accordance with Schedule 5 in order to compensate Deanmuir where this Agreement has been terminated pursuant to Clause 4 and where Clause 4.7 applies; and

“VAT” means Value Added Tax.

- 1.2 References to any Act of Parliament includes any statutory modification or re-enactment thereof or any statutory instrument hereunder.
- 1.3 Clause and schedule headings are for ease of reference only and do not affect the construction or interpretation of this Agreement.
- 1.4 Words and expressions importing the singular shall include the plural and vice versa, words and expressions importing the masculine shall include the feminine and neuter and vice versa, and words and expressions importing natural persons shall include bodies corporate, unincorporated associations and partnerships.
- 1.5 References to Clauses, Paragraphs and the Schedules (and Parts thereof), save where expressly provided otherwise, are references to clauses of, paragraphs of and the Schedules (and the parts thereof).

2. **TRANSITIONAL ARRANGEMENTS**

- 2.1 On the Date of Commencement, insofar as such steps shall not already have been taken:
- 2.1.1 Deanmuir shall execute a stock transfer form in the agreed terms pursuant to which it will transfer its entire shareholding in JVCo to EAC;
- 2.1.2 [Deanmuir’s directors] shall resign as directors of JVCo;
- 2.1.3 EAC, Deanmuir, JVCo, Muir and Deanway shall execute the Joint Venture Agreement Termination;
- 2.1.4 EAC and Deanmuir shall execute the Services Agreement Termination; and
- 2.1.5 EAC shall procure that JVCo redeems all outstanding loan stock issued by JVCo to Deanmuir and repays all other indebtedness advanced by Deanmuir to JVCo as at the Date of Commencement and Deanmuir shall surrender all relevant loan stock certificates to JVCo for cancellation.

2.2 All events in Clause 2.1 shall be deemed to take effect simultaneously to the intent that if any such event does not take place forthwith none of the Parties hereto shall be under any obligation to complete this Agreement.

2.3 All events in Clause 2.1 shall be deemed to take effect simultaneously to the intent that if any such event does not take place it shall be deemed that none of such events took place.

3. **APPOINTMENT OF DEANMUIR**

3.1 Deanmuir shall during the period of this Agreement provide the Services as soon as reasonably practicable and in a due and proper manner and, without prejudice to the foregoing generality, shall:

3.1.1 at all times exercise all reasonable skill, care and diligence in the provision of the Services expected of an experienced provider of services similar to the Services; and

3.1.2 observe any specific written instructions from EAC in relation to the provision of the Services.

3.2 Deanmuir shall keep EAC informed in reasonable detail of all material matters relating to the provision of the Services under this Agreement and without prejudice to the foregoing generality Deanmuir shall:

3.2.1 supply EAC on request with copies of all notices and minutes of, and relating to, all meetings and copies of correspondence relating to matters affecting the provision of the Services with (if appropriate) recommendations relating thereto; and

3.2.2 give EAC due notice of the existence of any matter, fact or circumstances which will or is likely to delay or prevent the provision of the Services to EAC in accordance with the terms of this Agreement.

4. **COMMENCEMENT, DURATION, TERMINATION AND SUSPENSION**

4.1 This Agreement shall commence on the Date of Commencement and shall remain in force until terminated in accordance with this Clause 4.

4.2 Deanmuir may terminate this Agreement if EAC shall fail in any material respect to perform its obligations under this Agreement and Deanmuir having given notice to that effect to EAC specifying clearly the nature of the failing and requiring the failing to be remedied (if the failure is remediable) and a reasonable period within which the breach shall be remedied (to be not less than 21 days) and EAC shall have failed to remedy the same within the said period (if any) then

this Agreement shall terminate on the expiry of that period unless Deanmuir shall previously have withdrawn its notice, in which case, the terms of Clause 4.7 shall apply and reference to the 'Relevant Date' shall mean the date of expiry of the relevant period.

4.3 EAC may terminate this Agreement:

4.3.1 by giving notice in writing to Deanmuir if:

- (a) an order is made or a resolution passed for the winding up or liquidation of Deanmuir (except a voluntary liquidation for the purposes of reconstruction or amalgamation upon the terms previously approved in writing by EAC); or
- (b) Deanmuir calls a meeting of its creditors or makes an arrangement with or compounds with its creditors; or
- (c) an administration order is made in respect of Deanmuir under the Insolvency Act 1986 (as amended from time to time); or
- (d) Deanmuir becomes insolvent or commits any act of bankruptcy; or
- (e) a receiver or administrator is appointed or an encumbrancer takes possession of any of the assets or undertakings of Deanmuir; or
- (f) any similar or analogous event relating to the matters in this Clause 4.3.1 occurs in any jurisdiction; or
- (g) Deanmuir has been excused performance of any of its obligations because of a Force Majeure Event for a continuous period of more than 90 days which affects Deanmuir alone and not also any other business carrying on the same or any similar business; or

4.3.2 if Deanmuir shall fail in any material respect to perform its obligations under this Agreement and EAC having given notice to that effect to Deanmuir specifying clearly the nature of the failing and requiring the failing to be remedied (if the failure is remediable) and a reasonable period within which the breach shall be remedied (to be not less than 21 days) and Deanmuir shall have failed to remedy the same within the said period (if any) then this Agreement shall terminate on the expiry of that period unless EAC shall previously have withdrawn its notice; or

4.3.3 by giving written notice to Deanmuir if there is a change in the effective control of Deanmuir from that existing as at the date of this Agreement provided that no right to

terminate this Agreement pursuant to this Clause 4.3.3 shall arise for so long as Deanway or Muir (or a combination of the two) maintain complete control of Deanmuir (in whatever proportions),

and, in either case, the terms of Clause 4.7 shall apply and reference to the 'Relevant Date' shall mean (i) in the case of termination under Clauses 4.3.1 or 4.3.3, the date of the relevant notice; and (ii) in the case of termination under Clause 4.3.2, the date of expiry of the relevant period.

4.4 In the event that the Land Pre-Conditions have not been satisfied to the reasonable satisfaction of the Parties or waived in full with the consent of the Parties on or before the Land Pre-Condition Longstop Date then, as soon as practicable after Land Pre-Condition Longstop Date, Deanmuir shall serve a notice to EAC setting out whether it wishes:

4.4.1 to terminate this Agreement, in which case the terms of Clause 4.7 shall apply and reference to the 'Relevant Date' shall mean the Land Pre-Condition Longstop Date; or

4.4.2 extend the Land Pre-Condition Longstop Date by one year (or such shorter period as the Parties may agree) (the "**Extended Land Pre-Condition Longstop Date**"),

UNLESS a material breach by Deanmuir of its obligations under this Agreement (which has not been remedied within a reasonable period of time) is a significant contributing factor in the failure to satisfy the Land Pre-Conditions in which case it shall not be entitled to extend the Land Pre-Condition Longstop Date.

4.5 In the event that the Survey Pre-Condition has not been satisfied to the reasonable satisfaction of the Parties or waived in full with the consent of the Parties on or before the Survey Pre-Condition Longstop Date then this Agreement shall terminate and the terms of Clause 4.7 shall apply and reference to the 'Relevant Date' shall mean the Survey Pre-Condition Longstop Date.

4.6 Subject to Clause 4.4, where the Land Pre-Conditions have not been satisfied to the reasonable satisfaction of the Parties or waived in full with the consent of the Parties on or before the Extended Land Pre-Condition Longstop Date then this Agreement shall terminate and the terms of Clause 4.7 shall apply and reference to the 'Relevant Date' shall mean the Extended Land Pre-Condition Longstop Date.

4.7 Where this Clause 4.7 applies, on the date occurring 14 Business Days after the Relevant Date (save in the case of termination under Clauses 4.2 or 4.3.2 where a 14 Business Day period shall not be required and the following provisions shall apply on the Relevant Date itself):

- 4.7.1 EAC shall pay any and all outstanding amounts due to Deanmuir pursuant to the terms of this Agreement; and
 - 4.7.2 without prejudice to any liability in relation to antecedent breaches, this Agreement shall terminate and shall cease to have any force and/or effect save for the provision of Clauses 22 (*No Partnership or Agency*), 27 (*Costs*), 17 (*Confidentiality*) and 28 (*Governing Law*) which shall survive termination.
- 4.8 Any termination of this Agreement in accordance with this Clause 4 shall be without prejudice to:
- 4.8.1 the right of either Party to sue for damages in respect of any breach of this Agreement (including, for the avoidance of doubt, damages representing loss of future profit); and
 - 4.8.2 to the obligations of both Parties at law to mitigate their loss.

5. **FEES**

- 5.1 On the Date of Commencement, EAC shall pay to Deanmuir an initial fee equal to 12.5% of all Development Costs incurred by JVCo prior to the Date of Commencement.
- 5.2 Provided that Deanmuir complies with the obligations incumbent upon it in terms of this Agreement, EAC shall also pay to Deanmuir the Agreed Fee on the last Business Day of each relevant Monthly Period.

6. **OBLIGATIONS OF EAC**

In addition to the obligation to pay fees pursuant to Clause 5, subject to the provisions of Clause 8, EAC shall also comply with the obligations set out in Schedule 2.

7. **GUARANTEE**

- 7.1 The Guarantors, in consideration of EAC entering into this Agreement, unconditionally and irrevocably guarantee to EAC the full, due and punctual performance and observance by Deanmuir of all of Deanmuir's obligations under, or pursuant to, the terms of this Agreement. If Deanmuir fails in the full, due and punctual performance and observance of any of its obligations hereunder or thereunder then the Guarantors shall each be liable for such obligations of Deanmuir as if they were a primary obligor and not merely a surety; PROVIDED ALWAYS THAT each of the Guarantors shall only be liable for 50% of the liability of Deanmuir in this regard.
- 7.2 The obligations of the Guarantors under Clause 7.1:

- 7.2.1 shall be continuing obligations and in addition to and not in substitution for any other right or security which EAC may now or hereafter have or hold for the obligations of Deanmuir under or pursuant to this Agreement and may be enforced by EAC without EAC first having recourse to any such other right or security or taking any proceedings against Deanmuir or any steps against Deanmuir other than serving notice of any claim under this Agreement on Deanmuir and, if applicable, allowing any cure period specified in such notice to have expired without Deanmuir having performed its obligations;
- 7.2.2 shall not be satisfied, discharged, lessened, impaired or affected by any intermediate payment or settlement of account or any change in the constitution or control of, or the insolvency of, or any liquidation, winding up or analogous proceedings relating to, Deanmuir or any changes in the terms, conditions and undertakings on the part of Deanmuir contained in this Agreement; and
- 7.2.3 shall not be discharged, prejudiced, lessened, affected or impaired by any act, event, omission or circumstance whatsoever which but for this provision would or might operate to release or exonerate the Guarantors from all or any part of such obligations or in any way discharge, prejudice, lessen, affect or impair the same.
- 7.3 The Guarantors agree to subordinate and do hereby subordinate any and all claims, rights or remedies they may have against Deanmuir whether existing now or arising hereafter to any and all claims, rights or remedies of EAC against Deanmuir under or pursuant to this Agreement or otherwise.
- 7.4 Notwithstanding anything to the contrary in this Clause 7, the Guarantors shall have no greater liability to EAC than they would have had if:
- 7.4.1 the Guarantors (and not Deanmuir) had been a party to this Agreement;
- 7.4.2 the guarantee contained in this Clause 7 had not been given; and
- 7.4.3 the Guarantors (and not Deanmuir) had committed the relevant failure in performing and observing its obligations under or pursuant to the terms of this Agreement.

8. **MATTERS REQUIRING CONSENT OF DEANMUIR**

EAC hereby agrees that it shall not without the prior written consent of the Deanmuir do any of the things listed in Schedule 3 without the prior written consent of Deanmuir.

9. **PROFESSIONAL ADVICE**

9.1 When deemed necessary for the proper performance of its duties under the Agreement, Deanmuir may, with the consent of EAC (which consent shall not be unreasonably withheld or delayed), seek legal, tax, financial, administrative or other advice of a reputable professional adviser. Except to the extent such advice is required as a result of any failure by Deanmuir (or its agents, delegates or employees) to perform its duties under the Agreement, Deanmuir shall be reimbursed in respect of any costs and expenses properly incurred in obtaining and receiving any such advice where such advice is addressed to EAC and/or Deanmuir or where EAC and/or Deanmuir is otherwise expressly entitled to rely thereon.

9.2 Deanmuir may act or rely on the advice or any information obtained from any adviser or expert referred to in Clause 9.1, whether reporting to EAC or Deanmuir, provided that, in all the circumstances, it is reasonable for Deanmuir to so act or rely, and Deanmuir shall not, provided as aforesaid, be responsible for any Losses accruing to EAC because of its so acting or relying in good faith and in the proper performance of its duties or in the proper exercise of any powers or discretions vested in it under the Agreement.

10. **THIRD PARTIES**

10.1 EAC hereby authorises Deanmuir to liaise directly with, and provide instructions to, any third party on EAC's behalf in relation to the Development.

10.2 Deanmuir shall not be liable to EAC for any Losses arising directly or indirectly from the actions or omissions of any relevant third party pursuant to the exercise by Deanmuir of the authority granted under Clause 10.1 and EAC shall make good any such Losses.

11. **EXPENDITURE**

EAC shall on the last Business Day of each Monthly Period reimburse to Deanmuir all proper and reasonable costs, expenses and charges incurred by it during the relevant Monthly Period in relation to the performance of its duties under this Agreement.

12. **STRATEGY MEETINGS**

12.1 The Parties shall meet with each other fortnightly (whether in person or by means of video-conferencing, conference telephone or similar communication equipment whereby they can hear and speak to each other) at such place and at such times as shall be agreed from time to time by the Parties, or at such other times as the Parties may agree, to discuss and review the arrangements provided for in this Agreement.

12.2 Prior to each fortnightly meeting, the Parties shall notify each other of any problems relating to the Alliance for discussion at the monthly meeting. At the meeting, the Parties shall agree a plan to address such problems. Progress in implementing the plan shall be included in the agenda for the next fortnightly meeting.

12.3 Each fortnightly meeting shall be attended by:

12.3.1 in relation to EAC:

- (a) the Depute Chief Executive of EAC; and
- (b) the Head of Legal Services of EAC; and

12.3.2 in relation to Deanmuir:

- (a) Alex Galbraith; and
- (b) Ronnie Muir,

or such other person nominated by the relevant person.

13. **FINANCIAL INFORMATION**

EAC undertakes that during the term of this Agreement, it shall provide (or procure that there is provided by any quantity surveyor appointed under this Agreement in relation to the Development) to Deanmuir on the last Business Day of each Monthly Period:

13.1 a full breakdown of all Development Costs incurred by EAC during the relevant Monthly Period; and

13.2 any other information required by Deanmuir in relation to the Development Costs as it may reasonably require from time to time.

14. **VAT**

14.1 For the avoidance of doubt, all payments hereunder due by Deanmuir to EAC or by EAC to Deanmuir shall be exclusive of any Value Added Tax (“**VAT**”) which may be payable thereon.

14.2 If VAT is chargeable in connection with or by reference to any supply or deemed supply by Deanmuir to EAC or by EAC to Deanmuir in terms of this Agreement then Deanmuir or EAC (as the case may be) shall pay in addition to any such payments or other consideration (and at the like times such payments or other consideration are due and payable) an amount equal to the

VAT due thereon at the relevant rate for the time being in force in exchange for a valid VAT invoice addressed to Deanmuir or EAC (as the case may be).

15. **INTEREST**

Each Party shall pay interest at the Prescribed Rate on any payment due by it to any of the other Parties in respect of which an invoice has been properly presented and which has not been paid within 14 days after the due date, which such interest shall accrue daily.

16. **FORCE MAJEURE**

16.1 No Party shall be liable for any delay or failure to perform its obligations under this Agreement caused by or resulting from a Force Majeure Event. In the event of the occurrence of a Force Majeure Event, the affected Party shall as soon as reasonably practicable notify the other Parties and later confirm that notification in writing.

16.2 If any Party gives to the other Parties such notice as is referred to in Clause 16.1 the Parties shall use all reasonable endeavours to mitigate the effect of the Force Majeure Event and, in particular, but without limitation, shall use all reasonable endeavours to agree a solution to overcome the consequences of the Force Majeure Event as soon as reasonably possible.

16.3 If Deanmuir is unable to perform any of the Services as a result of a Force Majeure Event, EAC shall be entitled (without prejudice to any other rights which it may have) to perform (or procure the performance by another supplier (an “**Alternative Supplier**”) of the Services for:

16.3.1 such period of time as Deanmuir is unable to perform such Services as a result of the Force Majeure Event; and

16.3.2 where EAC performs (or procures performance by an Alternative Supplier) of the Services during the period referred to in Clause 16.3.1 such additional period of time as is reasonable in the circumstances which shall include any reasonable minimum contract period imposed by any Alternative Supplier; and

17. **CONFIDENTIALITY**

Each Party undertakes:

17.1 that unless compelled to do so by a court of competent jurisdiction or required by applicable law, regulation or regulatory body, it shall not disclose any Confidential Information to any person other than such of its senior employees, advisers and providers of finance as are concerned with

the transaction hereby effected and that it will use the Confidential Information solely for the purposes of giving effect to this Agreement.

- 17.2 to use all reasonable efforts to procure that all persons, entities and/or undertakings to whom it discloses the Confidential Information under Clause 17.1 (other than in circumstances where compelled to do so by a court of competent jurisdiction or required by applicable law, regulation or regulatory body) are made aware of the confidential and/or commercially sensitive nature of such information, use it solely for the purposes of giving effect to this Agreement and observe the terms of this undertaking.

18. **WARRANTIES**

Each Party warrants to other Party that:

- 18.1 it has full capacity and authority to enter into this Agreement and to perform its obligations under this Agreement and it has taken all necessary action to authorise the execution, delivery and performance by it of this Agreement;
- 18.2 all necessary resolutions of its board of directors (or equivalent) authorising its execution, delivery and performance of this Agreement have been obtained and such resolutions remain in full force and effect as of the date hereof without revocation or amendment; and
- 18.3 it is not aware of any reason which may affect its ability to perform its obligations under this Agreement.

19. **NOTICES**

- 19.1 Any notice or other communication required to be given or served under or in connection with this Agreement shall be in writing and shall be sufficiently given or served if delivered or sent to:

19.1.1 in the case of EAC:

The East Ayrshire Council, Council Headquarters, London Road, Kilmarnock KA3
7BU

For the attention of David Mitchell

Fax number: ●

or such other address as EAC may provide by notice to Deanmuir from time to time;
and

19.1.2 in the case of Deanmuir to:

Quartermile One, 15 Lauriston Place, Edinburgh EH3 9EP

For the attention of Alastair Maclean

Fax number: 0131 228 7001

or such other address as Deanmuir may provide by notice to EAC from time to time.

19.2 Any such notice or other communication shall be delivered by hand or by courier, fax or sent prepaid first class recorded delivery post. If sent by courier such notice or communication shall conclusively be deemed to have been given or served when delivered. If sent by post such notice or communication shall (unless the postal service is unable to effect delivery) conclusively be deemed to have been received on the second Business Day after the date of posting, in the case of inland mail in the United Kingdom, or on the third Business Day after the date of posting, in the case of international mail. If sent by fax such notice or communication shall be conclusively deemed to have been given or served when received as evidenced by a valid transmission confirmed receipt.

20. **FURTHER ASSURANCE**

Each Party agrees to perform (or procure the performance of) all further acts and things, and execute and deliver (or procure the execution and delivery of) such further documents, as may be required by law or as the other Parties may reasonably require for the purpose of giving the other Parties the full benefit of the provisions of this Agreement.

21. **PREJUDICIAL ACTS**

Deanmuir undertakes not to suffer or permit anything (over which it has reasonable control) to be done which may prejudice the provision of the Services in accordance with this Agreement and in particular to the extent that it may prejudice the provision of any of the Services as aforesaid Deanmuir undertakes not to provide the Services or any similar services to any other Party without EAC's prior written consent.

22. **NO PARTNERSHIP OR AGENCY**

22.1 None of the provisions of this Agreement shall be deemed to constitute a partnership amongst the Parties (or any of them) and no Party shall have any authority to bind the other Party in any way.

22.2 Each Party hereby indemnifies the other Party (the "**Indemnified Party**") for 50% of the amount of any Losses actually incurred by the Indemnified Party as a direct or indirect result of the

contractual relationship constituted by this Agreement being deemed to constitute a partnership amongst the Parties.

23. **NON-WAIVER**

No failure by any Party to exercise and no delay by it exercising, any right, power or remedy in connection with this Agreement (each a “**Right**”) shall operate as a waiver thereof, nor shall any single or partial exercise of any Right preclude any other or further exercise of such Right or the exercise of any other Right. Any express waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

24. **SEVERABILITY**

If any provision of this Agreement is held to be invalid or unenforceable, then such provision shall (so far as it is invalid or unenforceable) be given no effect and shall be deemed not to be included in this Agreement but without invalidating any of the remaining provisions of this Agreement. The Parties shall then use all reasonable endeavours to replace the invalid or unenforceable provision by a valid and enforceable substitute provision the effect of which is as close as possible to the intended effect of the invalid or unenforceable provision.

25. **ENTIRE AGREEMENTS AND VARIATIONS**

25.1 This Agreement and all documents entered into pursuant hereto shall together constitute the entire agreement between the Parties in respect of the subject matter hereof.

25.2 In the event of any conflict between this Agreement and any documents entered into pursuant hereto priority shall be given to this Agreement.

26. **ASSIGNMENT**

This Agreement shall not be assignable by any of the Parties without the prior written consent of the other.

27. **COSTS**

EAC shall meet the legal and other professional costs and expenses of both Parties in relation to the negotiation and preparation of this Agreement and all agreements and documentation in relation to the termination of the arrangements for JVCo (including the fees, costs and charges of any third party instructed by either Party pursuant to this Agreement).

28. **GOVERNING LAW**

This Agreement shall be governed by and construed in accordance with Scots law and the Parties submit to the exclusive jurisdiction of the Scottish courts.

IN WITNESS WHEREOF these presents consisting of this and the preceding [●] pages together with the Schedules are executed at ● on ● 2009 as follows:

For and on behalf of
EAST AYRSHIRE COUNCIL

by
● Director
one of its directors
before and in the presence of:

..... Witness
..... Full Name
..... Address

For and on behalf of
DEANWAY MUIR LIMITED

by
● Director
one of its directors
before and in the presence of:

..... Witness
..... Full Name
..... Address
.....

For and on behalf of
DEANWAY DEVELOPMENT LIMITED

by
● Director

one of its directors

before and in the presence of:

..... Witness

..... Full Name

..... Address

.....

For and on behalf of
J.W. MUIR GROUP PLC

by
● Director

one of its directors

before and in the presence of:

..... Witness

..... Full Name

..... Address

.....

THIS IS SCHEDULE 1 REFERRED TO IN THE FOREGOING SERVICES AGREEMENT AMONGST EAST AYRSHIRE COUNCIL, DEANWAY MUIR LIMITED, DEANWAY DEVELOPMENT LIMITED AND J.W. MUIR GROUP PLC DATED • 2009

SCHEDULE 1

Services to be provided, where appropriate, by Deanmuir

1. GENERAL MANAGEMENT

- 1.1 Provide day to day management of the Development and general development advice to EAC. Report any material issues to EAC.
- 1.2 Advise EAC of changes to the master plan of the Development and recommend appropriate action. Initiate action to bring the Development back on programme.

2. FINANCE

- 2.1 Monitor the overall cost of the Development against agreed budgets and advise EAC of any variances against budget.
- 2.2 Co-ordinate, analyse and report all design and construction related costs.
- 2.3 Check and, if appropriate, recommend the professional team's applications for payment.
- 2.4 Check and, if appropriate, recommend for payment all other invoices related to the Development.
- 2.5 Report to EAC at regular intervals (not greater than monthly intervals) on the financial matters described above.

3. PROFESSIONAL ADVISERS

Insofar as not already done:

- 3.1 Negotiate suitable contracts or deeds of appointment in respect of each of the Relevant Professionals for execution by EAC.

[NB: Or will the contractor enter into any of these directly?]

- 3.2 Check that each of the Relevant Professionals maintains in force a professional indemnity insurance policy with an insurance office of good repute (which is satisfactory to Deanmuir, acting reasonably).

- 3.3 Seek to ensure that collateral warranties (in a form satisfactory to Deanmuir, acting reasonably) will be provided by each of the Relevant Professionals.

[NB: Will collateral warranties come from them all?]

- 3.4 Check the Relevant Professionals' programmes, seek clarification of the professional adviser's programme proposals if necessary, and incorporate these into the Master Plan.
- 3.5 Advise EAC of potential or actual delays and of the cost implications and proposed preventative/remedial action.
- 3.6 Check that applications for statutory consents etc. are submitted in accordance with the Master Plan.

4. CONSTRUCTION

- 4.1 Negotiate a suitable Building Contract for execution by EAC.
- 4.2 Check the Building Contractor's programmes, seek clarification of the Building Contractor's programme proposals if necessary, and incorporate these into the Master Plan.
- 4.3 Advise EAC of potential or actual delays and the cost implications and proposed preventative/remedial action.
- 4.4 Check that applications for statutory consents etc. are submitted in accordance with the Master Plan.

5. STATUTORY APPROVALS

- 5.1 Co-ordinate and support negotiations with planning authorities, building control and other statutory bodies.
- 5.2 Check with the architect the form and content of planning applications. Seek to progress the planning process and seek to arrange that a check of all approval/refusal documents is carried out by the project team. Check that the Relevant Professionals implement and obtain formal discharge(s) of any conditions attached to a planning consent.
- 5.3 Check with the Relevant Professionals which other statutory approvals are required and that applications for approvals are submitted.
- 5.4 Check the Relevant Professionals obtain clearance from health and safety and fire officers.

6. **LEGAL SERVICES**

- 6.1 Negotiate suitable scopes of engagement or deeds of appointment in respect of the Legal Advisers for execution by EAC.
- 6.2 Co-ordinate and liaise with the Legal Advisers and other professional advisers of EAC from time to time.

7. **REPORTING AND MEETINGS**

- 7.1 Establish meetings structure. Establish procedure for convening and chairing meetings. Agree attendance, function, frequency and responsibility for recording of meetings and circulation of information. Monitor inter-design team communications and distribution of information.
- 7.2 Check appropriate information is provided to EAC.
- 7.3 Seek to agree with the professional team their reporting and recording procedures.

8. **CDM REGULATIONS**

- 8.1 Throughout the duration of the Development liaise with the CDM Co-ordinator(s), all designers and the principal contractor appointed by EAC in terms of the Construction (Design and Management) Regulations 2007 (the “**CDM Regulations**”).
- 8.2 Seek to ensure that EAC discharges its obligations in terms of the CDM Regulations. Establish the competency of all designers and contractors.

THIS IS SCHEDULE 2 REFERRED TO IN THE FOREGOING SERVICES AGREEMENT BETWEEN AMONGST EAST AYRSHIRE COUNCIL, DEANWAY MUIR LIMITED, DEANWAY DEVELOPMENT LIMITED AND J.W. MUIR GROUP PLC DATED • 2009

SCHEDULE 2

EAC'S OBLIGATIONS

General

Insofar as it is able to do so without fettering its discretion as a statutory authority, EAC hereby agrees and undertakes as follows:

1. EAC shall:
 - 1.1 give full effect to the terms and conditions of this Agreement;
 - 1.2 procure that all third parties directly or indirectly under its control shall refrain from acting in a manner which is prejudicial to the Alliance or the Development;
 - 1.3 endeavour to promote the Development;
 - 1.4 ensure that during the term of this Agreement, all transactions entered into between EAC and Deanmuir or any Affiliate of them (in so far as it relates to the Alliance) shall be conducted in good faith and on the basis set out or referred to in this Agreement;
 - 1.5 act reasonably and in good faith towards Deanmuir;
 - 1.6 do all things necessary or reasonably desirable to give effect to the spirit and intention of this Agreement; and
 - 1.7 do all things necessary or reasonably desirable to give effect to the decisions of the Parties made in accordance with the terms of this Agreement.

Services

2. EAC shall co-operate with Deanmuir and do all acts, matters and things which are reasonably required to be done by it to enable Deanmuir to properly provide the Services including:
 - 2.1 providing all documentation and information relating to the provision of the Services to Deanmuir without charge and without unreasonable delay;

- 2.2 where Deanmuir seeks a decision from EAC in relation to the provision of the Services, giving such decision without unreasonable delay; and
- 2.3 allowing Deanmuir and all surveyors, architects, contractors, sub-contractors, suppliers, construction staff, engineers, CDM Co-ordinators, cost consultants, project managers, letting agents, property consultants and others authorised by Deanmuir to have unrestricted access to the Site or any part thereof at all times for the purpose of providing the Services or any of them.

Costs

3. EAC shall pay the Development Costs as and when they fall due.

Contracts

4. As set out in Recital (4), it is a material condition of Deanmuir's entry into this Agreement that the Relevant Professionals, Legal Adviser and Building Contractor who were selected in principle by the Parties prior to the date of this Agreement (and who were to be engaged by JVCo) are appointed by EAC in relation to the Development. As a result, EAC shall enter into contracts with all the Relevant Professionals, the Legal Adviser and the Building Contractor and shall pay all costs and expenses associated with such contracts.
5. EAC shall comply at all times with the terms of the contracts referred to in paragraph 4 of this Schedule 2.
6. EAC shall procure that a duty of care letter (in a form which is reasonably satisfactory to Deanmuir) is provided in favour of Deanmuir by the Quantity Surveyor and the Project Manager appointed by EAC pursuant to paragraph 4 of this Schedule 2.

Insurance

7. EAC shall:
- 7.1 insure and keep insured (or to procure the same) on the Office Land all works carried out from time to time thereon and all fixtures and fittings thereon, against loss or damage caused by all usual risks with an insurance office of good repute for its full reinstatement value;
- 7.2 duly and punctually pay all premiums in respect of such insurance;
- 7.3 not do or permit anything to be done which may cause such insurance to become void or voidable; and

- 7.4 upon request of any officer of Deanmuir, produce a copy of the policy or policies of such insurance and the receipt for every such premium.
8. In the case of destruction or damage to any part of the Development on the Office Land by any cause or risk whatsoever EAC shall, unless the Parties otherwise agree:
- 8.1 cause the same to be reinstated and apply the insurance proceeds accordingly; and
- 8.2 bear the liability for any insurance shortfall.
- 8.3 EAC shall use all reasonable endeavours to procure that the interest of Deanmuir is noted on such policies of insurance.

Access

9. EAC shall provide Deanmuir with and/or procure there is provided to Deanmuir (and any auditors of, or other advisers to, Deanmuir) a right of access (at its own cost for itself and for its advisers) to the Office Land as may be reasonably required by Deanmuir in relation to the provision of the Services under this Agreement.

Agreed preferred bidder

10. EAC shall:
- 10.1 ensure that any Building Contract entered into will follow the design & build contract procurement route (unless otherwise agreed between the Parties, acting reasonably);
- 10.2 ensure that Muir Construction Limited will be asked to put forward its terms for the work proposed in 10.1 above; and
- 10.3 if, on the advice of Deanmuir and third party cost consultants the terms put forward in Clause 10.2 above are acceptable and considered to be reasonable arms length terms, negotiate and conclude a building contract for the Development (“**Building Contract**”) on such terms or to request that terms be put forward by other building contractor(s) and to conclude a building contract on acceptable terms with such other contractor as EAC and Deanmuir agree (acting reasonably).

Land Pre-Conditions

11. EAC shall, insofar as it shall not have already done so and without being obliged to fetter its discretion as a statutory authority, use reasonable endeavours to:

- 11.1 obtain valid and legally marketable title to the Office Land to the satisfaction of Deanmuir acting reasonably;
- 11.2 obtain all necessary consents in respect of the Office Land to the satisfaction of the Parties acting reasonably; and
- 11.3 finalise and agree the Master Plan to the satisfaction of the Parties acting reasonably.

THIS IS SCHEDULE 3 REFERRED TO IN THE FOREGOING SERVICES AGREEMENT AMONGST EAST AYRSHIRE COUNCIL, DEANWAY MUIR LIMITED, DEANWAY DEVELOPMENT LIMITED AND J.W. MUIR GROUP PLC DATED • 2009

SCHEDULE 3

Matters requiring the consent of Deanmuir

EAC hereby agrees that it shall not without the prior written consent of Deanmuir:

1. create or grant any Encumbrance over the whole or any part of the Office Land; or
2. sell the whole or any part of the Office Land on any interest therein; or
3. allow or permit any trespass or encroachment to be made or other right or title to be acquired over or in respect of the Office Land whether by limitation prescription estoppel or otherwise; or
4. create any material interest which would either adversely affect the likelihood of obtaining planning permission and/or increase the cost of the Development and/or delay commencement of the Development on any part of the Office Land; or
5. appoint, amend or terminate the appointment of any member of the professional team other than the Relevant Professionals; or
6. appoint, amend or terminate the appointment of any solicitors other than the Legal Advisers; or
7. enter into, amend or terminate any building contract with any contractor other than the Building Contractor; or
8. enter into or amend existing, legally binding agreements or documentation in relation to the Development; or
9. agree, or make changes to, the Master Plan; or
10. make any application for planning or building consent; or
11. accept the terms of any planning or building consent.

THIS IS SCHEDULE 4 REFERRED TO IN THE FOREGOING SERVICES AGREEMENT AMONGST EAST AYRSHIRE COUNCIL, DEANWAY MUIR LIMITED, DEANWAY DEVELOPMENT LIMITED AND J.W. MUIR GROUP PLC DATED • 2009

SCHEDULE 4

Part 1 - Office Land

Part 2 - Site