

Working Draft 15.02.22
For review by Solihull Metropolitan Borough Council

2023

Shareholder's Agreement
relating to
Solihull Town Centre Low Carbon Energy Network

Solihull Metropolitan Borough Council ⁽¹⁾ and
Solihull Energy Limited ⁽²⁾

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DATE

PARTIES

- (1) Solihull Metropolitan Borough Council of Council House, Manor Square, Solihull B91 3QB (**Council**).
- (2) Solihull Energy Limited of Council House, Manor Square, Solihull B91 3QB (**Company**)

BACKGROUND

- (A) The Council is establishing a heat network in Solihull Town Centre (called the **Project** in this document) as part of its commitment to a low carbon Solihull.
- (B) The Company will be the owner of the Network and will direct its operation. It will engage as necessary with the Design, Build, Operate and Maintain (DBOM) Contractor and others for the delivery of the Network and its ongoing operation and maintenance.
- (C) This Agreement regulates the operation and management of the Company and certain aspects of the relationship between the Council and the Company in relation to the development, delivery and operation of the Network.
- (D) The Council wishes to enter into this Agreement and implement the Project pursuant to powers conferred on it by the Local Government Act 2000 and all other enabling powers.

AGREED TERMS

1. INTERPRETATION

- 1.1 The definitions and rules of interpretation in Clause 1 apply:

Annual Budget	has the meaning given in Clause 7.1.
Articles	the new articles of association of the Company in agreed form to be adopted at Completion, as amended from time to time.
Board	the board of directors for the time being of the Company.
Business	the business of the Company as described in Clause 2.1 and such other business as the Council may agree in writing from time to time should be carried on by the Company.
Business Plan	the Initial Business Plan and any detailed operating plan and financial budget of the Company for subsequent financial periods approved in accordance with Clause 6.2.
Cabinet	the Cabinet of the Council.
Commercially Sensitive Information	the information of a commercially sensitive nature relating to the Company, its intellectual property rights or its business.
Completion	the date on which each of the matters described in Clause 3 has been satisfied or waived.
Council Facility Agreement	the agreed form facility agreement between the Council and the Company in relation to the provision of debt funding to the Company to be entered into at Completion.

Council Representative	a person appointed by the Council to act as its representative at meetings of directors of the Company in accordance with Clause 4.13.
Customer	a person to whom the Company provides services pursuant to a Customer Agreement from time to time.
Customer Agreement	a Customer Heat Supply Agreement, Customer Electricity Supply Agreement, Customer Heat Connection Agreement or Customer Electricity Connection Agreement.
Customer Electricity Connection Agreement	a connection agreement in the agreed form between the Company and a Customer to enable the supply of electricity.
Customer Heat Connection Agreement	a connection agreement in the agreed form between the Company and a Customer to enable the supply of heat.
Customer Heat Supply Agreement	a heat supply agreement in the agreed form between the Company and a Customer.
Customer Electricity Supply Agreement	an electricity supply agreement between the Company and a Customer.
DBOM Agreement	the Design, Build, Operate and Maintain Agreement relating to the Solihull Town Centre Low Carbon Energy Network in the agreed form between the Company and the DBOM Contractor.
DBOM Contractor	Vital Energi Limited or any successor from time to time.
Deeds of Easement	<i>[the deeds of easement required to lay, access and maintain Network assets at Paragon Bank, Solihull College and Tudor Grange Academy].</i>
Director	any director for the time being of the Company including, where applicable, any alternate director.
Disposal	includes charging, selling, leasing, assigning or transferring or agreeing to do any of the same, granting an option or similar right, creating a trust or other equitable interest and Dispose shall be construed accordingly.
Draft Business Plan	as the case may be, any draft amendments to the Initial Business Plan or any Subsequent Business Plan in respect of the next relevant Financial Year.
EIRs	the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such regulations.
Employee	a person with whom the Company has a contract of employment.
Energy Centre Lease	a lease of the land comprising the Energy Centre Site from the Council to ESCo in the form set out in Schedule 4 (Real Estate Documents) of the DBOM Agreement.
Energy Centre Site	the land adjacent to Tudor Grange Leisure Centre off Blossomfield Road as shown on the plan at Schedule 22 (Energy Centre Site Plan) of the DBOM Agreement.

Energy Centre Underlease	an underlease of the Energy Centre from the Company to the DBOM Contractor in the form set out in Schedule 4 (Real Estate Documents) of the DBOM Agreement.
Financial Year	a period of twelve months ending on the Company's accounting reference date.
FOIA	the Freedom of Information Act 2000, and any subordinate legislation made under the Act from time to time, together with any guidance and/or codes of practice issued by the Information Commissioner or relevant government department in relation to such legislation.
High Value Change	has the meaning given in the DBOM Agreement.
Initial Business Plan	the Business Plan set out in Schedule 3.
Initial Business Plan Period	the period from and including the date of this Agreement until the end of the fifth Financial Year following Completion.
Intellectual Property	any patent, copyright, registered design, unregistered design right, trademark or other industrial or intellectual property of any nature including all applications (or rights to apply) for, and renewals or extensions of such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.
Key Matter	[●].
Major Repair or Replacement	has the meaning given in the DBOM Agreement.
Network	the Solihull Town Centre low carbon energy network owned by the Company, as upgraded and extended from time to time
Network Project	a project for upgrade or extension of the Network.
On-Grant Agreement	the agreed form grant agreement between the Council and the Company in relation to the provision of grant funding to the Company to be entered into at Completion.
Request for Information	a request for information or an apparent request under the Code of Practice on Access to Government Information, Freedom of Information Act (FOIA) or the EIRs (see above).
Security Interest	any mortgage, charge, pledge, lien, encumbrance, right of set off, hypothecation, assignment by way of security, or any other agreement or arrangement which has substantially the same legal or economic effect as conferring security, however created.
Service Contract	[a service contract between the Company and a Director.] ¹
Shares	the ordinary shares of one pound (£1) in the capital of the Company.
Small Value Change	has the meaning given in the DBOM Agreement.

¹ DRAFTING NOTE: Council to confirm the terms and conditions on which the directors of the ESCo are to be appointed.

Subsidy Control Rules the relevant provisions of the EU-UK Trade and Cooperation Agreement as given effect by the EU (Future Relationship) Act 2020 and any domestic law which may supersede those provisions.

1.2 In this Agreement:

- 1.2.1 any gender includes any other gender;
- 1.2.2 the singular includes the plural and vice versa;
- 1.2.3 references to persons include bodies corporate, unincorporated associations, governments, states, partnerships and trusts (in each case, whether or not having separate legal personality);
- 1.2.4 references to Clauses and Schedules are to Clauses of and Schedules to this Agreement;
- 1.2.5 the Schedules form part of this Agreement and the expression this **Agreement** includes the Schedules;
- 1.2.6 the headings in this Agreement are for convenience only and shall not affect interpretation;
- 1.2.7 any reference to a statutory provision includes a reference to any modification, replacement, consolidation or re-enactment of the provision from time to time in force and all subordinate instruments, orders or regulations made under it;
- 1.2.8 a reference to any of the parties includes, where appropriate, persons deriving title under it;
- 1.2.9 a reference to the Company shall be deemed to include any subsidiaries of the Company from time to time;
- 1.2.10 any document referred to as being **in agreed form** is one which is in a form agreed by or on behalf of the Council and which has been signed or initialled for identification purposes by or on behalf of the Council;
- 1.2.11 general words shall not be given a restrictive interpretation by reason of their being preceded or followed by words indicating a particular class of acts, matters or things;
- 1.2.12 references to a person acting **directly** or **indirectly** include acting alone or jointly with or by means of any other person; and
- 1.2.13 references to any document (including this Agreement) or a provision thereof shall be construed as a reference to that document or provision as from time to time supplemented, varied or replaced.

2. BUSINESS OF THE COMPANY

2.1 The business of the Company will consist of developing, owning and operating a sustainable, low-carbon energy network to provide long term, secure and heat and electricity supplies in accordance with the full business case approved by the Council on [●] and approved future Business Plans and decisions made in accordance with this Agreement.

2.2 In carrying on the Business the Company shall act in accordance with:

- 2.2.1 the applicable law and regulations binding on it from time to time; and
- 2.2.2 all policies of the Council, or amendments to policies, notified to the Company by the Council from time to time (**Council Policies**).

- 2.3 Without prejudice to Clause 2.1 and Clause 2.2, the Company will be run in accordance with the following general principles, as varied from time to time with the prior written consent of the Council:
- 2.3.1 the Company shall carry on and conduct its business and affairs in a proper and efficient manner;
 - 2.3.2 the Company shall transact all of its business on arm's length terms;
 - 2.3.3 the activities of the Company shall be carried on in accordance with the Business Plan and the Annual Budget;
 - 2.3.4 the Company shall maintain or procure that there is maintained with a well-established and reputable insurer adequate insurance against all risks usually insured against by businesses carrying on the same or a similar business as that carried on from time to time by it;
 - 2.3.5 the Company shall use all reasonable endeavours to obtain and maintain in full force and effect all permissions, approvals, consents and licences required for the carrying on of its activities including supporting the securing of those required by its contracted suppliers; and
 - 2.3.6 the Company shall keep the Council Representative fully informed as to all of its financial and business affairs.
- 2.4 Without prejudice to Clause 2.2 and Clause 2.3, the Company shall notify the Council Representative as soon as practicable of:
- 2.4.1 any significant health and safety incident or issue arising as a result of its activities, including but not limited to any HSE inspection or investigation; and
 - 2.4.2 any operational or financial issues that will or may potentially impact on its reputation or that of the Council including complaints from members of the public or Network customers.

3. COMPLETION

- 3.1 Before the Company commences trading, the Council shall take or cause to be taken the following steps at directors' and shareholder's meetings of the Company or by circulation of written resolutions of the Company:
- 3.1.1 the approval of the Business Plan;
 - 3.1.2 the adoption by the Company of the Articles;
 - 3.1.3 the appointment of [A.] and [B] as directors of the Company²;
 - 3.1.4 the appointment of [D] as the Council Representative;
 - 3.1.5 the resignation of all directors of the Company other than the persons specified in Clause 3.1.3 holding office prior to the execution of this Agreement and delivery of written confirmation by each person so resigning that he has no claim or right of action against the Company and that the Company is not in any way indebted to him;
 - 3.1.6 the adoption of Council House, Manor Square, Solihull, B91 3QB as the registered office of the Company;

² DRAFTING NOTE: Council to confirm the identity of directors.

- 3.1.7 the appointment of [●]³ of [●] as bankers to the Company;
 - 3.1.8 the appointment of [●]⁴ of [●] as auditors of the Company at a fee to be agreed;
 - 3.1.9 the adoption of [31 March] in each year as the accounting reference date of the Company; and
 - 3.1.10 the subscription by the Council for such number of Shares as is set opposite its name in Schedule 1 and the allotment and issue of such shares by the Company to the Council; and
 - 3.1.11 the adoption of the following as policies of the Company:
 - (a) the Council's Financial Regulations (as updated from time to time); and
 - (b) the Council's Procurement Policy (as updated from time tom time).
- 3.2 As soon as practicable after the date of this Agreement the Company [and, where relevant, the Council] shall enter into a series of agreements including the financial agreements between the Council and the Company, the Customer Connection and Supply agreements and the property agreements.

4. BOARD OF DIRECTORS

Composition of the Board

- 4.1 The maximum number of Directors holding office at any time shall be five.
- 4.2 Subject to Clause 4.1, the Council has the right to appoint and remove all Directors.

Chair

- 4.3 The first Chair shall be [●]⁵ and shall remain as Chair of the directors for 12 months from Completion of this Agreement without payment of any fee. Thereafter the Council shall have the right to appoint the Chair.
- 4.4 If the Chair is unable to attend a Board meeting, the Board shall be entitled to nominate another Director to act as Chair in their place at the meeting.

Quorum

- 4.5 The quorum for Board meetings shall be two Directors.

Board Meetings

- 4.6 Each Director shall have one vote. The Chair shall not have a casting vote.
- 4.7 Decisions of the Board shall be decided by a simple majority of votes.
- 4.8 Meetings of the Board shall be held quarterly in such manner as the Board shall agree. Any director may call a meeting of the board at any other time in accordance with the terms of the Articles.

³ DRAFTING NOTE: Council to confirm the name and address of the ESCo's bankers.

⁴ DRAFTING NOTE: Council to confirm the name and address of the ESCo's auditors.

⁵ DRAFTING NOTE: Council to confirm which director is to be the first Chair.

- 4.9 Subject to the Articles, directors participate in a directors' meeting, or part of a directors' meeting, when:
- 4.9.1 the meeting has been called and takes place in accordance with the Articles, and
 - 4.9.2 they can each communicate to the others any information or opinions they have on any particular item of the business of the meeting.
- 4.10 In determining whether directors are participating in a directors' meeting, it is irrelevant where any director is or how they communicate with each other.
- 4.11 If all the directors participating in a meeting are not in the same place, they may decide that the meeting is to be treated as taking place wherever any of them is.

Removal of Directors

- 4.12 If the Council removes any person nominated by it as a Director then the Council shall:
- 4.12.1 procure that its nominated Director vacates office without any claim to the Company for loss of office or otherwise;
 - 4.12.2 deliver to the Company a form of compromise agreement meeting the relevant statutory requirements acknowledging that they have no claim for compensation for loss of office; and
 - 4.12.3 indemnify the Company against all direct and indirect losses, liabilities and costs which the Company may incur arising out of, or in connection with, any claim by it as Director or that Director for wrongful or unfair dismissal or redundancy or other loss arising out of such removal or loss of office.

Council Representative

- 4.13 The Council shall be entitled at all times to appoint one person to act as the Council's representative at meetings the Board and meetings of any committee of the Directors (**Council Representative**).
- 4.14 The Council Representative shall be entitled to receive notice of, attend and speak at all meetings of the Directors and meetings of any committee of the Directors and to receive copies of all board papers as if he or she were a Director, but shall not be entitled to vote on any resolutions proposed.

5. BUSINESS PLANNING AND FINANCIAL MATTERS

Dividend Policy

- 5.1 The Council acknowledges that the dividend policy of the Company shall be determined by the Board in accordance with the agreed dividend policy as set out in the Business Plan.
- 5.2 However, all distributions will be subject to:
- 5.2.1 Clause 6 (*Business Plans*);
 - 5.2.2 any restrictions imposed by the On-Grant Agreement, the Council Facility Agreement, [●] or any other funding agreements that the Company enters into after the date of this Agreement; and
 - 5.2.3 the Board having first:

- (a) made reasonable and proper provision for the working capital requirements of the Company in accordance with approved Business Plans; and
- (b) made reasonable and proper reserves for taxation of the Company.

6. BUSINESS PLANS

- 6.1 The Initial Business Plan, which sets out the business plan for the Company for the Initial Business Plan Period, and the first Annual Budget are set out in Schedule 3.
- 6.2 The Initial Business Plan and each Subsequent Business Plan and Annual Budget shall be updated, revised and adopted on an annual basis in accordance with Clause 6.3.
- 6.3 The Initial Business Plan and any Subsequent Business Plan shall be amended as follows:
 - 6.3.1 the Company shall provide a copy of the Draft Business Plan to the Council not less than [four]⁶ months prior to the end of the relevant Financial Year (as applicable);
 - 6.3.2 on receipt of the Draft Business Plan the Council will within [20]⁷ Business Days provide the Board with any amendments that it requires to be made to the Draft Business Plan;
 - 6.3.3 the Council will use all reasonable endeavours to work with the Board to agree, subject to Clause 6.3.4, the final form of the Draft Business Plan as soon as reasonably practicable following receipt by the Board of the amendments required by the Council, but in any event no later than [two]⁸ months prior to the end of the relevant Financial Year; and
 - 6.3.4 adoption of the final form of the Draft Business Plan shall be subject to the prior written consent of the Council.
- 6.4 The detailed content of each Draft Business Plan shall be developed jointly by the parties, but shall set out as a minimum:
 - 6.4.1 confirmation of the strategy and vision for the Network and the Company;
 - 6.4.2 the key objectives for the Company;
 - 6.4.3 the Company's short-term (twelve month) plan, to include a list of key Network Projects, its High Value Change [and Small Value Change] proposals, funding requirements, and sources and adequacy of funds;
 - 6.4.4 the Company's plan for a Major Repair or Replacement to be funded by the Company;
 - 6.4.5 the Company's medium term (two to five year) plan, to include a list of potential new connections to be pursued actively;
 - 6.4.6 the Company's long term (five to ten year) plan, to include a strategic plan for attracting potential new connections;
 - 6.4.7 a financial forecast and the Annual Budget;

⁶ DRAFTING NOTE: ie by the beginning of December.

⁷ DRAFTING NOTE: ie by the end of December.

⁸ DRAFTING NOTE: ie by the end of January.

- 6.4.8 an assessment of all risks and issues identified and assumptions used in the preparation of the relevant Business Plan (including any annual budget included within the Business Plan), and appropriate mitigations for the risks and issues;
- 6.4.9 an analysis of the impact of any future political and/or legislative changes or decisions;
- 6.4.10 an analysis of the Company's operating model and assessment, based on evidence provided by benchmarking or market-testing, of its efficiency and value for money;
- 6.4.11 an analysis of key operational and performance metrics in respect of the previous Financial Year and any proposed changes to key operational and performance metrics for the next Financial Year; and
- 6.4.12 an analysis of the Company's key financial data, including projected income statements, balance sheet and cash flow data.

7. BUDGETS

- 7.1 The Company shall prepare and submit for approval pursuant to Schedule 2 not later than [four]⁹ months before the start of each Financial Year, a detailed draft budget for the Company for the following Financial Year (**Annual Budget**), in the form and substance required by the Council from time to time. Initially, the Annual Budget shall include the following:
 - 7.1.1 a cashflow forecast including a statement of the source and application of funds on a monthly basis and in particular indicating the amount (if any) which it is considered prudent to retain out of projected distributable profits to meet working capital requirements and identifying (by line item) material items of revenue and capital expenditure;
 - 7.1.2 a projected profit and loss account;
 - 7.1.3 a balance sheet showing the projected position of the Company as at the end of the following Financial Year;
 - 7.1.4 a comparison with the financial model or other financial projections previously approved by the Council, with an explanation of the reasons for any material differences between the budget and the previously approved projections, and including a review of the Company's performance during the preceding year, compared with the business plan contained in the preceding Annual Budget; and
 - 7.1.5 a statement of business objectives for the Financial Year and the proposed method of achieving them, including a list of the significant activities to be undertaken describing plans for the evaluation of the risks of implementing the activities, and plans to place contracts to implement the activities (identifying where possible prospective contractors and contract values) with appropriate cross referencing to the cash flow forecast to enable the financial consequences of the activity to be understood.
- 7.2 The Annual Budget for the first Financial Year is in the agreed terms.
- 7.3 At the same time as it submits the Annual Budget, the Company shall prepare, and submit to the Council for approval, an updated draft budget for the Company for the following four Financial Years (**Rolling Budget**) in the form and substance required by the Council from time to time. Initially the Rolling Budget shall include the same items as the Annual Budget. The Rolling Budget for Financial Years two to five is in the agreed terms.

⁹ DRAFTING NOTE: *ie by the beginning of December, at the same time as the Business Plan.*

- 7.4 The directors of the Company shall keep the Budgets under review during the course of each Financial Year. The Company shall provide such supporting information concerning the proposed and actual Budgets as the Council may require, promptly upon request.
- 7.5 If the draft Annual Budget is not approved by the Council by the start of the Financial Year, then pending the resolution of the failure to agree, the Company shall not carry out any activities which are the subject of a disputed item in the draft Budget, except to the extent:
- 7.5.1 necessary in order to comply with legally binding obligations which it has previously incurred according to this Agreement; or
- 7.5.2 that the nature and amount of the item was approved in the Rolling Budget.

8. ACCOUNTS

- 8.1 The Company undertakes that it shall at all times maintain accurate and complete accounting and other financial records in accordance with the requirements of all applicable laws and, in respect of each accounting year, shall prepare financial statements in accordance with International Financial Reporting Standards.
- 8.2 It is agreed that the Council and its authorised representatives (including professional advisers) shall be allowed, subject to any restrictions contained in the Data Protection Act 2018, Privacy and Electronic Communications Regulations 2003, the General Data Protection Regulation (EU) 2016/679 and any other relevant data protection legislation, access at all reasonable times and on reasonable notice to examine (and to take copies at the Company's reasonable expense) the books and records of the Company.
- 8.3 All books and records of the Company shall be retained for a period of at least six years from the end of the accounting period to which such records relate or, if later, the time at which any tax liabilities of the Company in respect of such accounting period have been finally determined.
- 8.4 The Company undertakes that it shall provide to the Council such key financial, project and other reports and updates as the Council may reasonably require, to ensure that both are made aware of, and kept abreast of, key issues and developments, including:
- 8.4.1 by not later than the [10th]¹⁰ Business Day following the end of the [month][Quarter] to which they relate, [monthly][Quarterly] management accounts for the Company containing such information as the Council shall agree from time to time;
- 8.4.2 by not later than the [10th]¹¹ Business Day of each [month][Quarter], a detailed cash-flow forecast for the Company in respect of the period of 12 months commencing on the first day of the next calendar month;
- 8.4.3 within [10] Business Days of each [month][Quarter], an updated risks and issues register;
- 8.4.4 within [10]¹² Business Days from the end of the Financial Year to which they relate, draft annual accounts for the Company;
- 8.4.5 within [three]¹³ months from the end of the Financial Year to which they relate, annual audited accounts for the Company;

¹⁰ DRAFTING NOTE: Council to confirm time period required.

¹¹ DRAFTING NOTE: Council to confirm time period required.

¹² DRAFTING NOTE: Council to confirm time period required.

¹³ DRAFTING NOTE: Council to confirm time period required.

- 8.4.6 an annual report on the activities undertaken by appointed contractors in accordance with their Social Value commitments;
- 8.4.7 a copy of the Annual report on the performance of the DBOM Contractor;
- 8.4.8 a report on the Company's performance relating to customer service standards; and
- 8.4.9 an annual report on the carbon emissions reduction of the Network and the proportion of heat and electricity generated by source; and
- 8.4.10 an annual report detailing compliance with environmental, health and safety, and ethical and social responsibility in such form as shall be specified by the Council from time to time.

9. MATTERS REQUIRING CONSENT

Board to manage the Business

- 9.1 Subject to the Articles and Clause 9.2, decisions relating to the operation of the Company's business and which may lawfully be made by the Board shall be made by the Board in accordance with Clause 4.

Matters reserved for the Council

- 9.2 The Company shall not carry out any matter listed in Schedule 2 without the consent of the Council, provided that if the matter has been expressly referred to and approved in the Business Plan that applies to the Company at the relevant time it shall be deemed to have been approved.

10. FUNDING OF THE COMPANY

No Obligation For Further Funding

- 10.1 The Council shall not be required to subscribe for any further Shares or to provide any additional funding for the Company or provide any guarantees or security for the obligations of the Company, whether as a result of the Company securing additional funding or otherwise, other than as subsequently agreed by the Council.

Sources of Funding

- 10.2 The Council agrees that the requirements of the Company for working capital to finance the Business are to be met as far as practicable by the Council Facility Agreement and by borrowings from banks and other similar sources on the most favourable terms reasonably obtainable as to interest, repayment and security, but without allowing any prospective lender a right to participate in the equity share capital of the Company as a condition of any loan.

11. SUBSIDY CONTROL

- 11.1 The Company acknowledges that it and the Council are both public bodies and are subject to the Subsidy Control Rules.
- 11.2 The Company shall:
 - 11.2.1 ensure that any transaction to be entered into by it or that has been entered into by it complies with the Subsidy Control Rules; and
 - 11.2.2 keep all transactions entered into by it under review to ensure compliance with the Subsidy Control Rules.

- 11.3 To the extent that the Company shall have reasonable grounds to believe that a proposed transaction or a transaction previously entered into by it may constitute unlawful subsidy or otherwise fail to comply with the Subsidy Control Rules, it shall immediately notify the Council Representative and shall provide the Council with such information as it may reasonably require so as to enable the full assessment of the relevant transaction. Where the transaction has yet to be entered into, the Company shall not enter into it without the prior written consent of the Council.
- 11.4 If unlawful subsidy has arisen, where reasonable the Company will use reasonable endeavours to procure that the transaction is restructured so as to ensure that it complies with the Subsidy Control Rules.
- 11.5 Where such restructuring is not possible for any reason, the Company shall ensure that any relevant sums (including any applicable interest) are recovered from the recipient of the subsidy so as to enable the parties to comply with their Subsidy Control Rules obligations.

12. CONFIDENTIALITY AND PUBLICITY

- 12.1 Without prejudice to Clause 8.2, but subject to any restrictions contained in the Data Protection Act 2018, Privacy and Electronic Communications Regulations 2003, the General Data Protection Regulation (EU) 2016/679 (as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018) and any other relevant data protection legislation, and notwithstanding the duties owed by each of the Directors to the Company, any Director nominated by the Council shall be entitled to disclose any information and provide relevant documents and materials about the Company to, and discuss its affairs, finances and accounts with, appropriate officers, employees and representatives of the Council where such persons are required to know the same to carry out their duties or functions. Any information, documents and materials supplied or disclosed to the Council in accordance with Clause 8.2 or this Clause 12.1 shall, subject to Clause 12.3, be kept strictly confidential in accordance with Clause 12.2.
- 12.2 Subject to Clause 12.3, the Council shall (and shall ensure that its officers, employees and representatives shall) safeguard, treat as confidential and not use for the purposes of its own business any information, documents or materials which it acquires in connection with or as a result of this Agreement and which relates to the provisions or subject matter of this Agreement.
- 12.3 Clause 12.2 shall not apply to any disclosure:
- 12.3.1 required by law or by the rules of any recognised stock exchange or any governmental, regulatory or supervisory body or court of competent jurisdiction, in which circumstances the party concerned shall, as far as practicable, supply a copy of the required disclosure to the other parties before it is disclosed and comply with the reasonable requests of the other parties regarding the extent of such disclosure;
 - 12.3.2 of information where such information has come into the public domain otherwise than through breach of Clause 12.2;
 - 12.3.3 reasonably required to be made in order to enforce any provision of this Agreement or any other agreement to which the Council is a party;
 - 12.3.4 of details of the Company's affairs, finances and accounts to:
 - (a) the professional and financial advisers of the Council, where such advisers are required to know the same to carry out their duties or functions;
 - (b) any tax authority to the extent reasonably required for the purposes of the tax affairs of the Council; and
 - 12.3.5 to a proposed bona fide transferee of the Council's Shares, provided always that such disclosure is strictly for the purpose of enabling such third party to determine whether

or not to make an offer for such Shares, or to determine the level of such an offer and that the person to whom such disclosure is made enters into customary confidentiality undertakings which at least mirror the terms of Clause 12.2.

- 12.4 Where Confidential Information is disclosed to a third party in reliance on any of the exceptions referred to in Clauses 12.3.4(a) or 12.3.5 the Council shall be responsible for any subsequent disclosure of such information by the recipient, as if any such disclosure were made by the disclosing party itself and not the recipient.
- 12.5 The obligations of confidentiality in Clause 12.2 shall survive the termination of this Agreement and shall continue unless and until any of the relevant Confidential Information enters the public domain through no fault of the relevant party or of any other person owing a duty of confidentiality to the relevant party to which the relevant Confidential Information relates.
- 12.6 The Company shall not make any press announcements or publicise this Agreement or its contents in any way; except as required by law, any government or regulatory authority, any court or other authority of competent jurisdiction or with the prior written consent of the Council[, such consent not be unreasonably withheld or delayed].
- 12.7 The Company shall not use the Council's Intellectual Property, including its name or logo, in any communication, promotion or marketing or announcement of orders, except as required by law, any government or regulatory authority, any court or other authority of competent jurisdiction, without the prior written consent of the Council[, which shall not be unreasonably withheld or delayed].

13. FREEDOM OF INFORMATION

- 13.1 The Company acknowledges that the Council is subject to the requirements of the FOIA and the EIRs. The Company shall:
- 13.1.1 provide all necessary assistance and cooperation as reasonably requested by the Council to enable the Council to comply with its obligations under the FOIA and EIRs;
 - 13.1.2 transfer to the Council each Request for Information relating to this Agreement that it receives as soon as practicable and in any event within two Business Days of receipt;
 - 13.1.3 provide the Council with a copy of all Information belonging to the Council requested in the Request for Information which is in its possession or control in the form that the Council requires within five Business Days (or such other period as the Council may reasonably specify) of the Council's request for such information; and
 - 13.1.4 not respond directly to a Request for Information unless authorised in writing to do so by the Council.
- 13.2 The Company acknowledges that the Council may be required under the FOIA and EIRs to disclose Information (including Commercially Sensitive Information) without consulting or obtaining consent from the Company. The Council shall take reasonable steps to notify the Company of a Request for Information (in accordance with the Secretary of State's section 45 Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the FOIA) to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this Agreement) the Council shall be responsible for determining in its absolute discretion whether any Commercially Sensitive Information and/or any other information is exempt from disclosure in accordance with the FOIA and/or the EIRs.

14. EFFECT OF TERMINATION

- 14.1 The provisions of this Agreement stated to remain in effect after termination of this Agreement and this Clause 14.1 and the Clauses referred to in Clause 14.3 shall remain in full force and effect following such termination.

14.2 For the purposes of Clause 14.1, the relevant Clauses are [Clause 1 (Interpretation), Clause 16 (Severance), and Clause 19 (Governing Law and Jurisdiction)]¹⁴.

14.3 Termination of this Agreement shall not affect any rights or liabilities that the parties have accrued under it.

15. WAIVER

15.1 No failure to exercise or any delay in exercising any right or remedy under this Agreement shall operate as a waiver of it or of any other right or remedy under it. No single or partial exercise of any such right or remedy shall prevent any further or other exercise of it or the exercise of any other right or remedy.

15.2 Any waiver given must be in writing and expressly stated by a duly authorised director to be a waiver. Such a waiver will only apply to the specific events to which it is stated to relate and not to any other events, whether past or future.

15.3 The rights and remedies provided by this Agreement are cumulative and (unless otherwise provided in this Agreement) are not exclusive of any rights or remedies provided by law or in this Agreement.

16. SEVERANCE

16.1 If any provision of this Agreement shall be found by any court or body or authority of competent jurisdiction to be invalid or unenforceable, such provision shall be severed from the remainder of this Agreement which shall remain in full force and effect to the extent permitted by law.

16.2 If any provision of this Agreement is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted or modified, the provision in question shall apply with such modification as may be necessary to make it valid.

16.3 In the circumstances referred to in Clause 16.1 and providing Clause 16.2 does not apply, the parties shall use all reasonable endeavours for a period of 30 days to substitute for any invalid or unenforceable provision a valid or enforceable provision which achieves to the greatest extent possible the same effect as would have been achieved by the invalid or unenforceable provision. During such period, the obligations of the parties under any invalid or unenforceable provision of this Agreement shall be deemed suspended.

17. MISCELLANEOUS

17.1 If there is any ambiguity or conflict arising between the terms of this Agreement and those of the Articles, the terms of this Agreement shall prevail.

17.2 Notwithstanding any other provision contained in this Agreement, the Company shall not be bound by any provision of this Agreement to the extent that it would constitute an unlawful fetter on any statutory power of the Company, but any such provision shall remain valid and binding as regards all other parties to which it is expressed to apply.

18. NOTICES

How notices should be given

18.1 Any notice given under this Agreement shall be in writing and delivered by hand or prepaid recorded, special delivery or first class post to the address of the party who is to receive such notice as set out on page 1 of this Agreement or to such other address in the United Kingdom as

¹⁴ DRAFTING NOTE: To be reviewed and finalised when the Shareholder's Agreement is final.

may from time to time be specified in writing by the relevant party as its address for the purpose of this Clause 18.

- 18.2 A notice given under or in connection with this Agreement is not valid if it is sent by electronic mail.

Deemed receipt

- 18.3 A notice shall be deemed to have been received:

18.3.1 if delivered by hand, at the time of delivery; and

18.3.2 if sent by prepaid recorded, special delivery or first class post, on the second business day after the date of posting;

- 18.4 A notice received or deemed to be received in accordance with Clause 18.3 on a day which is not a business day or after 5.00pm on any business day shall be deemed to be received at 9.00am on the next business day.

Proving service

- 18.5 In proving service:

18.5.1 by delivery by hand, it shall be necessary only to show that delivery was made; and

18.5.2 by post, it shall be necessary only to prove that the notice was contained in an envelope which was properly addressed and posted in accordance with this Clause 18.

19. GOVERNING LAW AND JURISDICTION

- 19.1 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 laws of England and Wales.

- 19.2 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes or claims (including any non-contractual disputes or claims) which may arise out of or in connection with this Agreement, its subject matter or formation (or any documents entered into in accordance with its provisions) or as to the rights and liabilities of the Council in connection with the Business and their holding of Shares and, for such purposes, irrevocably submits to the exclusive jurisdiction of the courts of England and Wales.

20. VARIATION

Subject to Clause 21.2, no amendment or variation of the terms of this Agreement or any documents entered into or delivered in accordance with its provisions shall be effective unless made or confirmed in writing and signed by all the parties to this Agreement or such document.

21. RIGHTS OF THIRD PARTIES

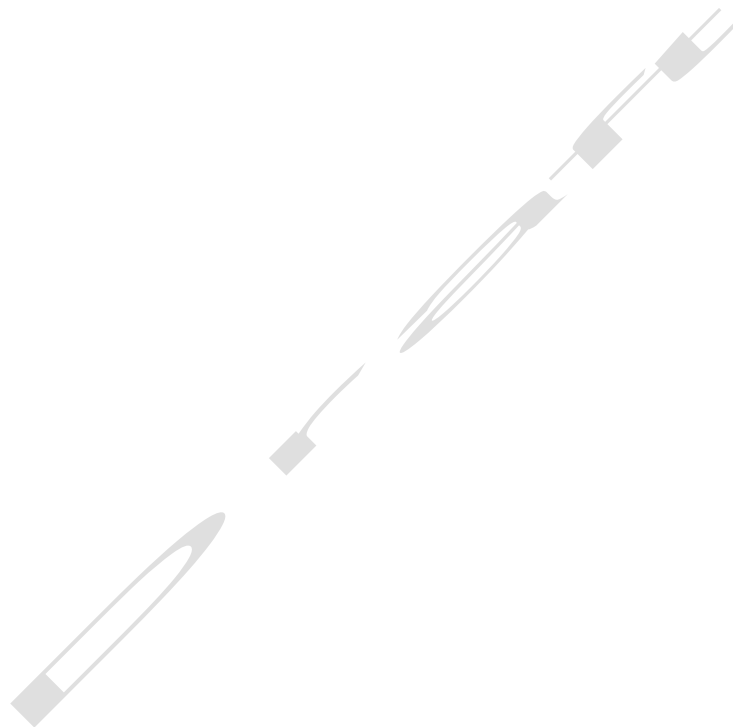
- 21.1 This Agreement does not create, confer or purport to confer any benefit or right enforceable by any person not a party to it except that a person who is a permitted successor to or assignee of the rights of a party to this Agreement is deemed to be a party to this Agreement.

- 21.2 Any variation, rescission or termination of any term of this Agreement shall only be effective if agreed in writing by the Council and no other person's agreement or consent shall be required for such variation, rescission or termination.

22. COUNTERPARTS

This Agreement may be executed in any number of counterparts all of which taken together shall constitute one and the same document, and any party may execute this Agreement by signing any one or more of such counterparts.

This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it



SCHEDULE 1

Details of the Company Immediately After Completion

Name: []

Share Capital: []

Post Completion shareholdings:

Name	Number of Shares Held	Percentage
Solihull Metropolitan Borough Council	1 ordinary share of £1.00	100%

Registered Office: []

Directors appointed by the Council: []

Auditors: []

Bankers: []

SCHEDULE 2

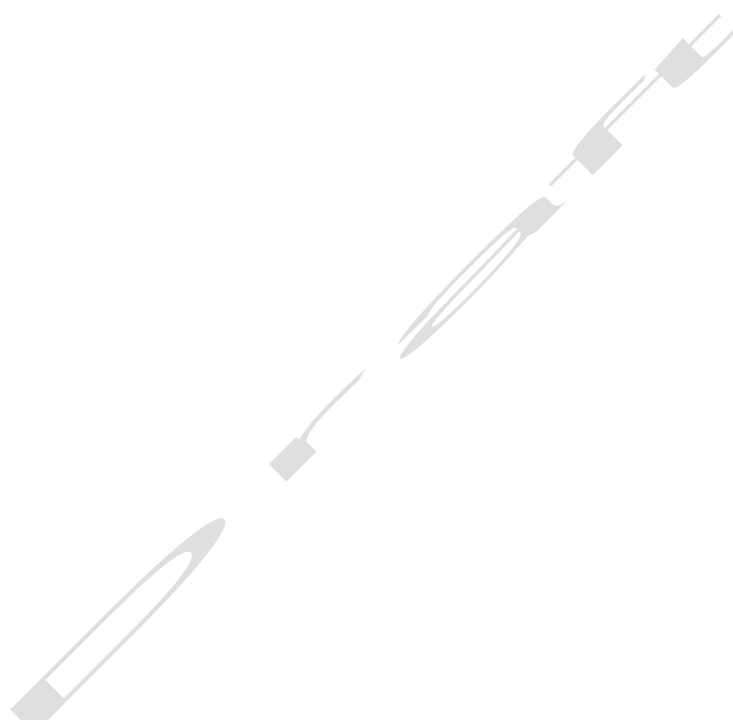
Matters Reserved for the Council

Ref	Description
A	Financial
A1	Application for or acceptance of grant funding not already provided for in an approved Business Plan.
A2	Any financial expenditure or commitment that is not contained in an approved Business Plan.
A3	Creation by the Company of any Security Interest over the whole or any part of the Company's assets, property or undertaking.
A4	Borrowing by the Company of any amount except as provided for in the Council Facility Agreement.
A5	Acquisition or Disposal by the Company of an interest in any asset (not otherwise referred to in the approved Business Plan), provided that A12 shall apply to any capital account expenditure or capital asset realisations.
A6	The Company entering into a legally binding agreement other than the DBOM Agreement or any other agreement expressly provided for in an approved Business Plan.
A7	The Company entering into a contract for the acquisition of heat or electricity.
A8	The Company entering into a contract for the supply of heat or electricity other than substantially in the form of a template approved by the Council. ¹⁵
A9	The Company making any loan, advance or credit (other than normal trade credit).
A10	The Company giving any guarantee or indemnity.
A11	Disposal by the Company of a material part of the undertaking, property and/or assets of the Company or contracting to do so.
A12	Expenditure by the Company on capital account or the realisation of capital assets unless provided for in an approved Business Plan.
A13	The Company taking or agreeing to take any leasehold interest or licence over land.
A14	The Company entering into any contract or transaction except in the ordinary course of the Business and on arm's length terms.
A15	Acquisition or subscription for shares, debentures or securities in any person by the Company.
A16	Any material change to a current Business Plan.
A17	Declaration and/or payment of any dividends by the Company unless in accordance with the dividend policy set out in any approved Business Plan.
A18	Alteration of the Company's accounting reference date.

¹⁵ DRAFTING NOTE: Council to pre-approve connection and supply templates, as appropriate.

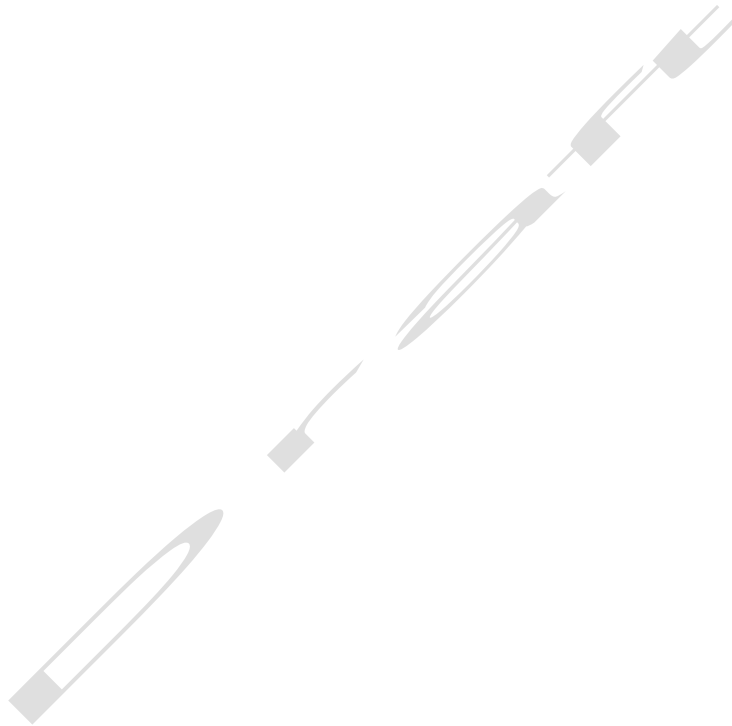
Ref	Description
A19	Appointment of new auditors to the Company.
A20	Appointment of new bankers to the Company.
A21	Amendments to the DBOM Agreement or any Customer Agreement.
A22	Factoring or assignment of book debts of the Company.
A23	Change in accounting or taxation policies of the Company other than in accordance with changes in the applicable accounting standard.
A24	Commencement or settlement of legal or arbitration proceedings involving the Company and a claim (including costs).
A25	Entry into a scheme of arrangement or (unless required to do so by law) the winding up of the Company.
A26	The Company entering into any partnership or profit sharing arrangement.
B	Management, Directors and Employees
B1	Remuneration of any officer or employee of the Company policies.
B2	The provision of any bonuses, dividend payments or other rewards.
B3	Appointment or removal of any Director.
B4	Appointment or removal of any Employee.
B5	Establishment of any committee of Directors.
B6	Adoption of any pension scheme, share option scheme or similar arrangement by the Company.
C	Share/Loan Capital and Constitutional Matters
C1	Issue or the creation of any shares in the Company unless expressly permitted by the Articles.
C2	Change in the Company's registered office.
C3	Allotment of any shares in the Company or the granting of any right to subscribe for or to convert any security into shares in the Company other than in accordance with the Articles.
C4	Creation, acquisition or Disposal of any subsidiary (or shares in a subsidiary) of the Company.
C5	Taking any step to appoint an administrator of the Company or to wind up or dissolve the Company (although this is subject to the statutory duties of the Directors).
C6	Issue of any debentures or securities convertible into Shares or the issue of share warrants or options in respect of Shares.
C7	Repurchase or cancellation by the Company of any shares or the reduction of the amount (if any) standing to the credit of its share premium account or capital redemption reserve or any other reserve of the Company.

Ref	Description
C8	Repurchase, repayment, redemption or cancellation of any loan stock issued by the Company.
C9	Capitalisation of profits or reserves of the Company.
C10	Change in the status of the Company from a private limited company.
C11	Any amendment or variation to this Agreement or the Articles.
C12	Any change to the Company name, logo or branding from that described in an approved Business Plan.



SCHEDULE 3

Initial Business Plan ~~and including~~ Annual Budget



The Common Seal of the **Metropolitan Borough of Solihull** was affixed in the presence of

.....

Authorised Signatory

Executed as a deed by **insert name of Company** acting by *insert name of director*, a director, in the presence of *insert name of witness*:

Signature (Witness).....

Print Name.....

Address.....

.....

Occupation.....

.....

Director