

DATED 26<sup>th</sup> March

2015

**THE COUNCIL OF THE  
BOROUGH OF TORBAY**

- and -

**CAVANA HOMES (DEVON) LIMITED**

- and -

**THE NATIONAL HOUSE-BUILDING COUNCIL**

**AGREEMENT**

under Section 278 of the Highways Act 1980  
in connection with  
Street Works at  
Browns Bridge Road/ Nicholson Road  
Torquay  
in the Borough of Torbay

THIS AGREEMENT made the 26<sup>th</sup> day of March 2015

**BETWEEN**

- 1) **THE COUNCIL OF THE BOROUGH OF TORBAY** of the Town Hall Castle Circus Torquay TQ1 3DR ("the Council")
- 2) **CAVANNA HOMES (DEVON) LIMITED** (Co. Regn No. 4228419) whose registered office is at Cavanna House, Riviera Park, Nicholson Road, Torquay TQ2 7TD ("the Developer")
- 3) **THE NATIONAL HOUSE-BUILDING COUNCIL** (Co. Regn. No 320784) whose registered office is at NHBC House, Davy Avenue, Knowhill, Milton Keynes, Bucks MK5 8FP ("the Surety")

**WHEREAS:**

- 1) THE Council is the highway authority for the area within which the Works described in clause 2.1 ("the Works") are situated
- 2) THE Council and the Developer have agreed to enter into this Agreement pursuant to section 278 of the Highways Act 1980 to secure the execution of and payment for the Works which will be of benefit to the Developer and of benefit to the general public at large

NOW THIS DEED WITNESSES as follows :

**1. ENABLING POWERS**

This Agreement is made pursuant to section 278 of the Highways Act 1980 and all other powers enabling

**2. DEFINITIONS AND INTERPRETATION**

**2.1 Definitions**

The following terms in this Agreement shall have the following meanings:-

(a)	"the <b>Communication Policy</b> "	means the document titled <i>Street Works and Works for Road Purposes. Communications Policy</i> annexed hereto
(b)	"the <b>Certificate of Satisfactory Completion</b> "	means the Certificate issued by the Proper Officer to the Developer upon satisfactory completion of the Works in accordance with the Drawing
(c)	"the <b>Council</b> " and "the	includes their respective successors in title

	<b>Developer</b>	and assigns
(d)	<b>"the Drawing"</b>	means the drawing numbered S278/102 B and (and any amended or additional drawing signed by the Proper Officer) which shall accord with the technical requirements of the Proper Officer and shall be approved by the Proper Officer prior to commencement of the Works
(e)	<b>"the Estimated Cost"</b>	means the sum of £27,000 (Twenty Seven Thousand Pounds) being the amount which is in the opinion of the Proper Officer the cost of carrying out the Works within the period specified in this Agreement
(f)	<b>"the Final Certificate"</b>	means the Certificate issued by the Proper Officer on the satisfactory completion of the Works
(g)	<b>"the Maintenance Period"</b>	means the period of 12 months immediately following the date of the issue of the Certificate of Satisfactory Completion
(h)	<b>"the Notice of Commencement"</b>	means 14 days' prior notice in writing served by the Developer upon the Proper Officer of its intention to proceed with the Works
(i)	<b>"Occupied"</b>	means occupied for residential purposes and does not include occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing or display or occupation in relation to security operations
(j)	<b>"the Proper Officer"</b>	means the officer of the Council for the time being appointed for the purposes of this Agreement or of any provision contained herein

(k)	<b>"Satisfactory Completion"</b>	means the satisfactory completion of the Works in accordance with the Drawing
(l)	<b>"the Specification"</b>	means the specification for Highway Works 1991 produced by Her Majesty's Stationery Office as amended from time to time
(m)	<b>"the Start Date"</b>	means the date of this agreement
(n)	<b>"Statutory Undertaker"</b>	Means a statutory undertaker as defined in Section 329(1) of the Highways Act 1980 and other undertakers and public utility suppliers deemed to be statutory undertakers for the purposes of that Act.
(o)	<b>"Traffic Manager"</b>	means the officer appointed by the Council to act as Traffic Manager for the purposes of the Traffic Management Act 2004;
(p)	<b>"the Works"</b>	Means pavement widening, provision of a cycleway, improvements to roundabout and other works at the junction of Browns Bridge Road and Nicholson Road, Torquay as more particularly described in the Drawing
(q)	<b>"the 1991 Act"</b>	means the New Roads and Street Works Act 1991

## 2.2 Interpretation

In this Agreement:-

- (a) the clause, paragraph and schedule headings are for reference only and are not to be taken into account in its construction or interpretation.
- (b) any reference in this document to a clause, paragraph or schedule without further designation is to be construed as a reference to the clause, paragraph or schedule of this document so numbered.

## 3. PRECONDITIONS

This Agreement is conditional upon and shall not take effect (save for payment to the

Council of the amounts set out in Clause 5.16.(a)) unless or until the Developer has served the Notice of Commencement and complied with the obligations set out in the Communication Policy

#### **4. GRANT OF RIGHT TO EXECUTE WORKS**

The Council as the highway authority hereby grants to the Developer and its servants and agents or any contractor of the Developer with all necessary plant and equipment a licence to enter upon the public highways so far as is necessary for the purpose of executing the Works (including breaking open the surface) and inspecting replacing and maintaining the same

#### **5. DEVELOPER'S COVENANTS**

The Developer hereby covenants with the Council that it will observe and perform the requirements of this clause 5:-

##### **5.1 Approval of Works**

Before carrying out the Works the Developer shall obtain:-

- (a) the approval of the Proper Officer to the specification plans and Drawings of the Works
- (b) all necessary planning consents
- (c) all necessary consents of Statutory Undertakers who have or may have apparatus that may be affected by the Works

##### **5.2 The Works**

The Developer shall at its own expense

- (a) carry out and complete the Works in a good and workmanlike manner and with proper materials, in accordance in all respects with the Specification and the Drawing, to the satisfaction of the Proper Officer and in accordance with any permits, permissions, consents and approvals granted by the Council (or any other statutory or public authorities),
- (b) advise all Statutory Undertakers who may or do have apparatus or any part of their services affected by the Works, and
- (c) execute all works or pay any costs that may become due and payable in respect of any further works that are required by any Statutory Undertaker as a result of the Developer undertaking the Works

##### **5.3 Contractors**

The Developer shall:-

- (a) before contracting for the construction of the Works inform the Proper Officer of the name and address of the proposed contractor and obtain the consent of the Proper Officer to that contractor being employed in writing before commencement of the Works and it shall be a requirement of this agreement



that the contractor shall at all times maintain a public liability insurance policy with a member of the Association of British Insurers in a minimum sum of £5,000,000 for a single claim (and in the event of the Developer carrying out the Highway Works itself it shall provide the insurance cover required by this clause)

- (b) include in the conditions of contract of the contractors (or any sub contractors) engaged to carry out the Works obligations to:-
  - (i) give the Traffic Manager appropriate notice such form of notice to be obtained from the Traffic Manager to comply with the requirements of the Traffic Management Act 2004 of the Developer's intention to commence the Works and
  - (ii) comply with the requirements of the Communication Policy
  - (iii) comply with any obligations imposed herein upon the Developer in so far as they relate to the carrying out of the Works
- (c) guarantee compliance with the matters set out in clause 5.3(b)

#### 5.4 **Notice of Commencement**

The Developer shall send to the Proper Officer the Notice of Commencement for the purpose of exercising its functions under the terms of this agreement

#### 5.5 **Programme of Works**

The Developer shall:-

- (a) give the Proper Officer a programme of works for the purpose of exercising its functions under the terms of this agreement for approval 28 days prior to commencement of the Works (such approval not to be unreasonably withheld) and
- (b) carry out the Works in accordance with the approved programme of works

#### 5.6 **Health and Safety**

Throughout the progress of the Works the Developer shall have full regard for the safety of the public and, without prejudice to the generality of the foregoing, shall:-

- (a) comply with the Communication Policy and
- (b) provide and maintain such precautionary works (including fencing) and signs as may be required by the Proper Officer or any other body having statutory authority

#### 5.7 **1991 Act**

The Developer shall comply in all respects with the 1991 Act.

#### 5.8 **General Indemnity**

The Developer shall indemnify the Council in respect of all actions claims demands expenses and proceedings arising out of or in connection with or incidental to the

carrying out of the Works other than those arising out of in consequence of any act neglect default or liability of the Council or any failure by the Council to comply with its obligations hereunder PROVIDED THAT subject to Clause 5.9 the Developer shall have no liability in relation to the same following the issue of the Final Certificate

**5.9 Developer's Further Indemnity**

Without prejudice to the generality of the indemnity given by the Developer to the Council at clause 5.8 the Developer shall for 7 years from the date of the issue of the Final Certificate

- (a) be responsible for all reasonable and proper costs and expenses incurred by the Council or its duly appointed agents in dealing with settling or disposing of claims for noise insulation or injurious affection arising from the execution of the Works during or after completion of the Works
- (b) indemnify the Council against any lawful claim under the Land Compensation Act 1973 (and any statutory modification or re-enactment thereof) arising out of the use of the Works

**5.10 Access to the Works**

During the carrying out of the Works the Developer shall following a reasonable request by the Proper Officer giving the provision of reasonable notice give the Proper Officer and any other officer of the Council access to every part of the Works and all materials used or intended to be used therein

**5.11 Duty to Allow Inspection of the Works**

The Developer shall not cover up any part of the Works without the approval of the Proper Officer (such approval not to be unreasonably withheld) who shall be given the opportunity to examine and measure any work which is about to be covered up and to examine foundations before permanent work is placed thereon. The Proper Officer shall be given at least two working days written notice whenever any such work is ready for examination

**5.12 Obligations During Maintenance Period**

The Developer shall at its own expense during the Maintenance Period (or as soon as practicable thereafter) reinstate and make good any damage or defect in the Works which in the reasonable and proper opinion of the Proper Officer shall have arisen out of any defect in the design or construction of the Works or the use of defective workmanship or of materials not in accordance with the Drawings during the construction of the Works or otherwise shall have been caused by the person carrying out the Works which shall have become apparent during the Maintenance Period

**5.13 As Built Drawings**



Before the issue of the Final Certificate the Developer shall furnish the Council with a full set of drawings of the Works as built

**5.14 Defective Design**

If during the execution of the Works any defect error or omission shall be found either in the Drawing plans or specification or in any survey undertaken by the Developer or if the highway shall be found to be unsuitable for the Works all defects errors omissions or wants of repair or making good shall be undertaken at the sole expense of the Developer

**5.15 Timing of Works**

The Developer shall carry out and complete the Works by **31<sup>st</sup> May 2015** and shall during the Maintenance Period at its own expense maintain the Works and shall carry out such routine maintenance and repairs as may be necessary to facilitate use by vehicles and pedestrians

**5.16 Inspection fee**

- (a) On completion of this Agreement the Developer shall pay to the Council the sum of £1,620 in respect of the costs incurred by the Council in inspecting the works being six per cent of the Estimated Cost TOGETHER with the proper legal costs of the Council in connection with the preparation and completion of this Agreement and the necessary duplicates thereof
- (b) RECEIPT by the Council of the payment of such sum shall not create any contractual relationship between the Council and the Developer nor absolve the Developer from any liability or obligation imposed upon it by the terms of this Agreement or by statute or at common law and the Council will not be liable for any loss damage or injury which the Developer may sustain by reason of insufficient or faulty inspection of the Works by the Council

**6. COUNCIL COVENANTS**

The Council hereby covenants that it will observe and perform the requirements of this clause 6:-

**6.1 The Certificate of Satisfactory Completion**

Upon notification in writing to the Proper Officer that the Developer considers that the Works are completed the Proper Officer shall inspect the Works within a reasonable time and in any event no longer than 14 working days following receipt of such notification from the Developer and if they have been completed to the satisfaction of the Proper Officer the Proper Officer shall issue to the Developer the Certificate of Satisfactory Completion and from the date thereof the Maintenance Period shall commence to run.

## **6.2 The Final Certificate**

Upon completion to the Proper Officer's satisfaction of any works for which the Developer is responsible under this Agreement following the expiry of the Maintenance Period and upon notification in writing to the Proper Officer that the Developer considers that the Works are finally completed the Proper Officer shall carry out a safety audit and issue a Final Certificate and give written authorisation for the discharge of the Bond PROVIDED THAT no such certificate or authorisation need be given until:-

- (a) the Developer has paid to the Council all amounts due to the Council under this Agreement and
- (b) any necessary reinstatement or other works have been completed to the satisfaction in all respects of the Proper Officer and
- (c) the Developer has delivered to the Proper Officer drawings showing the Works as built in accordance with Clause 5.13.

## **6.3 Release from Liability**

The Council covenants that the Final Certificate shall be issued in accordance with this Agreement and that the Developer shall be released from all liability under this Agreement (save for the indemnities set out in clauses 5.8 and 5.9) and that upon the issue of the Final Certificate the Works shall become maintainable at the public expense

## **7. AGREEMENTS AND DECLARATIONS**

It is hereby agreed between the parties hereto and declared as follows:-

### **7.1 Works in Default**

If the Works or any part or parts thereof or any works required within the Maintenance Period are not carried out or completed to the reasonable satisfaction of the Proper Officer in accordance with the terms of this Agreement, the Council after giving 28 (twenty eight) days written notice of its intention to the Developer may enter onto the site of the Works and execute or complete the relevant works in accordance with the provisions of this Agreement by its own employees or by contractors and recover its costs from the Developer up to the maximum of the Estimated Cost

### **7.2 Compliance with Communication Policy**

If in the opinion of the Proper Officer the Developer fails to comply with the Communication Policy the Proper Officer may:

- a) serve notice upon the Developer that the licence granted by this Agreement to carry out the Works on the public highway is suspended with immediate effect; and

- (b) should notice be served pursuant to clause 7.2(a) the Developer will immediately cease carrying out works on the public highway until the Communication Policy has been complied with and the Proper Officer gives notice to the Developer that it may continue carrying out the Works.

### 7.3 **Third Parties**

A person who is not a party to this Agreement has no right to enforce any term of this Agreement under the Contracts (Rights of Third Parties) Act 1999 and the parties to this Agreement do not intend that any third parties are created by this Agreement

### 7.4 **Council as a Public Authority**

Nothing contained in this Agreement shall in any way prejudice or be construed to prejudice the statutory rights powers duties and authority conferred upon the Council as local authority

## 8. **SURETY'S OBLIGATIONS:**

The Surety hereby covenants with the Council that it will observe and perform the requirements of this clause 8:-

### 8.1 **Council's Rights in Default**

If the Developer at any time fails to perform or observe any of the conditions stipulations or obligations on his part contained in this Agreement or if the Developer is adjudged bankrupt or if the Developer is being wound up or if the Developer enters into a composition or scheme of arrangement (otherwise than for the purpose of reconstruction or amalgamation) the Proper Officer may without prejudice to any statutory rights or powers or any other right claim or remedy under this Agreement (and in particular but without prejudice to the generality of this clause the rights of the Council pursuant to Clause 6 hereof) send to the Surety notice in writing (hereinafter referred to as the "**Default Notice**"):-

- (a) specifying the work (hereinafter referred to as the "**Default Work**") to be carried out in order that the Works may be executed or completed as the case may be in accordance with this Agreement and
- (b) containing an estimate by the Proper Officer of the cost of carrying out the default work and of the cost of maintaining the Works for a period of twelve months prior to the Works becoming maintainable at the public expense and also a statement of the amount of the usual establishment charges of the Council (together hereinafter referred to as the "**Default Cost**") which cost -
- (i) shall not exceed the sum of £27,000 (being the Estimated Cost) AND

- (ii) shall not exceed the sum of £6,750 on and after the issue of the Certificate of Satisfactory Completion

## **8.2 Surety's Counter Notice**

Within twenty-eight days after the Surety has received the Default Notice the Surety shall

- (a) pay the Default Cost to the Council or
- (b) send to the Council notice in writing (hereinafter referred to as the "Counter Notice") of the intention of the Surety to carry out the Default Work

## **8.3 Surety in Default following service of Counter Notice**

If the Surety having sent the Counter Notice to the Council:-

- (a) fails to start the Default Work within fifty-six days after the Surety received the Default Notice the Surety shall forthwith pay the Default Cost to the Council with simple interest thereon at the rate of 5 per cent per annum above the base lending rate from time to time in force of the National Westminster Bank PLC calculated from the date on which the Surety received the Default Notice to the date of payment
- (b) starts the Default Work and the said work is not completed within four months after the Counter Notice was received by the Council or within such further period as may be agreed between the Council and the Surety the Surety shall subject to Clause 8.4 forthwith on demand by the Proper Officer pay to the Council such sum as the Proper Officer may determine as being the cost of carrying out any Default Work not carried out by the Surety or the cost of maintaining the Works for the period of twelve months prior to the Works becoming maintainable at the public expense as may be the case (or as being the cost of both) and also pay to the Council the amount determined by the Proper Officer as being the amount of the appropriate usual establishment charges of the Council

## **8.4 Liability of Surety**

- (a) the sum payable under Clause 8.3(b) shall not exceed the Default Cost and on the issue of the Final Certificate the Surety shall be released from all liability hereunder; and

- 9.1 (b) for the purposes of this Agreement a demand stated to be made hereunder and signed or purportedly signed on behalf of the Council shall be conclusive as to the Surety's obligation to pay the amount demanded

and there shall be no obligation or duty whatsoever on the Surety to consider the alternative set out in clause 8.2(b)

IN WITNESS whereof the parties hereto have executed this Deed the day and year first before written

Executed as a D  
THE COMMON  
THE COUNCIL  
in the presence

Prc  
anc

Executed and  
A Deed by two  
Authorised rep  
Cavanna Horr  
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in the presen