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DATED

3rd March

2016

LINDEN SOUTH WEST LIMITED

- and -

**THE COUNCIL OF THE
BOROUGH OF TORBAY**

- and -

NHBC

AGREEMENT

under Section 38 of the Highways Act 1980
and Section 33 of the Local Government
(Miscellaneous Provisions) Act 1982
in connection with street works at
The Former Marine Holiday Park
Davy's Elm View,
off Grange Road,
Goodrington, Paignton
in the Borough of Torbay

THIS AGREEMENT made the 3rd March . day of
Two Thousand and Sixteen BETWEEN

1. LINDEN SOUTH WEST LIMITED (Co. Regn No. 02714200) of Cowley Business Park, Cowley, Uxbridge, Middlesex UB8 2A ("the Developer")
2. THE COUNCIL OF THE BOROUGH OF TORBAY of the Town Hall Castle Circus Torquay TQ1 3DR ("the Council")
3. NHBC of NHBC House, Davy Avenue, Milton Keynes, Bucks, MK5 8FP ("the Surety")

WHEREAS:

- (1) The Council is the Local Highway Authority
- (2) The Developer is the estate owner in fee simple absolute in possession of the land at the former Marine Holiday Park, off Grange Road, Goodrington, Paignton which is registered at Land Registry under Title Number DN625523 and which includes the site of the proposed Road or Roads and all other land required for the Works and is desirous of making up the Road or Roads so that the same shall become a highway or highways maintainable at the public expense
- (3) The Developer has requested that when the works hereinafter referred to for the making up of the Road or Roads 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
- (4) The Surety has agreed to enter into this agreement for the purposes set out in clause 18.

NOW in pursuance of Section 38 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 as follows :-

1. Interpretation:

In this Agreement except where the context so admits:

- 1.1 the "Drawings" mean the drawings numbered
 - 12178 - 350 - E Highway Section 38 layout
 - 12178 - 351 - E Section 38 layout 1 of 3
 - 12178 - 352 - E Section 38 layout 2 of 3
 - 12178 - 353 - E Section 38 layout 3 of 3
 - 12178 - 354 - D Long sections roads 1 & 2

12178 - 355 - D	Long sections road 3
12178 - 356	Long sections road 4
12178 - 358	Long sections paths 2 & 3
12178 - 359	Road 2 cross sections
12178 - 360	Road 3 cross sections
12178 - 361	Road 4 cross sections
12178 - 363	Path 2 cross sections
12178 - 365 -B	Standard details
12178 - 357- D	

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

- 1.2 the **"Estimated Cost"** is the sum of three hundred and eighty two thousand pounds (£382,000) being the amount which is in the opinion of the Proper Officer the cost of carrying out the Works within the period specified in Clause 2.1
- 1.3 the **"Final Certificate"** means the Certificate to be issued on satisfactory completion of the Works in accordance with Clause 11
- 1.4 the **"Maintenance Period"** means the period specified in Clause 9
- 1.5 the **"Part 1 Certificate"** means the Certificate to be issued on satisfactory completion of the Part 1 Works in accordance with Clause 7
- 1.6 the **"Part 1 Works"** means the works referred to in Part 1 of the First Schedule
- 1.7 the **"Part 2 Certificate"** means the Certificate to be issued on satisfactory completion of the Part 2 Works in accordance with Clause 9
- 1.8 the **"Part 2 Works"** means the works referred to in Part 2 of the First Schedule
- 1.9 the **"Parties"** means the parties to this Agreement being the Developer, the Council and the Surety as defined
- 1.9 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
- 1.10 the **"Road or Roads"** means the carriageways and footways of the Road or Roads shown coloured grey, beige, blue, light-green, dark-green and mauve on the Drawings 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 which are
- 1.11 the **"Specification"** means the edition of the publication entitled "Highways in Residential and Commercial Estates Design Guide" and dated January 1996 by Devon County Council

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 works for road purposes or major highway works as defined in section 86 of the New Roads and Street Works Act 1991 or any statutory modification or re-enactment thereof 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

5. Indemnity:

5.1 The Developer hereby indemnifies 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 or in consequence of any act neglect default or liability of the Council

5.2 The Developer shall indemnify the Council against any claims and liabilities under the Land Compensation Act 1973 and any claims under Section 10 of the Compulsory Purchase Act 1965 (and in either case any statutory modification or re-enactment thereof) arising out of the execution of or the use of the Works and all reasonable and proper costs and expenses (plus any Value Added Tax thereon) relating thereto including legal surveyors and other costs including statutory interest and expenses of the Council or their agents or contractors in dealing with settling and disposing of such claims

5.3 If during the execution of the 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 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

6. Access to the Site:

The Developer shall during the carrying out of the Works give to the Proper Officer and any other officer of the Council access to every part of the works and sites thereof for the purpose of inspecting the Works and all materials used or intended to be used therein

7. Part 1 Certificate:

On the 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

8. Occupation of Buildings:

No dwelling erected by the Developer or on his behalf fronting adjoining or abutting on to 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 service provider for an electricity supply thereto by giving at least six weeks' prior notice in writing or as may be otherwise agreed in writing by the Proper Officer

9. Part 2 Certificate:

On completion of the Part 2 Works to the satisfaction of the Proper Officer in all respects the Proper Officer shall if any sewer constructed under the Road or Roads under an agreement under Section 104 of the Water Industry Act 1991 (as amended) has been certified as being or having been on maintenance issue his Part 2 Certificate to the Developer and from the date thereof:

(a) the maintenance period of 12 calendar months shall commence to run

(b) the Road or Roads shall become a highway or highways and remain forever open for use by the public at large

(c) the Developer shall remain the street manager for the purposes of Section 49 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

10. Obligations During the Maintenance Period:

During the maintenance period:

(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

11. Final Certificate:

Prior to the expiration of the maintenance period 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 maintenance period (including any defect in or damage to the road surface water system) of which he has been notified in writing by the Proper Officer so that the 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;

(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 constructed

the Proper Officer shall issue his Final Certificate to the Developer and shall release the Surety from all liability hereunder

12. Grants of Rights of Drainage:

Before the issue of the Final Certificate by the Proper Officer the Developer shall without cost to the Council

(a) execute or procure the execution by all necessary parties of a deed of grant substantially in the form set out in the Second Schedule to secure for 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 for the avoidance of doubt 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

(b) pay to the Council the sum of £5,000 as a commuted sum towards the cost of maintaining those parts of the surface water drainage system as the Council shall have a right to use pursuant to the deed referred to in clause 12(a) above

13. Procedure for Inspection and Issue of Certificates:

Within fourteen days of receipt of written application from the Developer for the issue of a Part

1 Certificate or Final Certificate pursuant to this Agreement and within twenty-eight days of written application from the Developer for the issue of a Part 2 Certificate pursuant to this Agreement the Proper Officer shall inspect the works and where necessary provide the Developer with a definitive list in writing of any remedial works required to be carried out before the issue of that Certificate Any such remedial works shall be subject to the same inspection procedure detailed herein until such time as they shall be completed to the reasonable satisfaction of the Proper Officer who within twenty-eight days thereafter shall issue the relevant Certificate

14. Adoption:

Upon the issue of the Final Certificate the Road or Roads shall become a highway or highways maintainable at the public expense

15. Council's Fees:

15.1 On the date hereof the Developer shall pay to the Council

(a) the sum of £7,920 (being the inspection fee of £22,920 less £15,000 already paid to the Council the receipt of which the Council hereby acknowledges) in respect of the costs incurred by the Council in inspecting the Works being 6 per cent of the estimated cost and

(b) the proper legal costs of the Council in connection with the preparation and completion of this Agreement and the necessary duplicates thereof

15.2 Receipt by the Council of the payment of such sums 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

16. Determination by the Council:

If the Developer fails to perform or observe any of the conditions stipulations or obligations on his part contained in this Agreement or if the Developer is being wound up or if the Developer enters into a composition or scheme or 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 17 17A 18 and 19) 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

17. Power to Execute Works In Default:

Without prejudice to Clauses 2 and 16 if the Developer fails to execute or complete the Works in accordance with the Developer's obligations under this Agreement 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

17A. Defective or Dangerous Works:

17A.1 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

17A.2 Without prejudice to Clauses 2 and 16 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 7 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

18. Surety's Obligations:

18.1 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 17A) send to the Surety notice in writing (the "Default Notice") -

- 18.1.1 specifying the work (the "Default Work") to be carried out in order that the Works may be executed out or completed as the case may be in accordance with this Agreement and
- 18.1.2 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 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") which cost -
 - (a) shall not exceed the sum of £382,000 being the Estimated Cost
 - (b) shall not exceed the sum of £191,000 on and after the issue of the Part 1 Certificate
 - (c) shall not exceed the sum of £95,500 on and after the issue of the Part 2 Certificate
- 18.1.3 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 (the "Surety's Counter Notice") of the intention of the Surety to carry out the Default Work
- 18.1.4 If the Surety having sent the Surety's Counter Notice to the Council 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
- 18.1.5 If the Surety having sent the Surety's Counter Notice to the Council starts the 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 18.1.6 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 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

18.1.6 The sum payable under clause 18.1.5 shall not exceed the Default Cost and the covenant in Clause 19.3 shall apply with respect to such sum and on the issue of the Final Certificate the Surety shall be released from all liability hereunder

18.1.7 For the purposes of this Agreement a demand stated to be made under this Agreement 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 18.1.2 above

19. Council's Covenants:

19.1 The Council hereby covenants with the Developer and the Surety for the benefit of all building plots fronting adjoining or abutting the Road or Roads and for each and every one of them:

19.1.1 to use its best endeavours in consultation with the Surety 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

19.1.2 to apply all monies received from the Surety mentioned in this Agreement towards the expenditure involved in executing or completing the Works and maintaining and making good all defects for a period of twelve months after completion and the amount so received shall be deducted from any sum which would otherwise be recoverable from the owners of premises fronting the Road or Roads under the provisions of the Highways Act 1980 or any other Act for the time being in force replacing or amending the same

19.1.3 in the event of the sum paid by the Surety to the Council exceeding the cost of

executing or completing the Works and maintaining and making good all defects d together with the amount of the Council's usual establishment charges TO REPAY to the Surety within twenty-eight days after the Road or Roads become maintainable at the public expense the amount of such excess with interest calculated at half-yearly rests on the unexpended balance for the time being of the sum paid by the Surety to the Council at the rate of interest prevailing from time to time on monies held in a deposit account with the Council's bankers

19.2 The Council hereby covenants with the Developer and the Surety that the Final Certificate will be issued in accordance with this Agreement and that the Surety will be released from all liability under this Agreement in accordance with this Agreement

20. Part or Parts:

Notwithstanding anything contained in this agreement the Developer may from time to time during the currency of this Agreement apply to the Proper Officer for his Part 1 Certificate or his Part 2 Certificate in respect of any part of the Road or Roads (being the whole width of the Road or Roads between points to be defined in the application) and if the Proper Officer shall be satisfied that the part so defined is in all respects suitable to be treated as a separate road for the purposes of construction and adoption in accordance with the several provisions contained in this Agreement then he shall issue a separate Part 1 Certificate or Part 2 Certificate as the case may be in respect of that part and thereafter the same proceedings may be taken in respect of the said part of the Road or Roads as if the said part were the subject of a separate Agreement under which the terms of this Agreement applied to the said part separately from the remainder of the Road or Roads but without prejudice to the application of this Agreement to the remainder of the Road or Roads and the liability of the Surety shall be reduced as may be agreed by the Proper Officer with the Developer

21. Assignment:

This Agreement may not be assigned by the Developer without the consent of the Council and the Surety which consents shall not be unreasonably withheld

22. Arbitration:

In the event of any dispute arising out of this Agreement 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

23. Refund of Advance Payments Code Deposits:

The Council shall pursuant to its powers under sub-section (3) of Section 221 of the Highways Act 1980 refund to the Developer as soon as may be after the date of this Agreement the sum or sums deposited with the Council under Section 219 of the Highways Act 1980 in respect of buildings to be built on the Road or Roads together with interest thereon from the date of deposit to the date of repayment at the rate prescribed in sub-section (3) of Section 225 of the Highways Act 1980

24. Rights of 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

I N W I T N E S S whereof the parties hereto have executed and delivered this document as a deed the day and year first before written

FIRST 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. Footpaths 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 Drawings

SECOND SCHEDULE

Form - Deed to Secure Use of Soakaways

Town and Country Planning Act 1990 for the area which includes the Site

- (4) Pursuant to an agreement made under Section 38 of the Highways Act 1980 made between and the Council ("the Agreement") the Owner has constructed soakaways on the Land in the position shown by ("the Soakaways") and pipework shown by("the Drains") shown on the annexed drawing numbered and agreed to by to the Council the sum of £.....("the Commuted Sum") for the future maintenance of the Drains and Soakaways (the receipt of which the Council hereby acknowledges)

NOW THIS DEED WITNESSES:-

1. *The Owner's Covenant*

In consideration of and pursuant to the Agreement the Owner hereby covenants with the Council

- 1.1 for so long as(*insert name of road*).....is a highway maintainable at public expense to allow the use without claim for compensation (save as allowed for in this Deed) of the Drains and the Soakaways for the passage and conveyance of surface water from the highway at(*insert name of road*).....
- 1.2 to permit the Council to enter onto such parts of the Land as are reasonably necessary at any time to repair, maintain or replace the Drains and/or the Soakaways or any part thereof provided that in so doing the Council will cause as little interference as is reasonably practicable to the Owner
- 1.3 not to carry out cause or permit on the Land any works which cause damage to the Drains or the Soakaways or impede the flow of surface water through the Drains or the Soakaways and in the event of any such damage being caused to the Drains or the Soakaways forthwith upon receipt of a request in writing from the Council to make good to the reasonable satisfaction of the Council any such damage

2.. *The Council's Covenant*

In consideration of the Commuted Sum to maintain the Drains and Soakaways at its own expense for so long as(*insert name of road*).....is a highway maintainable at public expense and in so doing

- 2.1 Not cause any unnecessary damage to the Land and as soon as possible to the Owner's reasonable satisfaction shall make good any damage caused and pay full compensation to the

Owner in respect of any damage caused that is not made good

2.2 Not cause any unreasonable nuisance, annoyance or disturbance to the Owner

3. **Legal Basis**

The parties hereto hereby declare and agree that

- (a) the covenants set out in clause 2 hereof are covenants to which section 33 of the Local Government (Miscellaneous Provisions) Act 1982 applies
- (b) this Deed is made pursuant to Section 106 of the Town and Country Planning Act 1990 and that the covenants, restrictions and requirements imposed upon the Owner under this Deed create planning obligations pursuant to section 106 of the Act and are enforceable by the Council as local planning authority against the Owner and its successors in title

4. **General**

- 4.1 No person shall be liable for any breach of any of the planning obligations or other provisions of this Deed after it shall have parted with its entire interest in the Land but without prejudice to liability for any subsisting breach arising prior to parting with such interest.
- 4.2 A person who is not a party to this Deed shall have no rights under the Contract (Rights of Third Parties) Act 1999 to enforce any of its terms other than the parties to it under that Act
- 4.3 This Deed is a Local Land Charge and shall be registered as such
- 4.4 Insofar as any clause or clauses of this Deed are found (for whatever reason) to be invalid or unenforceable then such invalidity or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed

5. **Waiver**

No waiver (whether expressed or implied) by the Council of any breach or default in performing or observing any of the covenants terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default.

6. **Chargee's Consent**

The Chargee acknowledges and declares that this Deed has been entered into by the Owner with its consent and that the Land shall be bound by the obligations contained in this Deed and that the security of the mortgage over the Site shall take effect subject to this Deed PROVIDED THAT the Mortgagee shall otherwise have no liability under this Deed unless it

takes possession of the Site in which case it too will be bound by the obligations as if it were the person deriving title from the Owner notice of the Rights and any restrictive covenants made in this deed by the Owner being entered in the charges register of the title to the Land

5. HM Land Registry

5.1 The Owner consents to notice of this Deed being noted against the Owner's registered title to the Land.

5.2 On completion of this deed the Council shall apply to HM Land Registry to note this Deed against the Owner's registered title

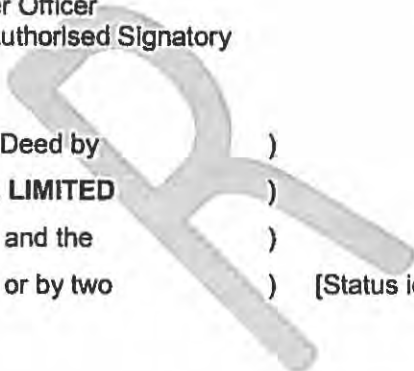
IN WITNESS whereof the parties hereto have executed and delivered this document as a deed the day and year first before written

Executed as a Deed by affixing
THE COMMON SEAL of
THE COUNCIL OF THE BOROUGH OF TORBAY
in the presence of :-)



Proper Officer
and Authorised Signatory

Executed and as a Deed by)
..... LIMITED)
acting by a director and the)
company secretary or by two) [Status ie: Director or Secretary]
directors



[Status ie: Director or Secretary]