**DATED** **xx/xx/xxxx**

(1) **ESSEX COUNTY COUNCIL**

‑ and ‑

(2) **xxxx**

Early Years and Childcare Capital Funding Agreement

EYCC Ref: S106 - 2024

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###### THIS AGREEMENT is dated

###### PARTIES

1. **Essex County Council** of County Hall, Market Road, Chelmsford, Essex CM1 1QH (“**the** **Council”**)
2. **xxxxxxxxxx** (“Provider”).

Each a Party and together the Parties

###### BACKGROUND

1. The Council has a duty to ensure all children have access to high quality early years and childcare provisions that help them reach their potential. It fulfils this duty through a commitment to partnership working with early years providers in the PVI sector.
2. This funding agreement supports the Council’s statutory duty under the Childcare Act 2006 of ensuring sufficient childcare provision for parents who want or need it in order to work or attend training.
3. Section 106 of the Town and Country Planning Act 1990 allows a Local Planning Authority to enter into an agreement which imposes planning obligations on land owners and developers which can restrict the implementation of development of land until either infrastructure has been provided or payment is made towards its provision. Under this provision the Council may request land, buildings and/or financial contributions to develop Early Years and Childcare (EYCC) services to meet the increased demand created by the impact of the development on the local area. Each s106 contribution is index linked to the cost of infrastructure provision at the start of the relevant financial year.
4. The Council’s standard covenant is to spend the funding on providing early years and childcare services and for any unspent monies to be repaid after 10 years. Planning obligations within the s106 agreement typically require the payment received to be spent within the ward or within 3 miles of the development site and require that the funding is used to provide pupil places arising as a direct result of the provision of that particular development.
5. Expenditure of s106 monies must comply with the legal tests in regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 as amended. The planning obligation requiring (for example early years education funding contributions) must therefore be:

1. necessary to make the development acceptable in planning terms

2. directly related to the development; and

3. fairly and reasonably related in scale and kind to the development.

1. The Council is able to award Capital Funding pursuant to the general power of competence contained in the Localism Act 2011. Section 1(1) of the Act gives a local authority the power to do anything that individuals may do subject to certain limitations, none of which apply in this instance.

The Council has agreed to pay the Capital Funding to the Provider to assist it in carrying out the Project.

1. This Funding Agreement sets out the terms and conditions on which the Capital Funding is made by the Council to the Provider to ensure that the capital funds are utilised in accordance with the Council’s requirements and the s106 obligations.
2. These terms and conditions are intended to ensure that the Capital Funding is used for the purpose for which it is awarded.

###### AGREED TERMS

###### 1. DEFINITIONS

* 1. In this Funding Agreement the following terms shall have the following meanings:

Application Form: the form provided as Schedule 5 that shall be completed by the Provider and sent to the Council to request payment of any part of the Fund as set out in Schedule 2 (Payment Profile), together with supporting evidence that shall for the avoidance of doubt include copies of invoices/receipts/or valuation certificates pertaining to the Project and equalling the amount claimed together with any other documentary evidence as shall be reasonably required by the Council to substantiate the amount requested

Bribery Act**:** the Bribery Act 2010 and any subordinate legislation made under that Act from time to time together with any guidance or codes of practice issued by the relevant government department concerning the legislation.

Capital Expenditure: money spent on the acquisition or construction of an asset (e.g. land and/or buildings) that:

* Will be held for use in the delivery of services; and
* Are expected to be used during more than one financial year.

Capital Funding**:** the sum of **£xx,xxx** to be paid to the Provider in accordance with this Funding Agreement.

Capital Funding Period**:** the period for which the Capital Funding is awarded starting on the Commencement Date and ending on the last day of the twelfth month from the commencement date

**Clawback:** the process of recovery of funds if specified services cease to be delivered during the Asset Liability Period

Commencement Date**:** Date agreement signed by provider

**Conditions Precedent:** shall mean the conditions as set out in clause 2.

Data Protection Legislation: means the GDPR and any national implementing laws, regulations and secondary legislation as amended from time to time.

Funding Agreement: means this Agreement dated xxxx

Funding Specification: means the funding described in Schedule 1

Asset Liability Period: the period during which the fixed asset is available for the delivery of service provision in accordance with the application and service specification documents.

Governing Body**:** the governing body of the Provider including its directors or trustees.

GDPR: means the General Data Protection Regulations ((EU) 2016/679)

Intellectual Property Rights**:** all patents, copyrights and design rights (whether registered or not) and all applications for any of the foregoing and all rights of confidence and know-how however arising for their full term and any renewals and extensions.

Know-How**:** information, data, know-how or experience whether patentable or not and including but not limited to any technical and commercial information relating to research, design, development, manufacture, use or re-sale.

**Necessary Consents:** means planning permission and all other consents, licences, permissions and approvals whether patentable or not and including but not limited to any technical and commercial information relating to research, design, development, manufacture, use or sale

Payment Schedule: means the payments profile set out in Schedule 2 and as agreed between the Council and the Provider.

Prohibited Act**:** means:

### offering, giving or agreeing to give to any servant of the Council any gift or consideration of any kind as an inducement or reward for:

#### doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Funding Agreement or any other contract with the Council; or

#### showing or not showing favour or disfavour to any person in relation to this Funding Agreement or any other contract with the Council;

### entering into this Funding Agreement or any other contract with the Council where a commission has been paid or has been agreed to be paid by the Provider or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Council;

### committing any offence:

#### under the Bribery Act;

#### under legislation creating offences in respect of fraudulent acts; or

#### at common law in respect of fraudulent acts in relation to this Funding Agreement or any other contract with the Council; or

### defrauding or attempting to defraud or conspiring to defraud the Council.

Project**:** means the services described in Section 3 of the Application Form at Schedule 5.

Project Manager**:** the individual who has been nominated to represent the Council for the purposes of Funding Agreement.

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# 2. CONDITIONS PRECEDENT

## 2.1 The rights of the Provider and obligations of each of the Parties to this Agreement are conditional on the Provider obtaining all necessary consents to include but not limited to planning permission and providing evidence of full compliance with and the discharge of all planning conditions save where any such planning condition is a continuing obligation and therefore incapable of being discharged and all other consents, licences, permissions and approvals whether of a public or private nature which shall be relevant in the context of the Project.

# PURPOSE OF CAPITAL FUNDING

## The Provider shall use the Capital Funding only for the delivery of the Project to enable provision of early years and childcare services as stated in the Application (schedule 5) and Service Specification (schedule 6) documents and in accordance with the terms and conditions set out in this Funding Agreement. The Capital Funding shall not be used for any other purpose without the prior written consent of the Council.

## The Provider shall not make any significant change to the Project without the Council's prior written consent.

## Where the Provider intends to apply to a third party for other funding for the Project, it will notify the Council in advance of its intention to do so and, where such funding is obtained, it will provide the Council with details of the amount and purpose of that funding. The Provider agrees and accepts that it shall not apply for duplicate funding in respect of any part of the Project or any related administration costs that the Council is funding in full under this Funding Agreement.

# 4 PAYMENT OF CAPITAL FUNDING

## Subject to Clause 13, the Council shall pay the Capital Funding to the Provider in accordance with Schedule 2, subject to the necessary funds being available when payment becomes due. The Provider agrees and accepts that payments of the Capital Funding can only be made to the extent that the Council has available funds.

## No Capital Funding shall be paid unless and until the Council is satisfied that such payment will be used for proper expenditure in the delivery of the Project. Equipment or other assets purchased with the Capital Funding will not be disposed of without prior written consent of the Council; such consent may be conditional on repayment of an appropriate proportion of the capital value of the asset.

## The amount of the Capital Funding shall not be increased in the event of any overspend by the Provider in its delivery of the Project and is inclusive of VAT.

## The Capital Funding shall be paid into a bank account in the name of the Provider which is separate to the account held for the running costs of the business. All transitions from the bank account must be approved by at least two individual representatives of the Provider.

## The Provider shall not transfer any part of the Capital Funding to bank accounts other than those specified in schedule 1 without the prior written consent of the Council.

## Receipt of the Capital Funding must be acknowledged in the Provider’s annual reports, the Chair or Secretary’s report at your AGM (if applicable), the accounts which cover the period of the Capital Funding and in any publicity materials which are produced about the work supported by the Capital Funding. The Council may request copies of these documents.

## The Capital Funding must be spent before the end of the twelfth month from the commencement date. The Provider shall promptly repay to the Council any money incorrectly paid to it either as a result of an administrative error or otherwise. This includes (without limitation) situations where either an incorrect sum of money has been paid or where Capital Funding monies have been paid in error before all conditions attaching to the Capital Funding have been complied with by the Provider.

# USE OF CAPITAL FUNDING

## The Capital Funding shall be used by the Provider for capital expenditure to enable provision of early years and childcare services as stated in the application (schedule 4) and service specification (schedule 5) documents in accordance with the agreed budget set out in Schedule 1. For the avoidance of doubt, the amount of the Capital Funding that the Provider may spend on any item of expenditure listed in column 1(Item) of Schedule 1 shall not exceed the corresponding sum of money listed in column 2 (Amount Agreed) without the prior written consent of the Council.

## Where the Provider has obtained funding from a third party in relation to its delivery of the Project (including without limitation funding for associated administration and staffing costs), the amount of such funding shall be included in the budget in Schedule 1 together with a clear description of what that funding shall be used for.

## The Provider shall not use the Capital Funding to:

### make any payment to members of its Governing Body; or

### pay for any expenditure commitments of the Provider entered into before the Commencement Date,

unless it has obtained the prior written approval of the Council.

## The Provider shall not spend any part of the Capital Funding on the delivery of the Project after the Capital Funding Period.

## Should any part of the Capital Funding remain unspent at the end of the Capital Funding Period, the Provider shall ensure that any unspent monies are returned to the Council. Any liabilities arising at the end of the Project including any redundancy liabilities for staff employed by the Provider to deliver the Project must be managed and paid for by the Provider. There will be no additional funding available from the Council for this purpose.

# ACCOUNTS AND RECORDS

## The Capital Funding shall be shown in the Provider's accounts as a restricted fund and shall not be included under general funds.

## The Provider shall keep separate, accurate and up-to-date accounts and records of the receipt and expenditure of the Capital Funding monies received by it.

## The Provider shall keep all invoices, receipts, and accounts and any other relevant documents relating to the expenditure of the Capital Funding for a period of at least six years following receipt of any Capital Funding monies to which they relate. The Council shall have the right to review, at the Council's reasonable request, the Provider's accounts and records that relate to the expenditure of the Capital Funding and shall have the right to take copies of such accounts and records.

## The Provider shall provide the Council with a copy of its annual accounts within six months (or such lesser period as the Council may reasonably require) of the end of the relevant financial year in respect of each year in which the Capital Funding is paid on request.

## The Provider shall comply and facilitate the Council's compliance with all statutory requirements as regards accounts, audit or examination of accounts, annual reports and annual returns applicable to itself and the Council.

# MONITORING AND REPORTING

## The Provider shall closely monitor the delivery and success of the Project throughout the Capital Funding Period to ensure that the aims and objectives of the Project are being met and that this Funding Agreement is being adhered to.

## The Provider shall provide the Council with a financial report and an operational report on its use of the Capital Funding and delivery of the Project every quarter and in such formats as the Council may reasonably require. The Provider shall provide on request the Council with each report within three months of the last day of the quarter to which it relates.

## Where the Provider has obtained funding from a third party for its delivery of part of the Project, the Provider shall include the amount of such funding in its financial reports together with details of what that funding has been used for.

## The Council shall be informed in writing if there are any changes to the information as provided in the application form. Failure to comply with this clause 6.5 may result in a loss of any other further funding.

## The Provider shall on request provide the Council with such further information, explanations and documents as the Council may reasonably require in order for it to establish that the Capital Funding has been used properly in accordance with this Funding Agreement.

## The Provider shall permit any person authorised by the Council such reasonable access to its employees, agents, premises, facilities and records, for the purpose of discussing, monitoring and evaluating the Provider's fulfilment of the conditions of this Funding Agreement and shall, if so required, provide appropriate oral or written explanations from them.

## The Provider shall permit any person authorised by the Council for the purpose to visit the Provider once every quarter to monitor the delivery of the Project. Where, in its reasonable opinion, the Council considers that additional visits are necessary to monitor the Project, it shall be entitled to authorise any person to make such visits on its behalf.

## The Provider shall provide the Council with a final report on completion of the Capital Funding Period which shall confirm whether the Project has been successfully and properly completed.

# ACKNOWLEDGMENT AND PUBLICITY

## The Provider shall acknowledge the Capital Funding in its annual report and accounts, including an acknowledgement of the Council as the source of the Capital Funding.

## The Provider shall not publish any material referring to the Project or the Council without the prior written of the Council. The Provider shall acknowledge the support of the Council in any materials that refer to the Project and in any written or spoken public presentations about the Project. Such acknowledgements (where appropriate or as requested by the Council) shall include the Council's name and logo (or any future name or logo adopted by the Council) using the templates provided by the Council from time to time.

## In using the Council's name and logo, the Provider shall comply with all reasonable branding guidelines issued by the Council from time to time.

## The Provider agrees to participate in and co-operate with promotional activities relating to the Project that may be instigated and/or organised by the Council.

## The Council may acknowledge the Provider's involvement in the Project as appropriate without prior notice.

## The Provider shall comply with all reasonable requests from the Council to facilitate visits, provide reports, statistics, photographs and case studies that will assist the Council in its promotional and fundraising activities relating to the Project.

# INTELLECTUAL PROPERTY RIGHTS

## The Council and the Provider agree that all rights, title and interest in or to any information, data, reports, documents, procedures, forecasts, technology, know-how and any other Intellectual Property Rights whatsoever owned by either the Council or the Provider before the Commencement Date or developed by either party during the Capital Funding Period, shall remain the property of that party.

## Where the Council has provided the Provider with any of its Intellectual Property Rights for use in connection with the Project (including without limitation its name and logo), the Provider shall, on termination of this Early Education Funding Provider Agreement, cease to use such Intellectual Property Rights immediately and shall either return or destroy such Intellectual Property Rights as requested by the Council.

# CONFIDENTIALITY

## Subject to clause 11 (Freedom of Information), each party shall during the term of this Funding Agreement and thereafter keep secret and confidential all Intellectual Property Rights or know-how or other business, technical or commercial information disclosed to it as a result of the Funding Agreement and shall not disclose the same to any person save to the extent necessary to perform its obligations in accordance with the terms of this Funding Agreement or save as expressly authorised in writing by the other party.

## The obligation of confidentiality contained in this clause shall not apply or shall cease to apply to any Intellectual Property Rights, know-how or other business, technical or commercial information which:

### at the time of its disclosure by the disclosing party is already in the public domain or which subsequently enters the public domain other than by breach of the terms of this Funding Agreement by the receiving party;

### is already known to the receiving party as evidenced by written records at the time of its disclosure by the disclosing party and was not otherwise acquired by the receiving party from the disclosing party under any obligations of confidence; or

### is at any time after the date of this Funding Agreement acquired by the receiving party from a third party having the right to disclose the same to the receiving party without breach of the obligations owed by that party to the disclosing party.

# FREEDOM OF INFORMATION

## 11. 1 Both Parties acknowledge that they are subject to the requirements of the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 and shall assist and co-operate with the other Party (at their own expense) to enable the other Party to comply with these information disclosure requirements.

## 11.2 In respect of any request for information relating to Capital Funding, the Provider shall:

### 11.2.1 transfer the request for information to the Council as soon as practicable after receipt and in any event within two (2) working days of receiving a request for information;

### 11.2.2 provide the Council with a copy of all information in its possession or power in the form that the Council requires within five (5) working days (or such other period as the Council may specify) of the Council requesting that information; and

### 11.2.3 provide all necessary assistance as reasonably requested by the Council to enable the Council to respond to a request for information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations 2004.

### 11.3 The Council shall be responsible for determining at its absolute discretion whether the information:

### 11.3.1 is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations 2004;

### 11.3.2 is to be disclosed in response to a request for information.

## 11.4 In no event shall the Provider respond directly to a request for information relating to Capital Funding unless expressly authorised to do so by the Council.

## 11.5 The Provider acknowledges that the Council may, acting in accordance with the Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of FOIA (issued under section 45 of the FOIA, November 2004), be obliged under the FOIA or the Environmental Information Regulations 2004 to disclose information:

### 11.5.1 without consulting with the Provider; or

### 11.5.2 following consultation with the Provider and having taken its views into account,

provided always that where clause 11.5.1 applies the Council shall, in accordance with any recommendations of the Code, take reasonable steps, where appropriate, to give the Provider advanced notice, or failing that, to draw the disclosure to the Provider's attention after any such disclosure.

## 11.6 The Provider shall ensure that all information produced in the course of this Agreement or relating to this Agreement is retained for disclosure and shall permit the Council to inspect such records

# DATA PROTECTION

12.1 Both Parties shall (and shall procure that any of its staff involved in connection with the activities of the Funding Agreement shall) comply with any notification requirements under the Data Protection Act 2018 (DPA) and both Parties will duly observe all their obligations under the DPA, which arise in connection with the Funding Agreement and also observe the General Data Protection Regulations (GDPR) which arise in connection with the Agreement and any national implementing laws, regulations, secondary legislation applicable guidance and codes of practice as amended or updated from time to time and any successor legislation to the DPA or GDPR

# WITHHOLDING, SUSPENDING AND REPAYMENT OF CAPITAL FUNDING

## The Council's intention is that the Capital Funding will be paid to the Provider in full. However, without prejudice to the Council's other rights and remedies, the Council may at its discretion withhold or suspend payment of the Capital Funding and/or require repayment of all or part of the Capital Funding if:

* 1. the Provider uses the Capital Funding for purposes other than those for which they have been awarded;
  2. the delivery of the Project does not start within three (3) months of the Commencement Date and the Provider has failed to provide the Council with a reasonable explanation for the delay;
  3. the Council considers that the Provider has not made satisfactory progress with the delivery of the Project;
  4. the Provider is, in the reasonable opinion of the Council, delivering the Project in a negligent manner;
  5. the Provider obtains duplicate funding from a third party for the Project;
  6. the Provider obtains funding from a third party which, in the reasonable opinion of the Council, undertakes activities that are likely to bring the reputation of the Project or the Council into disrepute;
  7. the Provider provides the Council with any materially misleading or inaccurate information;
  8. the Provider commits or committed a Prohibited Act;
  9. any member of the governing body, employee or volunteer of the Provider has (a) acted dishonestly or negligently at any time and directly or indirectly to the detriment of the Project or (b) taken any actions which, in the reasonable opinion of the Council, bring or are likely to bring the Council's name or reputation into disrepute;
  10. the Provider ceases to operate for any reason, or it passes a resolution (or any court of competent jurisdiction makes an order) that it be wound up or dissolved (other than for the purpose of a bona fide and solvent reconstruction or amalgamation);
  11. the Provider becomes insolvent, or it is declared bankrupt, or it is placed into receivership, administration or liquidation, or a petition has been presented for its winding up, or it enters into any arrangement or composition for the benefit of its creditors, or it is unable to pay its debts as they fall due; or
  12. the Provider fails to comply with any of the terms and conditions set out in this Funding Agreement and fails to rectify any such failure within 30 days of receiving written notice detailing the failure.
  13. The Council reserves the right to withhold/claw back all funding where The Provider fails to comply with the Early Years Foundation Stage (“EYFS”) Minimum Welfare requirements, or fails to take steps to improve quality and/or access the appropriate training for its staff to ensure that the “EYFS” minimum welfare requirements are met at all times; in particular where it has been identified as a requirement or recommendation by OFSTED, or the Council’s quality assessment process and/or action plan within the advised timescales in line with schedule 6.

## The Provider shall notify the Council in writing of any intention to sell or otherwise dispose of the Property or a Capital Asset within the Clawback Period at least three (3) months prior to the proposed date of sale or disposal.

## The Provider shall not sell or otherwise dispose of the property or a Capital Asset without the written consent of the Council which shall not unreasonably be withheld.

## The Provider shall within ten (10) working days of completion of this Agreement submit an application for registration of the following restriction against its registered leasehold title no. EX983657 as follows: -

## “ No disposition of the registered estate (other than a charge) by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a certificate signed by Essex County Council of County Hall, Market Road, Chelmsford, Essex CM1 1QH or their conveyancer that the provisions of clause 13.4 of a Funding Agreement dated [ ] and made between (1) Essex County Council and (2) xxxxxxx Partnership have been complied with or that they do not apply to the disposition”

## For the purpose of this Clause 13, "disposal" shall include any change of use of the Property or the Capital Asset (in particular, use of the Property or the Capital Asset (as the case may be) otherwise than for the purposes of the Service) or any other event or circumstance that would give rise to the operation of the clawback.

## There shall be a deemed disposal for clawback purposes where the registered childcare provider has terminated and the service is no longer being operated from the Property.

## If The Council wishes to exercise clawback, clauses 13.7 to 13.10 shall apply.

## The Provider shall return to The Council the agreed market value of the relevant Property or Capital Asset in line with the unexpired portion of the asset liability period in accordance with Schedule 6.

## At The Council's discretion, The Provider may satisfy its liability under Clause 13.8 by either:

## transferring the Property or the Capital Asset to the Council or such third party as the Council may direct; or

## selling the Property or Capital Asset at a price to be agreed with the Council but being not less than the agreed market value and paying over to the Council the proceeds of such sale or equivalent of the percentage Essex County Council investment where there is a joint funding involved; or

## if there is no requirement for the Service within reasonable proximity of the Property, selling the Property (with the agreement of the Council) and reinvesting any proceeds from such sale in the provision of the Service elsewhere in Essex as determined by the Council; or

## retaining the Property or Capital Asset and paying over to the Council the agreed market value (as reasonably determined by the Council) of such Property or Capital Asset in line with the unexpired portion of the asset liability period in accordance with Schedule 6.

## For the avoidance of doubt, Clause 13.9 does not prohibit the Provider from discharging its liability by any other means but use of other means shall be subject to the consent of the Council such consent not to be unreasonably delayed or withheld.

## Wherever under this Funding Agreement any sum of money is recoverable from or payable by the Provider (including any sum that the Provider is liable to pay to the Council in respect of any breach of this Funding Agreement), the Council may unilaterally deduct that sum from any sum then due, or which at any later time may become due to the Provider under the Funding Agreement or under any other Funding Agreement or contract with the Council.

## The Provider shall make any payments due to the Council without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise.

## Should the Provider be subject to financial or other difficulties which are capable of having a material impact on its effective delivery of the Project or compliance with this Funding Agreement it will notify the Council as soon as possible so that, if possible, and without creating any legal obligation, the Council will have an opportunity to provide assistance in resolving the problem or to take action to protect the Council and the Capital Funding monies.

# ANTI DISCRIMINATION

## The Provider shall not unlawfully discriminate within the meaning and scope of any law, enactment, order, or regulation relating to discrimination (whether in race, gender, religion, disability, sexual orientation, age or otherwise) in employment. The Provider will note the Council’s obligations under the Equality Act 2010, and any codes of practice and best guidance notes issued by the Government and appropriate enforcement agencies. The Provider must comply with this legislation in so far as it places obligations on it as well as facilitating the Council’s compliance under the aforementioned legislation.

## The Provider shall take all reasonable steps to secure the observance of clause 14.1 by all servants, employees or agents of the Provider and all suppliers and sub-contractors engaged on the Project.

# HUMAN RIGHTS

## The Provider shall (and shall use its reasonable endeavours to procure that its staff shall) at all times comply with the provisions of the Human Rights Act 1998 in the performance of this Funding Agreement as if the Provider were a public body (as defined in the Human Rights Act 1998).

## The Provider shall undertake, or refrain from undertaking, such acts as the Council requests so as to enable the Council to comply with its obligations under the Human Rights Act 1998.

# LIMITATION OF LIABILITY

## The Council accepts no liability for any consequences, whether direct or indirect, that may come about from the Provider running the Project, the use of the Capital Funding or from withdrawal of the Capital Funding. The Provider shall indemnify and hold harmless the Council, its employees, agents, officers or sub-contractors with respect to all claims, demands, actions, costs, expenses, losses, damages and all other liabilities arising from or incurred by reason of the actions and/or omissions of the Provider in relation to the Project, the non-fulfilment of obligations of the Provider under this Funding Agreement or its obligations to third parties.

## Subject to clause 16.1, the Council's liability under this Funding Agreement is limited to the payment of the Capital Funding.

# WARRANTIES

## The Provider warrants, undertakes and agrees that:

### it has all necessary resources and expertise to deliver the Project (assuming due receipt of the Capital Funding);

### it has not committed, nor shall it commit, any Prohibited Act;

### it shall at all times comply with all relevant legislation and all applicable codes of practice and other similar codes or recommendations, and shall notify the Council immediately of any significant departure from such legislation, codes or recommendations;

### it shall comply with the requirements of the Health and Safety at Work etc. Act 1974 and any other acts, orders, regulations and codes of practice relating to health and safety, which may apply to employees and other persons working on the Project;

### it has and shall keep in place adequate procedures for dealing with any conflicts of interest;

### it has and shall keep in place systems to deal with the prevention of fraud and/or administrative malfunction;

### all financial and other information concerning the Provider which has been disclosed to the Council is to the best of its knowledge and belief, true and accurate;

### it is not subject to any contractual or other restriction imposed by its own or any other organisation's rules or regulations or otherwise which may prevent or materially impede it from meeting its obligations in connection with the Capital Funding;

### it is not aware of anything in its own affairs, which it has not disclosed to the Council or any of the Council's advisers, which might reasonably have influenced the decision of the Council to make the Capital Funding on the terms contained in this Funding Agreement; and

### since the date of its last accounts there has been no material change in its financial position or prospects.

# INSURANCE

## The Provider shall effect and maintain with a reputable insurance company a policy or policies in respect of all risks which may be incurred by the Provider, arising out of the Provider's Ofsted registration, Early Education Funding Provider Agreement or other relevant agreements, including death or personal injury, loss of or damage to property or any other loss (the Required Insurances).

## The Required Insurances referred to above include (but are not limited to):

### public liability insurance with a limit of indemnity of not less than five million pounds (£5,000,000) in relation to any one claim or series of claims arising from the Project; and

### employer's liability insurance with a limit of indemnity of not less than five million pounds (£5,000,000) in relation to any one claim or series of claims arising from the Project.

### Professional Indemnity Insurance with an indemnity limit of two hundred and fifty thousand pounds (£250,000) (optional as required by the Council).

* 1. The Provider shall (no more than 14 days of request) supply to the Council a copy of such insurance policies and evidence that the relevant premiums have been paid. Failure to provide the requested documentation within the required timescales may result in the Council withholding payment of Capital Funding and would amount to a material breach of the Agreement.

# DURATION

## Except where otherwise specified, the terms of this Funding Agreement shall apply from the date of this Funding Agreement until the anniversary of expiry of the Capital Funding Period or for so long as any Capital Funding monies remain unspent by the Provider, whichever is longer.

## Any obligations under this Funding Agreement that remain unfulfilled following the expiry or termination of the Funding Agreement shall survive such expiry or termination and continue in full force and effect until they have been fulfilled.

# TERMINATION

## The Council may terminate this Funding Agreement and any Capital Funding payments on giving the Provider three months (3) written notice should it be required to do so by financial restraints or for any other reason.

## Either the Council or the Provider may terminate this Agreement with immediate effect by giving written notice to the other party in the following circumstances:

### if the other party commits any material breach of this Agreement and (if such a breach is remediable) fails to remedy that breach within 30 days of the other party being notified of the breach;

### an order is made or a resolution is passed for the winding up of the other party or if an order is made for the appointment of an administrator to manage the affairs, business and property of the other party or if a receiver is appointed of any of the other party's assets or undertakings or if circumstances arise which entitle the Court or a creditor to appoint a receiver or manager or which entitle the Court to make a winding-up order or if the other party takes or suffers any similar or analogous action in consequence of debt; or

### if the Provider is in breach of Clause 6.5

## in the event that clause 20.2 and clause 6.5 are invoked, the Council will require a repayment of the Capital Funding based on the remaining outstanding evidence or full repayment of all funding awarded. The Council will inform the Provider concerning the required disposal of assets which remain the property of the Council.

# ASSIGNMENT

The Provider may not, without the prior written consent of the Council, assign, transfer, sub-contract, or in any other way make over to any third party the benefit and/or the burden of this Funding Agreement and or, except as contemplated as part of the Project, transfer or pay to any other person any part of the Capital Funding.

# WAIVER

No failure or delay by either party to exercise any right or remedy under this Funding Agreement shall be construed as a waiver of any other right or remedy.

# NOTICES

All notices and other communications in relation to this Funding Agreement shall be in writing and shall be deemed to have been duly given if personally delivered, [e-mailed,] or mailed (first class postage prepaid) to the address of the relevant party, as referred to above or otherwise notified in writing. If personally delivered [or if e-mailed] all such communications shall be deemed to have been given when received (except that if received on a non-working day or after 5.00 pm on any working day they shall be deemed received on the next working day) and if mailed all such communications shall be deemed to have been given and received on the second working day following such mailing.

**DISPUTE RESOLUTION**

23.1 In the event of any complaint or dispute (which does not relate to the Council's right to withhold funds or terminate) arising between the parties to this Funding Agreement in relation to this Funding Agreement the matter should first be referred for resolution to the Project Manager or any other individual nominated by the Council from time to time.

23.2 Should the complaint or dispute remain unresolved within 14 days of the matter first being referred to the Project Manager or other nominated individual, as the case may be, either party may refer the matter to the Chief Executive of the Council and the Chair **OR** Chief Executive of the Provider with an instruction to attempt to resolve the dispute by Funding Agreement within 28 days, or such other period as may be mutually agreed by the Council and the Provider.

## 23.3 In the absence of agreement the parties may seek to resolve the matter through mediation under the CEDR Model Mediation Procedure (or such other appropriate dispute resolution model as is agreed by both parties). Unless otherwise agreed, the parties shall bear the costs and expenses of the mediation equally.

**NO PARTNERSHIP OR AGENCY**

24.1 This Funding Agreement shall not create any partnership or joint venture between the Council and the Provider, nor any relationship of principal and agent, nor authorise any party to make or enter into any commitments for or on behalf of the other party.

**JOINT AND SEVERAL LIABILITY**

25.1 Where the Provider is not a company nor an incorporated entity with a distinct legal personality of its own, the individuals who enter into and sign this Agreement on behalf of the Provider shall be jointly and severally liable for the Provider's obligations and liabilities arising under this Funding Agreement.

**CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

26.1 This Funding Agreement does not and is not intended to confer any contractual benefit on any person pursuant to the terms of the Contracts (Rights of Third Parties) Act 1999.

**DISCLOSURE AND BARRING SERVICE CHECKS (DBS)**

## 27.1 The Provider shall procure that in respect of all staff or persons who will or may provide any part of the Project (each a “**Named Employee**”)

### each Named Employee is questioned as to whether he or she has any convictions; and

### the results are obtained of a check of the most extensive available kind made with the Disclosure and Barring Service, as laid out in the Protection of Freedoms Act 2012.

**GOVERNING LAW**

28.1 This Funding Agreement shall be governed by and construed in accordance with the law of England and the parties irrevocably submit to the exclusive jurisdiction of the English courts.

**Name**: xxxx

**Position**: xxxx

**Signature on behalf of xxxx**

**Date**: XX

**Name**: Carolyn Terry

**Position**: EYCC Sufficiency and Sustainability Manager

**Signature on behalf of the Council**:

**Date**:

**SCHEDULE 1 FUNDING SPECIFICATION**

Funding has been agreed for the following items subject to and including information provided in the application documents.

| **Item** | **Total cost of project** | **Amount**  **Agreed £** | **Conditions** |
| --- | --- | --- | --- |
|  |  |  | **Prior written consent for transfer to bank accounts as per clause 4.4 above is given for the following: as per schedule 2** |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |  |

**SCHEDULE 2 PAYMENT SCHEDULE**

## As stated in clause 4.4, Capital Funding shall be paid into a bank account in the name of the Provider. This MUST be separate to the account held for the running costs of the business.

|  |  |
| --- | --- |
| **Bank Details** | |
| **Account Name** |  |
| **Bank Name** |  |
| **Sort code** |  |
| **Account number** |  |

|  |  |  |
| --- | --- | --- |
|  | **Payment Value** | **Conditions for release of payment** |
| 1st Amount Payable: |  | The first payment will be made on return of a signed declaration form; evidence that all required planning approvals have been obtained and any other documentary evidence as requested by the panel. |
| 2nd Amount Payable: |  | Acceptable monitoring evidence of 1st payment |
| 3rd Amount Payable: |  | Acceptable monitoring evidence of 2nd payment |
| **Total Capital Funding:** |  |  |

**SCHEDULE 3 MONITORING INFORMATION**

Evidence of the following items will be required to be submitted when requested by Representative of the Council.

| **Item** | **Capital Funding Value** | **Evidence Format** |
| --- | --- | --- |
| As listed in schedule 1 | £ | Copies of bank statements showing debits that correspond to invoices/receipts dated within this Funding Agreement and aligned to items in Schedule 1.  May include project updates, confirmation of completion of specified works, evidence of payment to building contractors for specified works |
| **Total** | **£** |  |

THE PROVIDER will collate and retain all evidence of expenditure against the Capital Funding and update the monitoring form with expenditure. The release of subsequent payments will be subject to the return of a completed monitoring form.

Evidence compiled by THE PROVIDER will be subject to random sampling by THE COUNCIL. THE PROVIDER must comply with any request made by THE COUNCIL for evidence listed on the monitoring form within 21 days. Failure to provide evidence within 21 days will lead to the suspension of further payments and the return of previous payments.

**SCHEDULE 4 TERMLY MONITORING RETURN**

Termly performance monitoring form to be completed and returned once each term for the first year of operating the funded provision.



**SCHEDULE 5 APPLICATION FORM**

**SCHEDULE 6 SERVICE SPECIFICATION**

**SCHEDULE 7 ASSET LIABILITY PERIOD**

Asset shall mean any property, real or personal, tangible or intangible.

|  |  |  |
| --- | --- | --- |
| **Capital Funding Service Asset type** | **Capital Funding Value** | **Asset Liability Period (from date of acquisition or completion of capital works)** |
| 1. Refurbishment, extension or construction of buildings or other property | £10,001 to £50,000 | 10 years |
| £50,001 to £100,000 | 15 years |
| Above £100,000 | 25 years |
| 1. Purchase of leasehold buildings / land | N/A | Either:  ·     Unexpired period of the lease; or  ·     80 years;  Whichever of the above is the shorter |

Where the Capital Funding has contributed to an appreciation in the value of the Capital Asset the funding reclaimed may exceed the initial Capital Funding. Where the contribution was to a depreciating asset the funding reclaimed may be less that the initial Capital Funding.