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DATED

8th September

2016

LINDEN LIMITED

- and -

WHITE ROCK LAND LLP

-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
Phase 1
White Rock, off Long Road
Paignton
in the Borough of Torbay

THIS AGREEMENT made the day of 2016

BETWEEN

1. LINDEN LIMITED (Co. Regn No. 01108676) of Cowley Business Park, Cowley, Uxbridge, Middlesex UB8 2A ("the Developer")
2. WHITE ROCK LAND LLP (Co. Regn No. OC387465) of Cowley Business Park, Cowley, Uxbridge, Middlesex UB8 2A ("the Landowner")
3. THE COUNCIL OF THE BOROUGH OF TORBAY of the Town Hall Castle Circus Torquay TQ1 3DR ("the Council")
4. NHBC of NHBC House, Davy Avenue, Milton Keynes, Bucks, MK5 8FP ("the Surety")

WHEREAS:

- (1) The Council is the Local Highway Authority
- (2) The Landowner is the estate owner in fee simple absolute in possession of land at White Rock, off Long Road Paignton which is registered at HM Land Registry under Title Number DN652888 and DN640983 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 and the Landowner have 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

WB03050 – 110K PHASE 1 ENGINEERING LAYOUT
 WB03050 – 111J PHASE 1 ENGINEERING LAYOUT
 WB03050 – 112G PHASE 1 ENGINEERING LAYOUT
 WB03050 – 120F PHASE 1 LONG SECTIONS
 WB03050 – 121D PHASE 1 LONG SECTIONS
 WB03050 – 123 PHASE 1 LONG SECTIONS
 WB03050 – 130H PHASE 1 SURFACE FINISHES
 WB03050 – 131E PHASE 1 KERB LAYOUT
 WB03050 – 141B PHASE 1 ROAD LEVELS
 WB03050 – 150E PHASE 1 HIGHWAY CONSTRUCTION DETAILS
 WB03050 – 151E PHASE 1 HIGHWAY CONSTRUCTION DETAILS
 WB03050 – 160B PHASE 1 ADOPTABLE DRAINAGE CONSTRUCTION DETAILS
 WB03050 – 161C PHASE 1 PRIVATE DRAINAGE CONSTRUCTION DETAILS
 WB03050 – 164 PHASE 1 ADOPTABLE DRAINAGE DETAILS
 WB03050 – 165 PHASE 1 PRIVATE DRAINAGE DETAILS
 WB03050 – 170G PHASE 1 MANHOLE SCHEDULES
 WB03050 – 171H PHASE 1 MANHOLE SCHEDULES
 WB03050 – 180H PHASE 1 SECTION 38 LAYOUT
 WB03050 – 190C PHASE 1 SECTION 104
 WB03050 – 600A PHASE 1 LOCATION PLAN
 WB03050 Drawing Issue Sheet 2-1
 WB03050 Drawing Issue Sheet 2-2
 WB03050 Drawing Issue Sheet 3-1
 WB03050 Torbay Council 2014-10-24 Out letter

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 four hundred and fifty three thousand pounds (£453,000) 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 brown or yellow 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 and the Design Guide Exception Report dated April 2003 by the Council a copy of which the Developer hereby acknowledges has been supplied to him
- 1.12 the "**Statutory Undertaker**" means a "statutory undertaker" as defined in Section 329(1) of the Highways Act 1980 and British Telecommunications and other utility suppliers deemed to be statutory undertakers for the purposes of that Act.
- 1.13 the "**Works**" means the works specified in the First Schedule for the making up of the Road or Roads

2. Developer's Liability:

- 2.1 The Developer shall carry out and complete the 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 within 12 calendar months from the date of this Agreement
- 2.1 FOR the avoidance of doubt it is hereby declared that the Council may at the discretion of the Proper Officer grant to the Developer an extension of the period referred to in clause 2.1 for the completion of the Works PROVIDED that such extension is requested in writing by the Developer and PROVIDED ALSO
- (a) 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
- (b) the Developer and the Proper Officer shall review the amount of the Bond (as referred to in Clause 18) in force at that time and the Developer shall if required by the Proper Officer in

writing arrange for the amount of the Bond to be increased to such reasonable amount as shall be required by the Proper Officer

3. Declaration:

The Developer hereby declares and warrants to the Council that 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

4. Statutory Undertakers - Connections to Existing Services:

The Developer shall 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 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. 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

13. Adoption:

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

14. Council's Fees:

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

(a) the sum of £27,180 in respect of the costs incurred by the Council in inspecting the Works being 6 per cent of the estimated cost (£10,000 (ten thousand pounds) of which has already been paid to the Council) and

(b) the proper legal costs of the Council in connection with the preparation and completion of this Agreement and the necessary duplicates thereof up to a maximum fee of £750.00.

14.2 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

15. 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 16 17 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

16. Power to Execute Works in Default:

Without prejudice to Clauses 2 and 15 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

17. Defective or Dangerous Works:

17.1 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

17.2 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 17) 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 £453,000 being the Estimated Cost
- (b) shall not exceed the sum of £226,500 on and after the issue of the Part 1 Certificate
- (c) shall not exceed the sum of £113,250 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 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

IN WITNESS 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