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This Deed is made on

Between

- (1) **Darlington Borough Council** whose principal address is at Town Hall, Darlington DL1 5QT (the **Authority**); and
- (2) **Kajima Darlington Schools Limited** (Company No. 4968498) whose registered office is at Grove House, 248A Marylebone Road, London NW1 6JZ (the **Contractor**),

each a **Party** and together the **Parties**, which term shall include the Parties' successors in title and permitted assigns.

Whereas

- (A) The Parties entered into a project agreement on 31 March 2004 relating to, *inter alia*, the construction of Harrowgate Hill Primary School (for the purposes of this deed, the **School**) and the provision of services to the School under the Private Finance Initiative (**Project Agreement**).
- (B) The Authority wishes to carry out and complete an extension to the School for the purpose of providing additional classrooms at the School by the carrying out of the Classroom Extension Works (as defined below).
- (C) The Authority wishes the Contractor to provide services to the completed Classroom Extension Works.
- (D) The Parties have agreed to enter into this deed (**Deed of Variation**) and to vary the Project Agreement in respect of the carrying out and completion of the Classroom Extension Works and the subsequent provision of services to the Classroom Extension Works.
- (E) The Contractor has simultaneously entered into a deed with the FM Contractor (**MITIE Deed**) in respect of arrangements relating to the Classroom Extension Works, as more particularly set out in the MITIE Deed.

It is agreed

1 Definitions and Interpretation

1.1 In this Deed of Variation:

- (a) save where defined in this Deed of Variation or where the context otherwise requires, words and phrases defined in the Project Agreement (as amended by this Deed of Variation) shall have the same meanings given to them whenever they are used in this Deed of Variation;
- (b) unless otherwise indicated, all references to clauses, schedules and annexes in this Deed of Variation are to clauses of, schedules and annexes to this Deed of Variation;
- (c) nothing in this Deed of Variation shall be construed as establishing or implying a partnership or joint venture between the Parties or shall be deemed to constitute any

of the Parties as the agent of any other or to allow any Party to hold itself out as acting on behalf of the other;

- (d) the terms of clause 1.2 of the Project Agreement shall apply to this Deed of Variation;
- (e) from the date of this Deed of Variation, clause 1.1 (Definitions and Interpretation) of the Project Agreement shall be amended by the addition or replacement (as the context admits) of the following definitions:

Access Protocol means the protocol set out in Schedule 6

Classroom Consents means all approvals, permissions, consents, licences, certificates (whether statutory or otherwise) which are required for the purposes of carrying out the Classroom Extension Works, whether required in order to comply with Legislation or as a result of the rights of any third party

Classroom Extension Acceptance Certificate means the certificate which shall be issued by the Authority in respect of the Classroom Extension Works in accordance with clause 11.1(d) (Service Availability)

Classroom Extension Compensation Event shall have the meaning set out in clause 1.1 of the Project Agreement, as amended by Schedule 1

Classroom Extension Works means the works more particularly set out in the Classroom Extension Works Specification

Classroom Extension Works Accommodation Site means the area for the site accommodation of the ♦ edged [♦] on the plan reference [♦] set out in Schedule 5

Classroom Extension Works Site means the areas edged and hatched [♦] on the plan reference [♦] set out in Schedule 5

Classroom Extension Works Specification means the specification of the Classroom Extension Works at Part 1 of Schedule 3

Classroom Services Variation means the variation to the Services in connection with the Classroom Extension Works set out in Schedule 7, which the Authority intend to request the Contractor to implement pursuant to clause 52 of the Project Agreement

Emergency means an event causing or, in the reasonable opinion of a Party, threatening to cause death or injury to any individual, or serious disruption to the lives of a number of people or extensive damage to property or contamination of the environment

Handover Date means the date on which the Classroom Extension Acceptance Certificate is issued in respect of the Classroom Extension Works

Minor Defects means incomplete works or defects which will not materially interfere with the beneficial occupation of the completed Classroom Extension Works and which a prudent professional would ordinarily include on a snagging list issued by such professional at the time he was certifying practical completion of the Classroom Extension Works

2 Commencement and Duration

- 2.1 This Deed of Variation and the rights and obligations of the Parties shall take effect from the date of this Deed of Variation and shall terminate on the expiry or earlier termination of the Project Agreement save where the Project Agreement expressly provides otherwise.
- 2.2 Termination of this Deed of Variation shall not affect the continuing rights of the Contractor under clause 4 (Local Government (Contracts) Act 1997) and of the Authority and the Contractor under clause 16 (Confidentiality) or any other provision of this Deed of Variation which is expressed to survive termination or which is required to give effect to such termination or the consequences of such termination and such rights shall continue in full force and effect notwithstanding termination of this Deed of Variation.

3 Conditions Precedent

On or prior to the date of this Deed of Variation the Authority shall procure all Classroom Consents required in respect of the Classroom Extension Works and provide three copies of each of them to the Contractor.

4 Local Government (Contracts) Act 1997

- 4.1 On or prior to the date being five (5) Working Days after the date of this Deed of Variation, the Authority shall provide to the Contractor a copy of a duly executed certificate in the form attached at Schedule 2, issued pursuant to the Local Government (Contracts) Act 1997 in relation to this Deed of Variation.
- 4.2 The Contractor hereby consents to the issue by the Authority of a certificate under Section 3 of the Local Government (Contracts) Act 1997 in respect of this Deed of Variation.
- 4.3 If the certificate referred to in clauses 4.1 and 4.2 above is not issued by the Authority by the date referred to in clause 4.1 and this Deed of Variation is held to be invalid then the provisions of clause 4.4 or 4.5 (as applicable) of this Deed of Variation shall be the relevant discharge terms which apply to this Deed of Variation.
- 4.4 In the event of the making of a determination or order by a court of final jurisdiction on an application for judicial review or audit review (within the meaning of the Local Government (Contracts) Act 1997), the result of which is that this Deed of Variation does not have effect or is otherwise unenforceable but the Project Agreement (save for this Deed of Variation) continues to have effect and is enforceable, then the Authority shall indemnify the Contractor against any and all damage, losses, liabilities, claims, actions, costs, expenses, demands and charges whether arising under statute, contract or at common law which arise in connection with or as a consequence of this Deed of Variation not having effect or otherwise being unenforceable.
- 4.5 Notwithstanding clause 4.4 above, in the event of the making of a determination or order by a court of final jurisdiction on an application for judicial review or audit review (within the

meaning of the Local Government (Contracts) Act 1997), the result of which is that this Deed of Variation and the Project Agreement cease to have effect or are otherwise unenforceable, then the relevant discharge terms referred to in clause 81 (Relevant Discharge Terms) of the Project Agreement shall be the relevant discharge terms which apply to this Deed of Variation.

5 Contractor Limitation of Liability

- 5.1 The Contractor's aggregate liability to the Authority in respect of any breach by the Contractor of the terms of this Deed of Variation or other act, default, omission or negligence in connection with this Deed of Variation (**Event**) howsoever arising shall not exceed the aggregate amount recovered by the Contractor from any policy of insurance and from the FM Contractor (**Recovered Sum**) in relation to such Event provided always that the liability of the Contractor to the Authority shall not be limited to the Recovered Sum and this clause 5.1 shall not apply to the extent that any amount due to the Authority is as a result of any breach by the Contractor of its obligations in clause 5.2.
- 5.2 The Contractor shall use all reasonable endeavours to recover any liability in relation to an Event from the FM Contractor and/or any policy of insurance (as applicable).¹

6 Amendments to the Project Agreement

- 6.1 With effect on and from the date of this Deed of Variation (or as otherwise set out in this Deed of Variation), the Project Agreement shall be amended as set out in Schedule 1.
- 6.2 The Parties confirm the terms of the Project Agreement (as amended by this Deed of Variation) shall otherwise continue in full force and effect.

7 CDM Regulations

- 7.1 As between the Contractor and the Authority the Authority shall be entirely responsible for the safety of any design which forms part of the Classroom Extension Works and for the adequacy, stability and safety of all site operations and methods of construction.
- 7.2 The Authority shall act as the only client in respect of the Classroom Extension Works for the purposes of the Construction (Design and Management) Regulations 2007 (the **CDM Regulations**).
- 7.3 The Authority shall observe, perform and discharge and/or shall procure the observance, performance and discharge of all the obligations, requirements and duties arising under the CDM Regulations and applying to the Authority, as appropriate, in connection with the Classroom Extension Works.

8 Interface Issues

- 8.1 Notwithstanding clause 7, the Parties shall comply (and the Authority shall procure that its contractors and subcontractors shall comply) with the Access Protocol, as the same may be amended from time to time.

¹ Wording subject to review by the Council of the FM Contract step down provisions in respect of the Deed of Variation.

- 8.2 The Contractor undertakes to the Authority that it shall not wilfully impede the Authority in the performance of its obligations under this Deed of Variation (having regard always to the interactive nature of the activities of the Authority and of the Contractor and to the use of the [Site] to provide the Services and any other operations or activities carried out by the Contractor on or at the Site for the purposes contemplated by the Project Agreement, this Deed of Variation or any other of the Contractor's duties.
- 8.3 Each Party agrees to co-operate, at its own expense (but without being compelled to incur material expenditure), with the other Party in the fulfilment of the purposes and intent of this Deed of Variation. Neither Party shall be under any obligation to perform any of the other's obligations under this Deed of Variation.

9 Classroom Extension Works

- 9.1 The Authority shall carry out (or procure the carrying out of) the Classroom Extension Works in accordance with:
- (a) all applicable Legislation;
 - (b) all applicable Guidance (with the reference to the Contractor in that definition being a reference to the Authority);
 - (c) all applicable Classroom Consents;
 - (d) Good Industry Practice (with the reference to the Contractor in that definition being a reference to the Authority); and
 - (e) in a good and workmanlike manner and with good quality materials of their respective kinds,

and any discrepancy or divergence between the requirements imposed under this clause 9.1 shall be resolved in the order of precedence set out above.

- 9.2 The Authority shall ensure that the Classroom Extension Works are designed, carried out and completed using the skill, care and diligence to be expected of an appropriately qualified building contractor and/or design consultant experienced in works of a type, nature and complexity similar to the Classroom Extension Works.
- 9.3 The Authority shall throughout the progress of the Classroom Extension Works:
- (a) take responsibility for the safety of all persons entitled to be upon the Classroom Extension Works Site and/or the Classroom Extension Works Accommodation Site;
 - (b) keep the Classroom Extension Works Site, the Classroom Extension Works and the Classroom Extension Works Accommodation Site in an orderly state appropriate to the avoidance of danger to such persons; and
 - (c) in connection with the Classroom Extension Works and the Classroom Extension Works Accommodation Site provide and maintain at its own cost all lights, guards, fencing, warning signs as required by any competent statutory authority for the protection of the Classroom Extension Works or for the safety and convenience of the public or others.

- 9.4 The Authority shall use all reasonable endeavours in accordance with Good Industry Practice to ensure that the Classroom Extension Works Site and Classroom Extension Works Accommodation Site shall be kept secure against trespassers throughout the duration of the Classroom Extension Works.
- 9.5 The Authority shall:
- (a) take all reasonable precautions to prevent any nuisance or inconvenience to the owners, tenants or occupiers of adjoining or neighbouring premises and to the public generally, including measures to reduce the nuisance from noise, dust, small, fumes and vibration during the carrying out of the Classroom Extension Works; and
 - (b) ensure that the access to neighbouring premises is not unduly interfered with or obstructed and that the duration of any such interference or obstruction is kept to a minimum.
- 9.6 The Authority shall:
- (a) provide the Contractor with a copy of the works programme for the Classroom Extension Works;
 - (b) provide detailed progress reports and accurate programme updates to the Contractor once every month and where reasonably required by the Contractor attend meetings to discuss the progress of the Classroom Extension Works; and
 - (c) reinstate the [Premises] and the [Sites] (other than the completed Classroom Extension Works) to their condition prior to the commencement of the Classroom Extension Works or as otherwise agreed between the Parties.
- 9.7 The Authority warrants that the Classroom Extension Works shall be carried out and completed in accordance with the Classroom Extension Works Specification as that may be amended in accordance with the design review procedure at Schedule 3 Part 2.
- 9.8 The Authority shall be responsible for and shall take all reasonable steps to rectify and make good within a reasonable period of becoming aware of the same itself or having been notified of the same in writing by Contractor:
- (a) any change to the Site Conditions caused by the Classroom Extension Works, where such change results (or is likely to result) in the Contractor being unable to comply with its obligations under the Project Agreement or in the Contractor incurring costs or losing revenue;
 - (b) any damage or disruption (including any excessive dust) caused to the relevant Premises and/or Site by the Classroom Extension Works;
 - (c) any defects, shrinkages or other faults in connection with or arising from the Classroom Extension Works; and
 - (d) any failure of the Classroom Extension Works to comply with the Classroom Consents.
 - (e) any Latent Defect in the Classroom Extension Works.

- 9.9 Where the Authority has failed to comply with its obligations under clause 9.8 above, the Contractor may (either itself or through an appointed contractor), having given twenty (20) Working Days' written notice to the Authority, and the Authority having continued to fail to comply with its obligations under clause 9.8 above at the end of such twenty (20) Working Days' written notice, rectify or make good the event or circumstances set out at 9.8(a) to 9.8(e) and shall be entitled to recover from the Authority as a debt all reasonable costs and expenses (including reasonable professional fees and expenses) incurred in so doing.

10 Services

- 10.1 The Authority has submitted an Authority Notice of Change to request that the Services to be provided by the Contractor under Part 4 of the Project Agreement be provided to Harrowgate Hill Primary School in its entirety including the Classroom Extension Works Site, as from the Handover Date ("the Classroom Extension Notice of Change").
- 10.2 The parties have agreed the Full Estimate in respect of the Classroom Extension Notice of Change ("the Classroom Extension Full Estimate") and the Authority has confirmed the Classroom Extension Full Estimate in writing. The Classroom Extension Notice of Change and the Classroom Extension Full Estimate are appended to this Deed of Variation at Schedule 7.
- 10.3 The Classroom Extension Full Estimate details how the Financial Model has been adjusted in accordance with clause 30.2 of the Project Agreement to take into account the Classroom Extension Notice of Change. As from the Handover Date, the Unitary Charge payable by the Authority shall be adjusted as identified in the Classroom Extension Full Estimate save that where there are any changes to the Classroom Extension Works or the design of the same or the Classroom Extension Works Specification in the Unitary Charge may be subject to further adjustment pursuant to Part 2 of Schedule 3.

11 Completion and Handover

- 11.1 In respect of the Classroom Extension Works:
- (a) [the Authority shall, prior to the Classroom Extension Acceptance Date, provide room data sheets for the Classroom Extension Works in the form annexed to Schedule [♦]. The Parties shall, acting reasonably, endeavour to agree such room data sheets within five (5) Working Days from such submission];
 - (b) the Authority shall notify the Contractor [five (5)] Working Days in advance of the date or dates when it is proposed that the Authority shall inspect the Classroom Extension Works in order to determine whether or not the Classroom Extension Works have been completed in accordance with the Classroom Extension Works Specification. The Authority shall procure that the Contractor, the FM Contractor and any of their agents and representatives shall be entitled to attend any inspection by the Authority pursuant to this clause 11.1(b);
 - (c) the Authority shall have due regard to any reasonable representations made by the Contractor and/or the FM Contractor arising from the inspection referred to in clause 11.1(b) to the extent relevant to the Classroom Extension Works Specification or the performance by the Contractor of its obligations under the Project Agreement and

that such representations are taken into account in the Classroom Extension Works;
and

- (d) within five (5) Working Days of the inspection described in clause 11.1(b) taking place the Authority shall either:
 - (i) issue a Classroom Extension Acceptance Certificate confirming that the Classroom Extension Works have been completed in accordance with the Classroom Extension Works Specification; or
 - (ii) issue a notice stating that the Classroom Extension Acceptance Certificate has not been issued and specifying any outstanding matters that it shall attend to before a Classroom Extension Acceptance Certificate will be issued in respect of the Classroom Extension Site;
- (e) the Authority shall, prior to the Handover Date:
 - (i) make available to the Contractor and the FM Contractor, adequate training and familiarisation as reasonably necessary in relation to equipment or building management systems comprised in the Classroom Extension Works; and
 - (ii) give prior notice to the Contractor and FM Contractor of the proposed date and content of such training to allow the Contractor and FM Contractor to make reasonable comments and suggestions in relation to the content and format of such training.

11.2 The issue of a Classroom Extension Acceptance Certificate shall in no way lessen or affect the obligations of the Authority under this Deed of Variation, and the Authority shall:

- (a) rectify within a reasonable time, any Minor Defects that are present at the time of issue of the Classroom Extension Acceptance Certificate and/or are notified to the Authority by the Contractor after that date;
- (b) unless the Contractor agrees otherwise, within five (5) Working Days of the Classroom Acceptance Date remove from the Classroom Extension Works Site any and all temporary structures, rubbish and all building and surplus materials and equipment.

11.3 The Authority shall not connect (and shall not permit connection) for the purposes of carrying out the Classroom Extension Works to any existing utilities serving the School without giving prior written notice to the Contractor and having received written consent from the Contractor (such consent not to be unreasonably withheld or delayed). The consumption of utilities in the carrying out and completion of the Classroom Extension Works shall be at the cost of the Authority, to be monitored by separate meters to be installed in respect of the Classroom Extension Works by the Authority.

11.4 The Authority shall within thirty (30) Working Days of the Classroom Extension Acceptance Date provide to the Contractor three copies of:-

- (a) the as-built drawings;

- (b) the maintenance manual; and
- (c) the health and safety file,

each in relation to the Classroom Extension Works.

12 Insurance

- 12.1 The Parties have agreed the annualised increase in the annual insurance premia in respect of the insurances that the Contractor is required to take out and maintain or procure the maintenance of in accordance with clause 56 (Insurances) and Schedule 12 (Insurances) of the Project Agreement (**Insurance Premia**) resulting from the Classroom Extension Works being carried out and completed in accordance with the Classroom Extension Works Specification and the design for the Classroom Extension Works (as both may exist at the date of this Deed of Variation). The agreed annualised increase in the annual insurance premia is set out in the Classroom Extension Full Estimate at Schedule 7.
- 12.2 The agreed annualised increase referred to in clause 12.1 shall be met directly by the Authority through an adjustment to the Unitary Charge under the Project Agreement. Where and to the extent that any change to the Classroom Extension Works, the Classroom Extension Works Specification or the design for the Classroom Extension Works would result in a further increase to the Insurance Premia, the Contractor shall give the Authority written details of such increase which shall be met directly by the Authority through a further adjustment to the Unitary Charge.

13 Change in Law

- 13.1 For the avoidance of doubt, the Contractor shall not be liable to incur any Capital Expenditure in respect of any Change in Law insofar as the same relates to the Classroom Extension Works or that part of the School which comprises the Classroom Extension Works once completed.
- 13.2 Any increases in revenue costs to the Contractor arising from a Change in Law insofar as the same relates to or affects the Classroom Extension Works or that part of the School which comprises the Classroom Extension Works once completed shall be dealt with in accordance with clause 51 of the Project Agreement.

14 Assignment and Sub-contracting

The provisions of clause 62 (Assignment and Sub-Contracting) of the Project Agreement shall apply to this Deed of Variation.

15 Further Assurance

The Parties agree that they shall execute and deliver all necessary documents and do all necessary acts and things in order to give full effect to this Deed of Variation.

16 Confidentiality

The provisions of clause 54 (Information and Confidentiality) of the Project Agreement (as amended by this Deed of Variation) shall apply mutatis mutandis to this Deed of Variation provided that the Parties agree that, without prejudice to the generality of this clause 16:

- (a) either Party shall be entitled to disclose a copy of this Deed of Variation to the Classroom Technical Advisor; and
- (b) the Contractor shall be entitled to disclose a copy of this Deed of Variation to the FM Contractor, the Senior Lender and the provider of Junior Debt.

17 Notices

- 17.1 Any notices to be given under this Deed of Variation shall be delivered personally or sent by first class post or by facsimile transmission to the address or facsimile number of the other Party set out below:

Authority:

The Chief Executive

Darlington Borough Council
Town Hall
Darlington
DL1 5QT

Facsimile Number: 01352 382032

Contractor:

The Company Secretary

Kajima Darlington Schools Limited
Grove House
248A Marylebone Road
London
NW1 6JZ

Facsimile Number: 020 7465 8788

or otherwise notified in writing to the other Party. Any such notice shall be deemed to be served, if delivered personally, at the time of delivery or, when sent by first class recorded delivery post, 48 hours after posting or, if sent by facsimile transmission, 24 hours after proper transmission evidenced by a confirmatory transmission sheet not indicating any transmission error and provided always that a copy of the notice is posted by first class recorded delivery post to the receiving Party on the day of transmission.

18 Governing Law and Jurisdiction

This Deed of Variation shall be governed by and construed in all respects in accordance with the laws of England and Wales. Subject to clause 20, the English courts shall have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Deed of Variation.

19 Contractual Rights of Third Parties

No term of this Deed of Variation shall be enforceable under the Contracts (Rights of Third Parties) Act 1999 by a third party.

20 Dispute Resolution Procedure

- 20.1 All disputes arising in connection with this Deed of Variation shall be resolved through the Dispute Resolution Procedure set out in clause 59 (Dispute Resolution Procedure) of the Project Agreement.

- 20.2 If the Contractor makes a claim for any relief (including relief from Deductions) under this Deed of Variation and such claim is disputed by the Authority then, during the dispute resolution proceedings, the relief claimed shall apply until the final determination of the

dispute in accordance with clause 59 (Dispute Resolution Procedure) of the Project Agreement.

21 Variations to this Deed

No variations to this Deed of Variation shall be effective unless made in writing and signed by or on behalf of both of the Parties.

22 Waiver

22.1 The failure of the Authority or the Contractor to insist on strict performance of any provision of this Deed of Variation or the failure of the Authority or the Contractor to exercise any right or remedy to which it is entitled hereunder shall not constitute a waiver thereof and shall not cause a diminution of the obligations established by this Deed of Variation.

22.2 A waiver of any rights or remedy arising from a breach of this Deed of Variation shall not constitute a waiver of any right or remedy arising from any subsequent breach.

22.3 No waiver of any of the provisions of this Deed of Variation shall be effective unless it is expressly stated to be a waiver and communicated to the Contractor or the Authority (as the case may be) by a director or other duly authorised officer of such Party in writing.

23 Set-Off

The Authority shall not be entitled to retain or set-off any amount owed to it by the Contractor under this Deed of Variation against any amount due to the Contractor under the Project Agreement. The Contractor shall not be entitled to retain or set-off any amount owed to it by the Authority under this Deed of Variation against any amount due to the Authority under the Project Agreement.

24 Counterparts

This Deed of Variation may be entered into in any number of counterparts, all of which when taken together shall constitute one and the same instrument.

25 Invalidity

Any provisions contained in this Deed of Variation which are prohibited by or unlawful or unenforceable under any applicable law shall to the extent required by such law be ineffective without invalidating the remaining provisions of this Deed of Variation provided that where the provisions of such applicable law may be waived they are by this Deed of Variation waived by the Parties to the full extent permitted by such law with the intent that this Deed of Variation shall be valid, binding and enforceable in accordance with its respective terms.

26 Prior Representations

26.1 This Deed of Variation shall supersede all prior representations (other than fraudulent representations), communications, negotiations and understandings concerning the subject matter of this Deed of Variation and there are no other prior or contemporaneous agreements between the Parties in respect of this Deed of Variation.

26.2 No party has relied on any representation or warranty in connection with this Deed of Variation except as expressly set out herein.

26.3 Nothing in clause 5 (Contractor Limitation of Liability) limits or excludes liability arising as a result of fraud, fraudulent misrepresentation, wilful concealment or wilful misconduct.

Executed as a deed by the Parties or their duly authorised representatives on the date of this Deed of Variation.

The common seal of)
DARLINGTON BOROUGH COUNCIL)
was hereto affixed in the presence of)

.....
Authorised Signatory

.....
Authorised Signatory

Executed as a deed by)
KAJIMA DARLINGTON SCHOOLS LIMITED)
acting by a director in the presence of) Director

.....
Signature of witness

Name

Address

.....

Schedule 1

Amendments to the Project Agreement

1 Project Agreement

With effect from the date of this Deed of Variation, references to the Project Agreement shall be deemed to include the terms of this Deed of Variation and accordingly, the Project Agreement shall be amended:

- (a) by the insertion of a new definition at clause 1.1 (Definitions) as follows:

"**Classroom Deed of Variation** means the deed of variation between the Parties dated [◆]" and

- (b) by the addition of a new clause 1.2.9 (Definitions and Interpretation) as follows:

"references in this Agreement to 'this Agreement' (except where referred to in clause 3.2 of this Agreement) shall be deemed to be references to this Agreement as varied by the Classroom Deed of Variation".

2 Classroom Extension Compensation Event

The Parties agree that the Project Agreement shall be amended as follows:

- (a) the definition of "Compensation Events" set out at clause 1.1 (Definitions and Interpretation) shall be amended by the addition of the word "or" after limb (h) and the addition of the following limb:

"(i) the occurrence of a Classroom Extension Compensation Event;"

- (b) insert the following new definition at clause 1.1 (Definitions and Interpretation):

"Classroom Extension Compensation Event" means:

- (i) any failure by the Authority to comply with any of its obligations under the Classroom Deed of Variation or any event or circumstance arising from or in connection with the Classroom Extension Works; or

- (c) clause 15.8.1, shall be amended by replacing the words "or (g)" with the words "(g) or (i)";

- (d) after clause 15.8.1, new clause 15.8.2 and 15.8.3 shall be inserted as follows:

"15.8.2 In respect of a Classroom Extension Compensation Event, the Contractor's Estimated Change in Project Costs shall include a sum equal to the costs reasonably and properly incurred or loss suffered by the Contractor arising from the occurrence of a Classroom Compensation Event (including but not limited to any costs or losses reasonably and properly incurred as a result of the Contractor or its subcontractors being prevented, hindered or delayed from performing the Services, any reasonable and proper additional costs incurred by the Contractor or any subcontractor in performing the Services

and/or any reasonable and proper costs of rectification of any damage) ("the Classroom Extension Compensation Event Losses").";

"15.8.3 Without prejudice to any other provisions of this Agreement, the Authority shall not be liable for any Classroom Extension Compensation Event Losses to the extent the same are caused or contributed to by any act or negligence of the Contractor or any Contractor Related Party or a breach by the Contractor or any Contractor Related Party of this Agreement or the Classroom Deed of Variation²."

(e) clause 66.1 shall be amended so as to read as follows:

"66.1 Except where expressly provided in this Agreement and the Classroom Deed of Variation and any document attached to it, this Agreement and the Classroom Deed of Variation and any documents attached constitute the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement and the Classroom Deed of Variation."

(f) paragraph 2.5 of Schedule 5 (Payment Mechanism) shall be amended by the words "(including a Classroom Compensation Event)" to the sixth limb so it reads:

"any act of the Authority and/or an Authority Related Party (including a Classroom Compensation Event) which interferes with the carrying out of the Services by the Contractor (or its subcontractors) or the Contractor's ability to comply with the terms of this Agreement".

[NOTE:

1. the Deed will also include a new Financial Model, which will replace the existing Financial Model;

2. the Payment Mechanism will need to include the new Areas which are the subject of the Classroom Extension Works together with any necessary re-calibration to ensure the Contractor is in a no better no worse position as a result of the introduction of additional Areas]

² Reference to the Classroom Deed of Variation has been reinstated here as the reference to the Project Agreement as amended by the Deed of Variation does not cover the provisions of the Deed of Variation which do not vary the terms of the Project Agreement.

Schedule 2

LGCA Certificate

CERTIFICATE ISSUED UNDER SECTION 3 OF THE LOCAL GOVERNMENT (CONTRACTS) ACT 1997 (the **Act**) IN RESPECT OF A DEED OF VARIATION RELATING TO CLASSROOM WORKS (the **Classroom Deed of Variation**) BETWEEN (1) DARLINGTON BOROUGH COUNCIL (the **Authority**), AND (2) KAJIMA DARLINGTON SCHOOLS LIMITED (the **Contractor**) RELATING TO THE PROJECT AGREEMENT DATED 31 MARCH 2004 BETWEEN THE AUTHORITY AND THE CONTRACTOR RELATING TO THE PROVISION OF SCHOOL ACCOMMODATION FACILITIES AND SERVICES (the **Project Agreement**)

1 **Period of the Contract**

The contract period is the period from the date of execution of the Classroom Deed of Variation expiring on the expiry or earlier termination of the Project Agreement.

2 **Purpose of Contract**

- 2.1 The Authority, under its statutory duty as local education authority, has contracted with the Contractor under the Government's Private Finance Initiative, for the design, financing, construction, fitting out, commissioning and operation of new school facilities including Harrogate Hill Primary School (the **School**).
- 2.2 By entering the Project Agreement the Authority sought to procure for its use in discharging its functions the provision of new schools to be located at the Education Village and Harrogate Hill Primary School.
- 2.3 By entering the Project Agreement the Contractor has contracted with the Authority to provide the required facilities and services under the conditions contained therein.
- 2.4 The Authority wishes to construct an extension at the School and engage the Contractor to provide services in respect of such extension.
- 2.5 The purpose of the Classroom Deed of Variation is to vary the Project Agreement to permit the construction of the extension at the School and to address the implication to the Contractor of such extension.

3 **Contract Type**

The Classroom Deed of Variation falls within Section 4(3) of the Act.

4 **Powers to Enter into the Contract**

The Authority has power to enter into the Classroom Deed of Variation and the statutory provisions conferring the powers are Section 13 (as amended) and 14 of the Education Act 1996, Section 111 of the Local Government Act 1972 and Section 1(1) of the Act.

5 Copies of Certificate

Copies of this certificate are to be given to the Contractor, the Authority's Monitoring Officer and the Authority's Auditor.

6 Matters to be Dealt with in Certificate

The Classroom Deed of Variation is calculated to facilitate and is conducive and incidental to the discharge of the Authority's functions (acting as local education authority pursuant to section 12(2) of the Education Act 1996) of:

- 6.1 securing sufficient schools for the provision of secondary education in its area, and the statutory provisions conferring this function are Sections 13 (as amended) and 14 of the Education Act 1996; and
- 6.2 doing anything (whether or not involving any expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of the Authority's functions and the statutory provision conferring this function is Section 111 of the Local Government Act 1972.

7 Compliance with Regulations

The Authority has complied and will comply with the requirements of the Local Authority (Contracts) Regulations 1997 with respect to the issue of certificates under Section 3 of the Act.

8 Consent of Other Parties to the Agreement

The Contractor is the only other party to the Project Agreement and the Classroom Deed of Variation and has consented to the issue of this certificate.

Signed:

Dated:

Chief Finance Officer
Darlington Borough Council

Schedule 3

Classroom Extension Works Specification and Design Review

Part 1 - Classroom Extension Works Specification

[DN: To include full details of the design and specification of the works.]

Part 2 - Changes to the Classroom Extension Works

- 1 The Authority will give reasonable prior written notice to the Contractor of any change to the Classroom Extension Works and/or the Classroom Extension Works Specification:
 - (a) which is material; and/or
 - (b) which would be reasonably likely to affect the provision of the Services

(a "**Relevant Classroom Extension Change**") together with such information in relation to any relevant changes that the Contractor may reasonable request.
- 2 In the event of the Authority proposing a Relevant Classroom Extension Change, the Authority shall be deemed to have served an Authority Notice of Change and the provisions of clause 52 of the Project Agreement shall apply to determine the implementation of the Relevant Classroom Extension Change and any adjustment to the Unitary Charge or to the obligations of the Contractor as a consequence of the Relevant Classroom Extension Change.
- 3 For the avoidance of doubt the Contractor shall not be obliged to provide Services to the Classroom Extension Works until any Relevant Classroom Extension Change has been agreed pursuant to clause 52

DD Draft: 20 July 2010
AG mark up:22 July 2010
DD Mark-up: 06.09.10
AG mark up: 09.09.10
DD Mark-up 14.09.10

Schedule 4

NOT USED

DD Draft: 20 July 2010
AG mark up:22 July 2010
DD Mark-up: 06.09.10
AG mark up: 09.09.10
DD Mark-up 14.09.10

Schedule 5

Plans

[DN: To be inserted – Classroom Extension Works Accommodation Site; Classroom Extension Works Site]

Schedule 6

Access Protocol

Part 1 - Access Protocol (pre Classroom Extension Acceptance Date) to the Classroom Extension Works Site and Classroom Extension Works Accommodation Site

In carrying out any works relating to the Classroom Extension Works before the Classroom Extension Availability Date, the Authority shall:³

To include:

- relevant provisions from Part 3
- notification of access;
- hours of access;
- security arrangements;
- site rules and conditions;
- permit the Contractor to access the Classroom Extension Works Site and/or Classroom Building Contractor's Site on reasonable notice or, in any Emergency, without prior notice from the Contractor.

³ Mitie to revise.

**Part 2 - Access Protocol (pre Classroom Extension Availability Date) to parts of the School
(other than the Classroom Extension Works Site and Classroom Extension Works
Accommodation Site)**

In respect of any access to the School (other than the Classroom Extension Works Site and Classroom Extension Works Accommodation Site) before the Classroom Extension Availability Date, the Authority shall:

- (a) provide the Contractor with at least two (2) Working Days' notice of any required access together with full details of the areas to which such access is required and the hours of such access;
- (b) before exercising such access, obtain the Contractor's prior consent (such consent not to be unreasonably withheld or delayed);
- (c) leave the area in a clean safe and tidy condition, having regard to its condition excluding any existing defect and any effect there from before such works were carried out;
- (d) take all reasonable precautions to minimise as far as reasonably practicable any disruption or disturbance or loss or additional costs to the provision of the Services by the Contractor, except where the Contractor has consented otherwise pursuant to paragraph (b) above;
- (e) consult with the Contractor and comply with any relevant site rules and regulations (including permit to work systems) reasonably required by the Contractor and observe all reasonable requirements of the Contractor in respect of such matters;
- (f) comply with any programme of works agreed with the Contractor pursuant to paragraphs (a) and (b) above provided always that the Contractor shall not object to immaterial slippages in the programme and shall act reasonably in relation to material slippages in the programme (including by not unreasonably withholding or delaying its consent to any revised programme);
- (g) ensure that a responsible employee of the Authority acts as manager for the purpose of supervising any rectification works;
- (h) comply with any School policies in relation to people visiting/working on the Site;
- (i) ensure that all persons attending have been notified in advance to the Contractor and approved in advance by the Contractor. Where it has not been practicable to obtain the Contractor's approval, such persons must be accompanied at all times by a member of the Authority's staff who has been properly notified and approved by the Contractor; and
- (j) maintain all existing access routes within such parts of the School.

Part 3 - Access Protocol (post Classroom Extension Acceptance Date)

In carrying out any works relating to the Classroom Extension Works after the Classroom Extension Acceptance Date, the Authority shall:

- (a) provide the Contractor with at least two (2) Working Days' notice of any required access together with full details of the areas affected and an indicative programme for any such works and will take into account the Contractor's submissions in relation to such programme;
- (b) before carrying out such works, obtain the Contractor's prior consent (such consent not to be unreasonably withheld or delayed);
- (c) leave the area in a clean safe and tidy condition, having regard to its condition excluding any existing defect and any effect there from before such works were carried out;
- (d) take all reasonable precautions to minimise as far as reasonably practicable any disruption or disturbance or loss or additional costs to the provision of the Services by the Contractor, except where the Contractor has consented otherwise pursuant to paragraph (b) above;
- (e) consult with the Contractor and comply with any relevant site rules and regulations (including permit to work systems) reasonably required by the Contractor and observe all reasonable requirements of the Contractor in respect of such matters;
- (f) carry out the works in accordance with Good Industry Practice;
- (g) comply with any programme of works agreed with the Contractor pursuant to paragraphs (a) and (b) above provided always that the Contractor shall not object to immaterial slippages in the programme and shall act reasonably in relation to material slippages in the programme (including by not unreasonably withholding or delaying its consent to any revised programme);
- (h) ensure that a responsible employee of the Authority acts as manager for the purpose of supervising any rectification works;
- (i) comply with any School policies in relation to people visiting/working on the Site;
- (j) ensure that all persons attending have been notified in advance to the Contractor and approved in advance by the Contractor. Where it has not been practicable to obtain the Contractor's approval, such persons must be accompanied at all times by a member of the Authority's staff who has been properly notified and approved by the Contractor; and
- (k) in relation to any replacement of plant or other components of the Classroom Extension Works, ensure that:
 - (i) the replacement item has a life expectancy that is no worse than the life expectancy that the item which is being replaced should have had at the time of the replacement, had the Authority been complying with its obligations under this Deed of Variation; and/or

- (ii) a replacement warranty is provided and that the period of the replacement warranty in respect of that plant or component shall recommence from the date that the replacement plant or component is fully installed and cease on the same date as that which it replaces.

Schedule 7

Classroom Services Variation

[DN: The Classroom Extension Notice of Change and the Classroom Extension Full Estimate are appended to Schedule 7].