

DATED 20 JUNE 2012

CAVANNA HOMES (SOUTH WEST) LIMITED

- and -

PARKBAY DEVELOPMENTS LIMITED

- and -

THE COUNCIL OF THE BOROUGH OF TORBAY

AGREEMENT

Under Sections 38 and 278 of the Highways Act 1980
and Section 33 of the Local Government
(Miscellaneous Provisions) Act 1982
relating to development at
Yannons Farm, Brixham Road
Paignton, Devon

PHASE 1

ELIZABETH RAIKES
Chief Executive
Town Hall
TORQUAY

W:\CESRV\Legal Conveyancing\FILES\CH Highways S38 & S278\CH 0323 - Yannons Farm\

2012.05.31 - final agreement (tracked) JO.DOC

AN AGREEMENT made the 20th day of JUNE 2012
BETWEEN

1. **CAVANNA HOMES (SOUTH WEST) LIMITED** a company registered in England and Wales under Company Number 4228446 and whose registered office is at Cavanna House, Riviera Park, Nicholson Road, Torquay, Devon TQ2 7TD (the "**Developer**");
2. **PARKBAY DEVELOPMENTS LIMITED** a company registered in England and Wales under Company Number 03528563 and whose registered office is at Wessex House, Teign Road, Newton Abbot, Devon TQ12 4AA ("**Parkbay**"); and
3. **THE COUNCIL OF THE BOROUGH OF TORBAY** of The Town Hall Castle Circus Torquay Devon TQ1 3DR (the "**Council**");

WHEREAS :

- (1) The Council is the Local Highway Authority.
- (2) The Developer is the estate owner in fee simple absolute in possession free from encumbrances of the land known as Yannons Farm and other land on the south west side of Brixham Road, Paignton registered under Title Numbers DN405470 and DN354259
- (3) Parkbay is the estate owner in fee simple absolute in possession free from encumbrances of the land known as Parkbay Garden Centre, Brixham Road, Paignton registered under Title Number DN519259
- (4) The land within Title Numbers DN405470, DN354259 and DN519259 includes the site of the proposed road or roads shown coloured light blue and pink and all other land required for the Works hereinafter referred to and is desirous of making up the road or roads so that the same shall become a highway or highways maintainable at public expense.
- (5) The Developer and Parkbay have requested that when the Works have been executed and maintained as hereinafter appearing the Council shall undertake the maintenance of the Road or Roads as a highway or highways maintainable at the public expense

which the Council has agreed to do upon the terms and conditions hereinafter appearing.

- (6) The Council is requiring that the Developer execute certain works upon the public highway as hereinafter described and the Council is satisfied that those highway works will be of benefit to the public.

N O W in pursuance of Sections 38 and 278 of the Highways Act 1980 and Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 **IT IS HEREBY AGREED AND DECLARED** by and between the parties hereto as follows:

1. INTERPRETATION:

IN this Agreement where the context so admits:

1.1 the "Certificate of Substantial Completion " means the Certificate to be issued on satisfactory completion of the Highway Works in accordance with Clause 11 hereof;

1.2 the "Commuted Sum" means the sum of £15,000 as a commuted sum for onwards maintenance of the attenuation pipes shown hatched on Drawings P9464/H126 Revision L and P9464/H128 Revision K

1.3 The "Drawings" mean the Drawings numbered

P9464 H100 Revision L

P9464 H101 Revision E

P9464 H105 Revision J

P9464 H125 Revision K

P9464 H126 Revision L

P9464 H127 Revision D

P9464 H128 Revision K

P9464 H141 Revision D

853783852 Revision C

annexed hereto and signed by or on behalf of the parties hereto and any amended such drawing signed by or on behalf of the Proper Officer;

- 1.4 the "Final Certificate" means the Certificate to be issued on satisfactory completion of the maintenance period for the Works or the Highway Works in accordance with Clause 15 hereof;
- 1.5 the "Highways Works" means the works to be executed upon that part of the public highway shown coloured dark blue on the Plan and described in Part 3 of the Schedule;
- 1.6 the "Land Compensation Sum" means the sum of £280,000 being the estimated cost of dealing with settling and disposing of claims pursuant to clause 25(a)(i) and 25(a)(ii) hereof
- 1.7 the "Part 1 Certificate" means the Certificate to be issued on satisfactory completion of the Part 1 Works in accordance with Clause 9 hereof;
- 1.8 the "Part 1 Works" means the works referred to in Part 1 of the Schedule hereto
- 1.9 the "Part 2 Certificate" means the Certificate to be issued on satisfactory completion of the Part 2 Works in accordance with Clause 12 hereof;
- 1.10 the "Part 2 Works" means the works referred to in Part 2 of the Schedule hereto
- 1.11 the "Plan" means the plan annexed hereto labelled 'Proposed Land Transfer Layout' (Ref: P9464 H152 Rev D)
- 1.12 the "Programme of Works" means that referred to in clause 5;
- 1.13 the "Proper Officer" means the officer of the Council for the time being appointed for the purposes of this agreement or of any provision contained herein;
- 1.14 the "Retained Land" means the land shown shaded orange on the Plan
- 1.15 the "Road or Roads" unless otherwise required means the carriageways and footways of the road or roads referred to in this Agreement including any off site highway drainage shown on the Drawings and includes the footpaths street lighting all verges service strips service margins vehicular crossings road surface water drainage system (if any) and all other things ancillary thereto;
- 1.16 the "Safety Audit" means a safety audit of the Works and the Highway Works to be carried out in accordance with the advice issued by the Institution of Highways and Transportation

- 1.17 "Section 104" Agreement means any agreement between the Developer and South West Water Limited pursuant to Section 104 of the Water Industry Act 1991 relating to the construction of the Sewers
- 1.18 "Sewers" means the sewers to be constructed beneath the Road or Roads and forming part of the Works or Highway Works
- 1.19 the "Sewer Retention Sum" means the sum of £10,545.00 being the estimated cost of the construction of the Sewers
- 1.20 the "Site" means the land bound by this agreement shown edged red on the Plan and more particularly referred to in recital 4
- 1.21 the "Specification" means the Highways in Residential and Commercial Estates Design Guide dated January 1996 (as amended) produced by Devon County Council and the Design Guide Exception Report dated April 2003 produced by the Council;
- 1.22 the "Statutory Undertaker" means a "Statutory Undertaker" as defined in Section 329(1) of the Highways Act 1980 and British Telecommunications PLC;
- 1.23 the "Traffic Manager" means the officer appointed by the Council to act as Traffic Manager for the purposes of the Traffic Management Act 2004;
- 1.24 the "Works" means the works specified in Parts 1 and 2 of the Schedule hereto for the making up of the Road or Roads
- 1.25 the "Works Bond" means a bond or bonds to secure the carrying out of the Works and Highway Works in the form annexed hereto (or such alternative wording as shall be agreed between the parties acting reasonably)
- 1.26 "Working Day" means any day falling between Monday and Friday (both days inclusive) upon which the clearing banks in the City of London are open for normal business which is not Good Friday a Bank Holiday or Public Holiday.;

2. DEVELOPER'S LIABILITY:

- (a) **SUBJECT** to the terms, conditions, agreements and undertakings contained in this Agreement the Developer shall carry out and complete the Works and the Highway Works at the Developer's expense in a good and workmanlike manner

and with proper materials in accordance in all respects with the Specification and the Drawings to the satisfaction of the Proper Officer and in accordance with permits and approvals granted by the Council or any other statutory or public authorities and (except as may be otherwise provided in this Agreement) shall complete the Highway Works and the Works within 12 months of the date hereof.

- (b) the Council may at the discretion of the Proper Officer grant to the Developer an extension of the period referred to in clause 2(a) for the completion of the Works and Highway Works PROVIDED that such extension is requested in writing by both the Developer and Parkbay and PROVIDED ALSO
- (i) that on the granting of such extension of time (to be confirmed in writing by the Proper Officer) the Developer shall pay to the Council such additional inspection fee (based on the estimated cost of any outstanding works) as shall be agreed between the Proper Officer and the Developer and
 - (ii) the Developer and the Proper Officer shall review the estimated cost of the Works and the Highway Works.

3. HIGHWAY WORKS

- (a) The Council as the Local Highway Authority hereby grants to the Developer and its servants agents or any contractor of the Developer with all necessary plant and equipment a licence to enter upon the public highway so far as it is necessary for the purposes of executing the Highway Works (including breaking open the surface of the public highway) and inspecting replacing and maintaining the same
- (b) The Developer covenants with the Council that the Developer will at its own expense in relation to the Highway Works observe and perform to the satisfaction of the Council the following requirements obligations and conditions or any of them outstanding at the date of this Agreement and will immediately do

any act or thing required by the Council to remedy any breach of those requirements obligations and conditions:-

- (i) Not to commence any part of the Highway Works before:
 - A a Programme of Works and a method of carrying out the Highway Works shall have been approved by the Proper Officer such approval not to be unreasonably withheld;
 - B entering into the Works Bond with a major reputable clearing bank or other reputable surety approved beforehand by the Council
- (ii) Secure at its own expense any necessary approvals required from any Statutory Undertakers emergency services and other public authorities and utilities and comply with all requirements of these;
- (iii) execute the Highway Works and works associated therewith expeditiously causing no unnecessary nuisance to the public;
- (iv) employ a suitably qualified Supervisor to oversee the construction of the Highway Works and to act as liaison between the Contractor and the Council;
- (v) employ a contractor or contractors to carry out the Highway Works who shall be approved by the Proper Officer (such approval not to be unreasonably withheld or delayed) and that all the covenants conditions and obligations contained in this agreement relating to the method of working shall be included in any agreement between the Developer and its contractor and it shall not depart from it without the approval of the Council and the said contractor or contractors shall at all times during the progress of the Highway Works maintain a public liability insurance policy with a member of the Association of British Insurers for at least £5,000,000.
- (vi) comply in all respects with the provisions of the New Roads and Street Works Act 1991
- (vii) procure that any contractor employed to carry out the Highway Works keeps roads accesses and rights of way which are being used by

construction traffic at all times clean and clear so far as possible of dirt mud and material dropped from vehicles or from tyres arising from such use and that the contractor provides maintains and uses suitable equipment for this purpose

4. OBLIGATIONS TO BE IMPOSED ON CONTRACTOR

THE Developer covenants to include in the conditions of contract of the contractors (or any sub contractors) engaged to carry out the Highway Works the following clauses:-

- (a) The Programme of Works and method of carrying out the Highway Works shall be approved by the Proper Officer and the contractor shall in all cases
 - (i) provide the Council with not less than 4 weeks prior written notice of the proposed dates on which works will be carried out on the highway with such details of its Programme of Works as are available at that time;
 - (ii) submit its intended Programme of Works and any width restrictions or occupation of the public highway to the Proper Officer for his approval in writing not less than five Working Days before carrying out those works and the approved Programme of Works and method shall be followed at all times PROVIDED THAT if the Council fail to respond in respect of the Programme of Works within five Working Days of receipt of the same the Council shall be deemed to have approved the Programme of Works
- (b) All work on the public highway shall be restricted to dates and times agreed in writing by the Proper Officer in order to minimise delay to vehicular traffic;
- (c) All operations on or affecting the public highway shall be carried out so to have full regard for the safety of the public and to provide and maintain such precautionary works and signs as may be required by the Proper Officer as to avoid risk of danger to both pedestrians and vehicular traffic and (except as may be previously agreed in writing by the Proper Officer) to avoid any interference with the free movement of pedestrians and vehicular traffic;

- (d) The contractor shall in accordance with the agreed Programme of Works be allowed to take possession of so much of the public highway land as may be agreed in writing by the Proper Officer for the carrying out of the Highway Works;
- (e) Where in the opinion of the Proper Officer work affecting the public highway causes excessive traffic congestion the contractor shall immediately suspend that work and remove any plant or equipment that create such restrictions to traffic flows;
- (f) The contractor shall 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 Highway Works.
- (g) The Proper Officer may require the contractor to agree to variations to any previously agreed Programme of Works in the event of excessive traffic congestion resulting from it and the contractor will take all steps to comply with any such request;
- (h) The contractor will comply with the Department of Transport's Specification for Road and Bridgeworks (100 General Series) and shall include the following additional clauses to that specification:-
 - (i) The traffic signs road markings lamps barriers and traffic control signals shall be in accordance with the requirements of the Traffic Signs Regulations and General Directions current at the date of execution of the work Traffic control signals shall be operated in the vehicle actuated mode unless otherwise agreed by the Proper Officer;
 - (ii) Traffic cones and cylinders shall comply with the requirements of BS 873 Part 8 Category A Designation 1;
 - (iii) The contractor shall construct temporary diversion ways wherever he proposes to interfere with the existing public or private roads or other ways over which there is a public or private right of way for any traffic;

- (iv) The standard of construction and lighting shall be suitable in all respects for the appropriate class of road and the width of any diversion shall not (unless otherwise agreed with the Proper Officer such agreement not to be unreasonably withheld) be less than that of the existing way. The standard of construction shall conform to the requirements of the Council;
- (v) Temporary white lining is to be provided to all such diversions and laid in accordance with the requirements of the Traffic Signs Regulations and General Directions or otherwise as instructed by the Proper Officer;
- (vi) Roads accesses and rights of way which are being used by construction traffic shall at all times be kept clean and clear so far as possible of dirt mud and material dropped from vehicles or from tyres arising from such use. The contractor shall provide maintain and use suitable equipment for this purpose;
- (vii) The contractor shall at all times ensure that all highway drains affected by its works shall be kept clear of any spoil mud slurry or other material likely to impede the free flow of water in them;
- (viii) The contractor shall provide the Proper Officer with the name and telephone number of a person and his deputy who can be contacted at any time during the day and night and who will be in a position to put into immediate effect any measures considered necessary by the Proper Officer to ensure the safety of the public.

5. PROGRAMME OF WORKS

The Programme of Works shall include details of:-

- (i) The sequence in which each phase of the Highway Works including temporary highway works or temporary access arrangements shall be undertaken;
- (ii) The period of time within which each phase of work shall be completed;

- (iii) Temporary traffic and pedestrian arrangements during the construction of the development of the adjoining land including the means and positions of vehicular and pedestrian access to the development;
- (iv) Such additional plans and details as may be required by the Council to describe each phase of work.

6. DECLARATION:

THE Developer hereby declares and warrants to the Council that

- (a) it has and will throughout the duration of this Agreement maintain full right liberty and consent to carry out such works as may be necessary to connect the Road or Roads to a vehicular highway or highways.
- (b) it has obtained all necessary planning consents and the approval of the Proper Officer to the specification plans and Drawings of the Works (such approval not to be unreasonably withheld or delayed)

7. STATUTORY UNDERTAKERS - CONNECTIONS TO EXISTING SERVICES:

THE Developer shall

- (a) at its own cost and expense advise all Statutory Undertakers who may or do have apparatus or any part of their services affected by the Works or Highway Works
- (b) 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 or Highway Works
- (c) before connecting the Road or Roads with any highway or highways maintainable at the public expense give notice to each person board or authority being the Statutory Undertaker for the time being of any service or services laid in upon or under such highway or highways of the proposal to make such connection as if the connection were a work to be executed for the purposes of and were mentioned in Section 48 of the New Roads and Street Works Act 1991

and shall indemnify the Council in respect of the cost of any works or measures considered necessary by any Statutory Undertaker in consequence of the proposal to make such connection.

8. ACCESS TO THE WORKS/HIGHWAY WORKS AND INSPECTION:

- (a) **THE** Developer shall not cover up any part of the Works or the Highway Works without the approval of the Proper Officer 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 PROVIDED THAT if the Proper Officer fails to inspect the work within two Working Days the Proper Officer shall be deemed to have approved it
- (b) **THE** Developer shall during the carrying out of the Works and the Highway Works give and allow the Proper Officer and any other officer of the Council access to every part of the Works and the Highway Works and the respective sites thereof for the purpose of inspecting the same and all materials used or intended to be used therein and the Developer shall if requested open up for inspection any portion of the Works or (as the case may be) the Highway Works which may be covered up and should the Developer decline to comply with such a request the Council may itself open up the Works or (as the case may be) the Highway Works and in the event of any such portion of the same being found (in the reasonable opinion of the Council) to be defective the cost of such opening shall be recoverable from the Developer;
- (c) If any inspection carried out under sub-clause (b) of this clause reveals defects in the Works or the Highway Works the Developer shall carry out remedial works to the satisfaction of the Council;
- (d) **The** Council will inspect any remedial works carried out under sub-clause (c) of this clause within five Working Days of a written request from the Developer to

do so PROVIDED THAT if the Council fail to inspect the remedial works within five Working Days the Council shall be deemed to have approved the remedial works.;

(e) Following any inspection under sub-clause (d) of this clause the Council shall within five Working Days of its inspection notify the Developer in writing of its satisfaction with the remedial works PROVIDED THAT:

(i) in the event of the remedial works being unsatisfactory this process may be repeated as many times as necessary until the defective works have been remedied to the satisfaction of the Council;

(ii) if the Council fail to notify the Developer within five Working Days the Council shall be deemed to have approved the remedial works.

(f) Upon practical completion of the Works and the Highway Works the Developer shall in each case notify the Council in writing of their completion and within fourteen days of receipt of such notice the Council shall carry out a final inspection of the Works or (as the case may be) the Highway Works;

(g) In the event of the final inspection revealing any defect or defects in the Works or (as the case may be) the Highway Works the provisions of sub-clause (e) of this clause shall apply as if they related to a final inspection PROVIDED THAT if the Council fail to carry out an inspection within fourteen days the Council shall be deemed to have approved the Works or the Highway Works as appropriate

9. PART 1 CERTIFICATE:

ON completion of the Part 1 Works to the satisfaction of the Proper Officer in all respects the Proper Officer shall issue his Part 1 Certificate to the Developer.

10. OCCUPATION OF BUILDINGS:

NO dwelling erected fronting adjoining or abutting onto the Road or Roads shall be occupied until:

- (a) the Proper Officer has issued his Part 1 Certificate in respect of the Road or Roads or such part of the Road or Roads as will provide the occupier with access to a vehicular highway and where applicable a base course pedestrian access to such highway has been provided; and
- (b) the Road or Roads or such part of the Road or Roads have columns erected ready for lighting in accordance with the Specification and the Drawings and the Developer has arranged with the electricity company for an electricity supply thereto by giving at least six weeks' prior notice in writing or as may otherwise be agreed in writing by the Proper Officer.

11. COMPLETION OF HIGHWAY WORKS

ON completion of the Highway Works to the satisfaction of the Proper Officer in all respects the Proper Officer shall issue the Certificate of Substantial Completion and from the date thereof the maintenance period of twelve months for the Highway Works shall commence to run

12. PART 2 CERTIFICATE:

ON completion of the Part 2 Works for the Road or Roads to the satisfaction of the Proper Officer in all respects and subject to:-

- (a) the prior issue of a Certificate of Substantial Completion of the Highway Works;
- (b) the Sewer:-
 - (i) being the subject of a Section 104 Agreement and
 - (ii) having been constructed to adoptable standards pursuant to such an agreement to the Council's reasonable satisfaction
- (c) the prior payment of
 - (i) the Commuted Sum;
 - (ii) the Land Compensation Sum (save that as an alternative to payment to the Council of the Land Compensation Sum the Developer may procure a bond in a form reasonably acceptable to the Council with a major

- reputable clearing bank or other reputable surety approved beforehand by the Council for a sum equivalent to the Land Compensation Sum); and
- (iii) the Sewer Retention Sum (save that as an alternative to payment to the Council of the Sewer Retention Sum the Developer may procure that the Council have the benefit of the right to call upon any bond or other form of security provided by the Developer to South West Water Limited pursuant to a Section 104 Agreement)

the Proper Officer shall issue his Part 2 Certificate to the Developer and from the date thereof:-

- (d) the maintenance period of twelve calendar months for the Works shall commence to run;
- (e) the Road or Roads shall become a highway or highways and remain forever open for use by the public at large;
- (f) the Developer shall remain the street manager for the purposes of Section 49(4) of the New Roads and Street Works Act 1991 and any statutory modification or re-enactment thereof until such time as the Road or Roads shall become a highway or highways maintainable at the public expense.

13. OBLIGATIONS DURING THE MAINTENANCE PERIOD FOR THE WORKS:

DURING the Maintenance Period for the Works:

- (a) the Developer at his own expense shall maintain the Works including all grassed and planted areas and carry out such routine maintenance as may be necessary to facilitate use by vehicles and pedestrians;
- (b) the Council at its own expense shall undertake routine maintenance of and be responsible for payment for energy for all street lights and illuminated traffic signs.

14. OBLIGATIONS DURING THE MAINTENANCE PERIOD FOR THE HIGHWAY WORKS

DURING the Maintenance Period for the Highway Works the Developer shall maintain the Highway Works and for the purposes of this clause but for the avoidance of doubt the Developer shall not have any obligations in respect of cyclic maintenance such as sweeping cleansing and provision of street lighting and other functions normally performed by the Council in respect of highways maintained at public expense.

15. FINAL CERTIFICATE FOR THE WORKS AND THE HIGHWAY WORKS

PRIOR to the expiration of the respective maintenance periods for the Works and the Highway Works the Developer shall forthwith at his own expense reinstate and make good any defect or damage which may have arisen from any cause whatsoever or be discovered during the respective maintenance periods (including in the case of the Works any defect in or any damage to the road surface water drainage system) of which he has been notified in writing by the Proper Officer so that the Works or (as the case may be) the Highway Works comply with the Specification.

AND THEN PROVIDED THAT:

- (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 (in the case of the Works) delivered to the Proper Officer drawings showing the works as constructed

the Proper Officer shall issue his Final Certificate to the Developer in respect of the Works or (as the case may be) the Highway Works.

16. GRANTS OF RIGHTS OF DRAINAGE:

BEFORE the issue of his Final Certificate in respect of the Works by the Proper Officer the Developer shall without cost to the Council execute or procure the

execution by all necessary parties of such deeds as are in the opinion of the Council necessary to secure to the Council full drainage rights in respect of such parts of the surface water drainage system of the Road or Roads as are situate outside the limits of the Road or Roads and the Council shall not be liable for the payment of compensation or legal or any other costs or fees arising on account of the execution of any such deeds.

17. ADOPTION:

UPON the issue of the Final Certificate in respect of the Works the Road or Roads (which for the avoidance of any doubt includes the area within Cavanna's ownership shown coloured light blue on the Plan and the area within Parkbay's ownership shown coloured pink on the Plan) shall become a highway or highways maintainable at the public expense.

18 DETERMINATION BY THE COUNCIL:

IF the Developer fails to perform or observe any of the conditions stipulations or obligations on his part contained herein or if a receiving order in bankruptcy is made against him 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 amalgamation or reconstruction) the Council may without prejudice to any of its rights claims or remedies against the Developer in respect of such non-performance or non-observance determine this Agreement (except for Clauses 19, 20 and 21 hereof) by notice in writing signed by the Proper Officer and delivered to the Developer or sent by post to the address stated in this Agreement.

19. POWER TO EXECUTE WORKS IN DEFAULT:

WITHOUT prejudice to Clauses 2 and 18 hereof if the Developer fails to execute or complete the Works in accordance with the Developer's obligations hereunder the Council shall after not less than twenty-eight days notice in writing to the Developer be

entitled to execute or complete the Works in default by its own employees or by contract or otherwise and to recover the cost as certified by the Proper Officer from the Developer

20. POWER TO EXECUTE HIGHWAY WORKS IN DEFAULT

IF the Developer fails to execute the Works or the Highway Works in accordance with any previously agreed Programme of Works (unless prevented from doing so by matters beyond the control of the Developer when the period for completion of the Highway Works or the relevant part of them shall be extended by such reasonable period as shall be appropriate to the circumstances of delay) or if work shall (without the prior agreement of the Council) cease for more than one month or if the Developer shall go into voluntary or compulsory liquidation or if interim works are required in the interests of public safety then the Council may under Sections 278 and 296 of the Highways Act 1980 and after service of notice carry out any works it deems necessary in order to meet the requirements of this agreement (if necessary entering onto the adjoining land for the purpose) and may then recover the reasonable and proper cost of those works from the Developer who shall reimburse the Council on demand.

21. DEFECTIVE OR DANGEROUS WORKS

UNTIL the Road or Roads become a highway maintainable at the public expense pursuant to this Agreement the Developer shall keep it or them and the several parts thereof in a reasonable state of repair having regard to the progress of the building works abutting on such several parts thereof and shall reinstate and make good any defects in or damage to the Works which shall or may appear to arise occur or become manifest to the Proper Officer and the Proper Officer may by notice require the Developer to make good any portion of the works which he reasonably considers to be defective damaged or dangerous and require the making good or reconstruction of the same by the Developer Without prejudice to Clauses 2 and 18 hereof if the Developer fails to reconstruct or make good the same in accordance with the requirements of the

Proper Officer the Council shall after not less than seven days notice in writing to the Developer (except in case of emergency) be entitled to reconstruct and make good the portion of the works which is defective damaged or dangerous by its own employees or by Contractors or otherwise and to recover the cost as certified by the Proper Officer from the Developer.

22. COUNCIL'S COVENANTS:

THE Council hereby covenants with the Developer for the benefit of all building plots fronting and adjoining or abutting the Road or Roads and for each and every one of them to use reasonable endeavours to mitigate any loss or damage sustained by reason of any default by the Developer by taking such reasonable steps as the Council shall think fit

23. ASSIGNMENT:

THIS Agreement may not be assigned by the Developer without the consent of the Council which consents shall not be unreasonably withheld provided that the Council may require bonding as a condition of such an assignment.

24. ARBITRATION:

IN the event of any dispute arising out of this Agreement save for a dispute arising from the provisions set out in clause 36 the same shall be referred to a sole arbitrator to be agreed between the parties or failing agreement to be appointed by the President for the time being of the Institution of Civil Engineers and in this respect this Agreement shall be construed as a submission to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment or modification thereof

25. INDEMNITY

(a) **THE** Developer shall indemnify and keep indemnified the Council against

(i) any actions costs claims demands expenses and proceedings arising out of the undertaking of any of the Works or the Highway Works which are due to any acts or defaults of the Developer or its contractor whether directly or indirectly during the course of their construction or during the ensuing maintenance period other than those arising out of or in consequence of any act neglect default or liability of the Council and without prejudice to the generality of the above:-

(ii) all Valid Claims (being a claim with a reasonable prospect of giving rise to a liability) pursuant to section 10 of the Compulsory Purchase Act 1965 and all claims and liabilities under the Land Compensation Act 1973 (or any statutory modification or re-enactment of either statute) arising from the carrying out or the use of the Works and the Highway Works and prior to the commencement of the Works and the Highway Works shall carry out such surveys as may be deemed necessary by the Council to define the levels of physical factors as specified in the said Acts PROVIDED THAT the Council complies with the following:

- (1) the Council shall consult with the Developer and before agreeing whether a claim is a Valid Claim shall take proper account of all comments and representations made by the Developer
- (2) upon receiving any such claim the Council shall give to the Developer details thereof within 14 days of receiving the same
- (3) the Council shall notify the Developer in writing whether or not the claim is considered a Valid Claim upon a decision as to the validity thereof being made

(4) the Council shall not make any admission of liability, agreement or compromise in relation to the claim without the prior written consent of the Developer

(5) the Council shall take such action as the Developer may reasonably request to avoid, dispute, compromise or defend the claim.

(iii) all reasonable and proper costs and expenses incurred by the Council relating to sub-clause 25(a)(ii) including legal surveyors and other costs and expenses of the Council or their agents or contractors in dealing with settling and disposing of such claims

(b) for the avoidance of doubt the parties agree that the liability of the Developer set out at clauses 25(a) will not be limited to the Land Compensation Sum should costs payable pursuant to clause 25(a) exceed such sum.

26. DEFECTIVE DESIGN

IF during the execution of the Works or the Highway Works any defect error or omission shall be found either in any approved plans specifications details and drawings or in any survey undertaken by or on behalf of the Developer or the highway shall be found to be unsuitable for the Highway Works all defects errors omissions alterations modifications remedial works or wants of repair or making good shall be undertaken at the sole expense of the Developer

27. CONSENTS AND APPROVALS

WHERE under this agreement the consent or approval of any party is required that consent or approval shall not be unreasonably withheld or delayed.

28. NOTICE

ANY notice required to be served under this agreement shall be in writing and shall be validly served if delivered to the relevant party or if sent by registered or recorded delivery post (and by fax in the case of emergency) as set out below:

- (a) in the case of the Council to Highways and Engineering Department, Roebuck House, Torquay;
- (b) in the case if the Developer at address shown in this Agreement.

29. SUPPLEMENTAL DRAWINGS ETC

All subsequent drawings specifications licences agreements letters and documents relating to any matter contained or referred to in this agreement shall be signed by or on behalf of the parties to this agreement as appropriate and shall be deemed to be supplemental to this agreement and the stipulations and conditions contained in this agreement shall apply to all such drawings specifications licences agreements letters and documents as if the same were incorporated in and formed part of this agreement unless the parties specifically agree otherwise.

30. INSPECTION FEE AND OTHER PAYMENTS

The Developer agrees as follows:-

- (a) on completion of this Agreement the Developer shall pay to the Council
 - (i) the sum of £117,282.00 in respect of the costs incurred by the Council in inspecting the Works and the Highway Works PROVIDED THAT 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 him 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;

- (ii) the Council's reasonable costs in connection with the preparation and completion of this Agreement;
- (b) to pay the Council's reasonable costs in applying for and making any Traffic Order required or recommended by a Safety Audit;
- (c) to pay the Council's reasonable costs in preparing any amendment or variation of the this Agreement;
- (d) to pay the costs reasonably incurred by the Council in issuing any certificate issued pursuant to this Agreement; and
- (e) to pay the Commuted Sum to the Council prior to the issue of the Part II Certificate

31. LAND COMPENSATION SECURITY

The Developer covenants to either pay the Land Compensation Sum to the Council or procure the bond referred to at clause 12(c)(ii) prior to the issue of the Part II Certificate

32. SAFETY AUDIT

- (a) The Developer shall undertake a Safety Audit on completion of the Works and the Highway Works.
- (b) If in the reasonable opinion of the Proper Officer the Safety Audit carried out under clause 32(a) is inadequate, the Council reserves the right to undertake such additional Safety Audits as it deems necessary and the Developer shall pay to the Council within 28 days of demand the whole of the Council's reasonable costs in undertaking any such Safety Audit.
- (c) Upon service upon it of the reports of a Safety Audit the Developer shall undertake at its own expense such additional or alternative works within the public highway or any other land owned or under the control of Parkbay and/or the Developer as are reasonably necessary to comply with the recommendations therein.

33. TRAFFIC ORDERS

- (a) Without prejudice to sub-clause 33(b) hereof if a Safety Audit requires or recommends that any Traffic Order be introduced on or in the vicinity of the Highway Works the Proper Officer will apply for these to be made
- (b) By entering into this Agreement the Council does not warrant or guarantee that any Traffic Orders as referred to on the Drawings will be made or confirmed

34. STAMP DUTY LAND TAX

The Developer shall indemnify the Council against all Stamp Duty Land Tax which may be payable pursuant to this Agreement.

35. DEVELOPER MAY BE CALLED UPON TO TRANSFER/DEDICATE LAND

- (a) If and when called upon by the Council to do so within 21 years of the date of this agreement the Developer shall prove his title to the land on which the Road or Roads have been constructed and shall upon the payment of £1.00 transfer the freehold estate to the land to the Council or its nominee with full title guarantee.
- (b) If within 30 years of the date of this Agreement the Council promote a scheme to widen Brixham Road which would require the expansion of the extent of public highway into the Retained Land then if and when called upon the Council to do so the Developer shall dedicate the Retained Land to the Council and the Retained Land shall upon such dedication become highway maintainable at the public expense PROVIDED THAT the Developer shall use all reasonable endeavours to procure that the redundant farmhouse currently located on the Retained Land is demolished and removed from the Retained Land prior to its dedication to the Council

36. LAND COMPENSATION SUM

- (a) Prior to the issue of the Part 2 Certificate, the Developer shall pay the Land Compensation Sum into an account with a major clearing bank in the name of the Council ("the Account"). Such sum shall be placed on deposit at the best rate reasonably obtainable with interest accruing to the Developer and being credited to the Account
- (b) If the Developer at any time fails to perform or observe any of the conditions, stipulations or obligations on his part contained in pursuant to clause 25 of this Agreement the Proper Officer may without prejudice to any statutory rights or powers or any other right claim or remedy under this Agreement send to the Developer notice in writing (hereinafter referred to as the "Default Notice").
- (c) The Default Notice shall:
- (i) provide full details of the claim and/or any associated costs and expenses
 - (ii) provide an estimate from the Council's valuer of the total cost to the Council of settling the claim
- (d) On the date that is twenty-eight days after the Developer has received the Default Notice the Council shall be entitled to withdraw a sum equivalent to the estimate set out in the Default Notice from the Account
- (e) subject to (f) below, on the anniversary and each subsequent anniversary of the issue of the Part 2 Certificate a proportion of the Land Compensation Sum equivalent to the reduction in potential liability for claims under the Land Compensation Act 1973 and the Compulsory Purchase Act 1965 shall be repaid to the Developer from the Account by the Council. The Council and the Developer shall use their reasonable endeavours to agree the level of repayment of the Land Compensation Sum and if the Council and the Developer cannot agree on a level of repayment then either party may refer the matter for determination by an expert pursuant to the provisions set out at clause 37 below

- (f) on the seventh anniversary of the date of the issue by the Council of the Part 2 Certificate the remainder of the Land Compensation Sum and all accrued interest shall be repaid to the Developer from the Account by the Council

37 LAND COMPENSATION DISPUTE RESOLUTION

- (a) Any dispute or difference between the Developer and the Council arising out of or in connection with clause 36 of this Agreement may be referred at the instance of either of them (or their respective successors in title) for determination by a single independent expert whose decision save for manifest error shall save as provided in clause 37(b) be final and binding on the parties. If the Developer or the Council elect to refer the dispute to an expert the provisions set out at clause 37(c) shall apply.
- (b) The provisions of clause 37(a) shall not prevent or delay the right of any party to seek resolution of any matter relating to this Agreement by the Courts or in accordance with sections 106(6) or 106(A) of the 1990 Act
- (c) The following provisions and terms of appointment shall apply to such expert determination
- (i) the expert shall be a Fellow or Chartered member of the Royal Institution of Chartered Surveyors and have at least ten (10) years post qualification experience in claims under the Land Compensation Act 1973 and the Compulsory Purchase Act 1965 to include acting for or advising on projects within at least two different local planning authority areas
 - (ii) the expert shall be agreed between the parties or in default of agreement within ten (10) Working Days appointed by the President of the Royal Institution of Chartered Surveyors at the request of any party to the dispute;
 - (iii) the persons calling for the determination shall make written submission to the expert and the other parties within ten (10) Working Days of his appointment;

- (iv) the expert shall make directions as to a timetable for presentation of evidence and the other parties shall have ten (10) Working Days from receipt of such directions or such extended period as the expert shall allow to respond;
 - (v) the parties shall in good faith provide (or procure that others provide) the expert with the assistance and documents that the expert reasonably requires to reach a decision
 - (vi) the expert shall be entitled to disregard any representations made out of time and shall as part of his terms of reference be required to use reasonable endeavours to make his decision within twenty (20) Working Days of receipt of the representations under sub-clause 37(c)(iv) above or if none within twenty (20) Working Days of the expiry of the period referred to in sub-clause 37(c)(iv) above;
- (d) the expert's decision shall be given in writing to the parties and give reasons for his decision;
 - (e) the expert's reasonable and proper fees shall be payable as directed by the expert and if they are not so paid within 10 (ten) Working Days after a demand for payment the party against whom such costs were not awarded shall be entitled to pay the expert the sums due and recover the amount due from the other party on demand

38. SEWER RETENTION SUM

- (a) Prior to the issue of the Part 2 Certificate, unless the Sewers have been adopted, the Developer shall pay the Sewer Retention Sum into an account with a major clearing bank in the name of the Council ("the Account"). Such sum shall be placed on deposit at the best rate reasonably obtainable with interest accruing to the Developer and being credited to the Account
- (b) If a fault or defect arises in respect of any Sewer which in the Council's reasonable opinion adversely affects the Road and the Council having used

reasonable endeavours has failed to procure that South West Water Limited enforces its rights pursuant to the Section 104 Agreement to either:

- (i) oblige the Developer to rectify such defects; or
- (ii) call upon any bond or other security provided by the Developer pursuant to the Section 104 Agreement and rectify the defects itself accordingly

the Proper Officer may without prejudice to any statutory rights or powers or any other right claim or remedy under this Agreement send to the Developer notice in writing (hereinafter referred to as the "Default Notice").

(c) The Default Notice shall:

- (i) provide full details of the claim and/or any associated costs and expenses
- (ii) provide an estimate from the Council's valuer of the total cost to the Council of settling the claim

(d) On the date that is twenty-eight days after the Developer has received the Default Notice (assuming the relevant defects have not been rectified by the Developer in the meantime) the Council shall be entitled to withdraw a sum equivalent to the estimate set out in the Default Notice from the Account

(f) Within 10 Working Days of the date that the Sewers have :

- (i) been certified as being or having been on maintenance or have been the subject of a declaration made by South West Water Limited pursuant to Section 102 of the Water Industry Act 1991 (where such sewer has been constructed under a Section 104 Agreement); or
- (ii) otherwise become maintainable by South West Water Limited (or any statutory successor).

the remainder of the Sewer Retention Sum and all accrued interest shall be repaid to the Developer from the Account by the Council

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

SCHEDULE

Part 1

1. All highway drainage
2. All other drainage contained within the highway
3. All kerb foundations and where appropriate kerbs including lowering at vehicle crossings and pram-ramps
4. Carriageway sub-base road base and any supporting structures thereto
5. Carriageway base course surfacing where appropriate
6. Demarcation of sight lines and clearance of vision splays
7. Footways to Formation level

Part 2

8. All outstanding kerbing not completed in Part 1
9. Pedestrian ways
10. Carriageway wearing course and/or carriageway base course
11. Vision splays and verges
12. Street lighting and street furniture
13. Street name plates
14. Road markings
15. All other works described in the Specification and shown in the Drawing

Part 3

The Highway Works

The works necessary on those parts of the Site which are public highway to construct the Road or Roads as set out in the Programme of Works and as shown on the Drawings in accordance with the terms of this Agreement to the reasonable satisfaction of the Proper Officer.

IN WITNESS whereof this Deed has been

Executed and delivered as)
A Deed by two duly)
Authorised representatives of)
Cavanna Homes (South West))
Limited)

Executed and delivered as)
A Deed by)
Parkbay Developments Limited)
Acting by its sole director)
)
)

In the presence of:-

Executed as a Deed by affixing)
The Common Seal of)
The Council of the Borough Of Torbay)
In the presence of:-)

J.D. Harte



Proper Officer and Authorised Signatory

The Council of the
Borough of Torbay

No: 3926

ANNEX

'THE WORKS BOND'

THIS BOND dated _____ is made **BETWEEN**

CAVANNA HOMES (SOUTH WEST) LIMITED a company registered in England and Wales under Company Number 4228446 and whose registered office is at Cavanna House, Riviera Park, Nicholson Road, Torquay, Devon TQ2 7TD ("the Developer")

HCC INTERNATIONAL INSURANCE COMPANY PLC a company registered in England and Wales under Company Number 01575839 and whose registered office is at WALSINGHAM HOUSE, 35 SEETHING LANE, LONDON EC3N 4AH ("the Surety") and

THE COUNCIL OF THE BOROUGH OF TORBAY of The Town Hall Castle Circus Torquay Devon TQ1 3DR (the "Council");

WHEREAS:

- 1 By an Agreement ("the Agreement") dated _____ made between **THE COUNCIL OF THE BOROUGH OF TORBAY** ("the Council") (1) the Developer (2) and **PARKBAY DEVELOPMENTS LIMITED** (3) relating to the development of land at Yannons Farm, Brixham Road, Paignton, Devon the Developer is under an obligation to carry out certain highway works on the terms and conditions specified in the Agreement
- 2 Clause 3(b)(i)(B) of the Agreement contains a covenant for the Developer to enter into a bond with a surety (approved by the Council) to secure its obligations under the terms of the Agreement

NOW THIS DEED WITNESSES:

1. INTERPRETATION:

- 1.1 "Bond Sum" means the sum of One Million Nine Hundred and Fifty Four Thousand Six Hundred and Thirty One Pounds (£1,954,631) being the estimated cost of carrying out the Works and the Highway Works

- 1.2 Any word or words defined in the Agreement shall have the same meaning for the purposes of this Bond

2. SURETY'S OBLIGATIONS

2.1 If the Developer at any time fails to perform or observe any of the conditions, stipulations or obligations on his part contained in the 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 the Agreement (and in particular but without prejudice to the generality of this clause the rights of the Council pursuant to Clauses 19, 20 and 21 of the Agreement) send to the Surety notice in writing (hereinafter referred to as the "Default Notice").

2.2 the Default Notice shall:

- (i) specify the work required to be to be carried out (the "Default Work")
- (ii) contain an estimate by the Proper Officer of the cost of the carrying out of the Default Work and the cost of maintaining the Road or Roads for a period of twelve months prior to the Road or Roads becoming maintainable at the public expense and also a statement of the amount of the usual establishment charges of the Council (the "Default Cost")

3. If the Surety receives a Default Notice pursuant to clause 2.2 above then within twenty-eight days after the Surety has received the Default Notice the Surety shall

- 3.1 subject to clause 8 pay the Default Cost to the Council; or

3.2 send to the Council notice in writing (hereinafter referred to as the "Surety's Counter Notice") of the intention of the Surety to carry out the Default Work and to maintain the Road or Roads for a period of twelve months, prior to the Road or Roads becoming maintainable at the public expense.

4. If the Surety having sent the Surety's Counter Notice to the Council fails to start any 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 four per cent per annum above the prevailing base rate from time to time of Barclays Bank plc calculated from the date on which the Surety received the Default Notice.
5. If the Surety, having sent the Surety's Counter Notice to the Council, starts any Default Work and the said work is not completed within four months after the Surety's Counter Notice was received by the Council or within such further period as may be agreed by the Council the Surety shall subject to clause 6 and 8 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 of the Default Work not carried out by the Surety and/or the cost of maintaining the Road or Road for the period of twelve months prior to the Road or Roads 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;
6. The sum payable under clause 5 shall not exceed the Default Cost and on the issue of the later of the Final Certificates referred to in clause 15 of the Agreement the Surety shall be released from all liability hereunder;

7. 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 obligations 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 3.1 above.

8. Any sums requested by the Council pursuant to clauses 2.2 and 2.3 above:

8.1 prior to the issue of the Part 2 Certificate (as defined in the Agreement) shall not exceed the Bond Sum;

8.2 from the date of the issue of the Part 2 Certificate but prior to the issue of later of the Final Certificates referred to in clause 15 of the Agreement shall not exceed the sum of £488,657.75

PROVIDED THAT the Surety's aggregate liability under this Bond shall not at any time exceed the Bond Sum

IN WITNESS of which this Bond has been duly executed as a deed on the date and year first before written

[EXECUTION CLAUSES]