

Appendix 1: Section 106 Covenants regarding Rooftop Garden Weekend Opening (Section 106 Agreement dated 14 February 2019)

Definitions

“**Rooftop Garden Management Plan**” means the Rooftop Garden Management Plan annexed to this Deed as Schedule 5 or as may be revised in accordance with the review mechanism in the Rooftop Garden Management Plan

“**Opening Hours**” means:

- (a) From 1st April to 30th September 10 a.m. to 9 p.m. on Working Days
 - (b) From 1st October to 31st March 10 a.m. to 6.30 p.m. on Working Days
 - (c) Weekend opening from 10 a.m. to 5 p.m. on Saturdays and Sundays subject to the trial period arrangements in the Rooftop Garden Management Plan
- or such other hours as may be approved by the City from time to time;

Clause 10 (extract)

10 ROOFTOP GARDEN

- 10.1 The Developer shall complete the Rooftop Garden no later than occupation of the Restaurant or within two months of the date of this Deed, whichever shall be the sooner, and shall retain the Rooftop Garden at all times when the Building remains in place.
- 10.2 The Developer shall comply with the Rooftop Garden Management Plan (provided that in the event of conflict between this paragraph 10 and the Rooftop Garden Management Plan, this paragraph 10 shall take precedence).
- 10.3 The Developer shall at its own expense and in accordance with the Rooftop Garden Management Plan cleanse maintain and keep in good repair and good working order the surface of and the lighting and drainage to the Rooftop Garden together with any furniture and hard and soft landscaping and the Rooftop Garden Lift.
- 10.4 Unless otherwise agreed in writing by the City the Developer shall no later than two months from the date of the Deed open and thereafter keep open the Rooftop Garden and the Rooftop Garden Lift open and available to the public for access on foot and in wheelchairs free of charge at all times save as provided for in this deed or as may be approved by the City or in the following circumstances:
- 10.4.1 closure outside the Opening Hours;
 - 10.4.2 in the case of Force Majeure;
 - 10.4.3 where there is a need to carry out maintenance, cleaning, renewal and necessary required works during the Opening Hours including works associated with the landscaping to be provided within the Rooftop Garden and works of restaurant and café fitting out or structural or non-structural alteration, PROVIDED THAT any works under this sub-paragraph which exceed 24 hours' duration shall only be undertaken with the prior written approval of the City and in such a way as to cause minimum disruption to the public;

10.4.4 closure for the holding of private events, exhibitions or similar functions (to which the public at large are not admitted or are admitted on payment of a fee) during the Opening Hours provided that the total duration of such private events, exhibitions or other similar functions shall not exceed 14 days in any calendar year and for the avoidance of doubt the closure of the Rooftop Garden for private events, exhibitions or similar functions during the Opening Hours shall not be permitted without the City's prior approval; and

10.4.5 closure where there is imminent danger to life or damage to property PROVIDED THAT such closure shall not exceed 24 hours duration without the prior approval of the City Corporation.

10.5 the Developer shall not erect any temporary structure on or in the Rooftop Garden without the prior written consent of the City such consent not to be unreasonably withheld or delayed.

10.6 the Developer may restrict the maximum number of visitors to the Rooftop Garden in accordance with the Rooftop Garden Management Plan. The Developer shall use reasonable endeavours to maximise the public access available to the Rooftop Garden and inter alia, unless otherwise agreed by the City:

10.6.1 the Developer shall not restrict the number of visitors to the Rooftop Garden (and who are not visiting the restaurant or bar) at any time to below 207 and shall not restrict the number of visitors to the Rooftop Garden and restaurant to below 622 at any time.

10.6.2 no access during the Opening Hours to the Rooftop Garden shall be permitted to occupants of the Development, other than those occupying solely as short-term visitors to the development for the sole purpose of visiting the Rooftop Garden

10.6.3 there shall be no restaurant use (including use ancillary to the restaurant use) at the Rooftop Garden outside the area marked Publicly Accessible Restaurant Area on the Plans annexed as Plan 2A and 2B (save in respect of any temporary structures for food kiosk purposes approved pursuant to paragraph 10.5)

10.7 Save insofar as the same is insured by the landlord of the Building, the Developer shall keep the Rooftop Garden properly insured and in the event of damage to pay out any insurance payments on making good such damage.

10.8 The Developer will adopt such changes to the Rooftop Garden Management Plan as may be approved or required by the City as a result of the review mechanism pursuant to the Rooftop Garden Management Plan and the provisions of paragraph 10.2 shall apply to the Rooftop Garden Management Plan as amended.

Schedule 5 – Roof Garden Management Plan (extract)

GARDEN OPENING HOURS

The Garden will be maintained as an open space accessible by the public free of charge during the opening hours of the garden as required by the S106 Agreement.

In respect of Weekend opening from 10 am to 5pm on Saturdays and Sundays subject to the trial period arrangements provided for as follows:

- Within 28 days (or such longer period as the City Corporation may agree) of the Garden opening as an open space accessible to the public during the weekday, a six week trial period of the Weekend Opening shall be commenced to monitor public use of the Garden during the said trial period. The review of this first trial period shall then be carried out by the City Corporation so as to coincide with

the review of queuing arrangements occurring three months after opening of the Garden. If the first trial period is held within 1 October to 31 March (the "Winter Season"), the City Corporation's determination ("the Winter Season Trial Decision") shall determine whether weekend opening will take place during the Winter Season. If the first six-week trial period is held within 1 April to 30 September (the "Summer Season") then the City Corporation's determination ("the Summer Season Trial Decision") shall determine whether weekend opening will take place during the Summer Season.

- Within 6 months of the first trial period commencing (or such later date as the City Corporation may agree), a second six-week trial period shall be commenced to monitor public use of the Garden during the said second trial period. The review of this second trial period shall then be carried out by the City Corporation at the conclusion of the second trial period. If the second trial period is held within 1 October to 31 March (the "Summer Season"), the City Corporation's determination ("the Summer Season Trial Decision") shall determine whether weekend opening will take place during the Summer Season. If the second trial six-week trial period is held within 1 April to 30 September (the "Winter Season") then the City Corporation's determination ("the Winter Season Trial Decision") shall determine whether weekend opening will take place during the Winter Season.
- At the end of each trial period, the Developer shall provide to the City Corporation visitor take up information using data collected by the digital counters at the entry and exit points.
- At the end of the first six-week trial period the City Corporation shall determine whether or not the weekend opening should be recommenced (for the Winter or Summer Season, as appropriate) during the weekend opening hours. If the first trial period is held within 1 October to 31 March (the "Winter Season"), the City Corporation's determination ("the Winter Season Trial Decision") shall determine whether weekend opening will take place during the Winter Season. If the first six week trial period is held within 1 April to 30 September (the "Summer Season") then the City Corporation's determination ("the Summer Season Trial Decision") shall determine whether weekend opening will take place during the Summer Season. At the end of the second six week trial period the City Corporation shall determine whether or not the weekend opening (for the Winter or Summer Season, as appropriate) should be recommenced during the weekend opening hours. If the second trial period is held within 1 October to 31 March (the "Winter Season"), the City Corporation's determination ("the Winter Season Trial Decision") shall determine whether weekend opening will take place during the Winter Season. If the second six week trial period is held within 1 April to 30 September (the "Summer Season") then the City Corporation's determination ("the Summer Season Trial Decision") shall determine whether weekend opening will take place during the Summer Season. In making its determinations the City Corporation shall have regard to whether there is sufficient demand. The City shall not make its determinations until it has consulted the Developer and taken into consideration all representations made by the Developer within a reasonable time.
- The criteria used to assess if there is sufficient demand for weekend opening and to make the Winter Season Trial Decision and the Summer Season Trial Decision shall be whether the cost of opening and maintaining public access is reasonably proportionate to the use by the public and the public benefit achieved, having regard to:
 - the extent of publicity provided in respect of the weekend opening;
 - the principle that the Garden is provided as a public benefit in connection with the development of Fen Court to ensure the development as a whole is compliant with planning policies.
- As an overarching principle, weekend opening and any review thereof will be conducted with regard to the principle of prudent estate management applicable to the operation of publicly accessible open space provided as a planning benefit as would be exercised by a reasonable estate manager in all of the circumstances applicable to the Garden and Fen Court.