



dated **2020**

The Council of the Borough of Torbay

and

[Developer]

Conditional Sale Agreement

relating to site at Collaton Saint Mary, Torbay

Trowers & Hamlin LLP
3 Bunhill Row
London
EC1Y 8YZ
t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
www.trowers.com

trowers & hamlin

Contents

1	Definitions	1
2	Interpretation	8
3	Conditions	9
4	Deposit and Council's Fees	10
5	Transfer	10
6	Access Licence	11
7	Value Added Tax	11
8	Land Release Funding	11
9	Construction Industry Scheme	12
11	Developer's indemnity	14
12	Developer's default	15
13	Dispute Resolution	16
14	Continuation of this Agreement	17
15	No Partnership or Council	17
16	Waiver	18
17	Joint And Several Liability	18
18	Contracts (Rights Of Third Parties) Act 1999	18
19	Entire Agreement	18
20	Notices	19
21	Confidentiality and freedom of information	20
22	HM Land Registry	23
23	Jurisdiction	23
24	Council's capacity	23
25	Developer warranties	24
26	Developer undertakings	25
27	Status of warranties	25
28	Developer's Due Diligence	25
29	No relief	26
30	Interest	26
31	Council's dealing rights	26
32	Personal covenants and restrictions on dealings	26
33	Co-operation	26
34	Project Data	27
35	Licence in respect of Intellectual Property Rights	27
36	Vesting of Intellectual Property Rights	27
37	Anti-bribery	28
38	Anti-Modern Day Slavery	29

39	Press announcements	30
	Schedule 1 - Conditions	32
	Schedule 2 - Planning Conditions	33
	Schedule 3 - Land Dealings	38
	Schedule 4 - Terms of Access Licence	43
	Annexure 1 – Transfer	48
	Annexure 2 – Affordable Housing Contract	49
	Annexure 3 – Affordable Housing Values	101
	Annexure 4 – Plan showing the Property	102

Conditional Sale Agreement

dated 2020

Parties

- (1) The Council of the Borough of Torbay of Town Hall, Castle Circus, Torquay TQ1 3DR (the Council); and
- (2) [Developer] (registration no. []) whose registered office is at [] (the Developer).

Introduction

- (A) The Council and the Developer have agreed to enter into this Agreement to set out the terms upon which the Property (as defined below) may be acquired by the Developer.
- (B) The Council has agreed to enter into this Agreement pursuant to its powers contained in Section 1 of the Localism Act 2011, and section 111, 120 and 123 of the Local Government Act 1972, and all other enabling powers.
- (C) The Council's Cabinet resolved to approve this transaction on [].
- (D) The Developer's Board resolved to approve this transaction on [].

Operative clauses

1 Definitions

In this Agreement the following words and expressions have the meaning specified except when expressly stated to the contrary:

1990 Act the Town and Country Planning Act 1990;

1994 Act the Law of Property (Miscellaneous Provisions) Act 1994;

Access Licence means a licence in the terms set out in Schedule 4 of this Agreement;

Affordable Dwelling means any Dwelling provided at an asking price or rent lower than the prevailing market prices or market rents in the county of Devon and to be made available to Qualifying Occupiers in accordance with the terms of any planning agreement pursuant to section 106 Town and Country Planning Act 1990 (as amended);

Affordable Housing means Affordable Dwellings to be constructed as part of the Development and comprising a minimum of 30% (or such other higher figure as may be required or imposed by the Local Planning Authority in any Planning Agreement) of the aggregate of all Dwellings forming part of the Development and which are to be disposed of to either:

- (a) Qualifying Occupiers and/or persons or households in housing need (and including those on moderate incomes) all in line with; or
- (b) pursuant to the terms of the Affordable Housing Contract;

Affordable Housing Contract means the form of contract set out in Annexure 2 for the disposal on the terms therein contained of the Affordable Housing and which will refer to the Affordable Housing Values;

Affordable Housing Specifications means the Council's requirements and specifications for the provision of the Affordable Housing provided by the Developer as part of the Development;

Affordable Housing Values means the agreed value of the Affordable Dwellings set out in Annexure 3;

Approved means as approved by the Council in its absolute discretion;

Confidential Information means all confidential designs, drawings, data, specifications, manufacturing processes, testing procedures and all other technical, business and similar information relating to either Parties business and affairs, its customers, employees and suppliers including all readable data, logic, logic designs, flowcharts, source or object codes, listings, test data, test routines, diagnostic programs, software programs or other material;

Completion means actual completion of the Transfer and payment of the Purchase Price under this Agreement;

Completion Date means the contractual completion date for the Transfer being 30 days after the Unconditional Date (or if such date is not a Working Day then the Completion Date shall be on the next Working Day following the expiry of such 30 day period) in accordance with this Agreement;

Conditions means the conditions precedent for the Transfer as set out at Schedule 1;

Construction Industry Scheme refers to the Income Tax (Construction Industry Scheme) Regulations 2005 as amended from time to time;

Contamination means all or any pollutants or contaminants including any chemical or industrial radioactive dangerous toxic or hazardous substance waste or residue whether in solid semi-solid or liquid form or a gas or vapour;

Contract Rate means 4% above the annual base lending rate of The Royal Bank of Scotland plc from time to time;

Council's Solicitors means Trowers & Hamlins LLP of 10 Colmore Row, Birmingham B3 2QD (Ref. JQM.32998.58);

Defects means any defect damage shrinkage or unfinished work in any of the buildings and/or other structures or features comprising the Development, or any part of them, or anything installed in such buildings or structures or features;

Design Data means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Development, in each case that is used by or on behalf of the developer or its Sub-Contractors in connection with the provision of the Developer's Works or the performance of the Developer's obligations under this Agreement;

Developer Related Party means:

- (a) an officer, servant or agent of the Developer or any Group Company of the Developer and any officer, servant or agent of such a person;
- (b) any Sub-Contractor of the Developer and any of their officers, servants or agents; and
- (c) any person on or at the Property at the express or implied invitation of the Developer;

Developer's Bank Account means [REDACTED];

Developer's Solicitors means [REDACTED] of [REDACTED] (Ref means [REDACTED]);

Developer's Works means the works operations and provision of services to effect the Development;

Development means the development of the entirety of the Property or any part or parts thereof (including if necessary the demolition of existing buildings thereon) by the erection and completion on the Property of buildings, erections, structures, infrastructure and other works in accordance with the Planning Permission;

Dwelling means any house, bungalow, flat, maisonette or other single unit of residential accommodation to be constructed on the Property together with any land forming its curtilage and any other appurtenant structures;

Event of Default has the meaning ascribed to that term in clause 12.1;

Event of Insolvency means the occurrence of any of the events listed in clause 13.4;

Expert means a planning Counsel of at least ten years call with at least five years of relevant experience in advising on similar matters the identity of whom shall be agreed between the Parties and in the absence of agreement nominated pursuant to the provisions of clause 19.3;

FOIA the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the FOIA) made under the FOIA from time to time together with any guidance or codes of practice issued by the Information Commissioner (as defined in the regulations) or relevant Government department in relation to the FOIA;

FOIA Fees Regulations the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

Free from Challenge means either that:

- (a) seven weeks have expired from the issue of the Planning Permission in question with no Proceedings issued; or
- (b) any such Proceedings are successfully defended so that the Planning Permission in question remains intact without modification and is no longer open to challenge in any way by the issue of further Proceedings;

Hazardous Substances means any substance of the nature listed in Schedule 1 to the Planning (Hazardous Substances) Regulations 2015;

Information has the meaning ascribed to it by section 84 of the FOIA;

Intellectual Property Rights mean any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights (but not including any house type drawings) whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached to them which are created, brought into existence, acquired, used or intended to be used by the Developer or any Developer Related Party for the purposes of carrying out the Developer's Works or otherwise in connection with the Development or for the purposes of this Agreement;

Land Release Fund means the funding pool provided to the Council as part of the One Public Estate programme and which was awarded to the Council on 8 March 2018 and from which the Land Release Contribution shall be made available to the Developer as a contribution to the cost of the LRF Works pursuant to clause 13;

Land Release Account means a bank account held and operated by the Council specifically for the operation of the Land Release Fund;

Land Release Contribution means the sum of £850,000.00 towards the cost of the LRF Works;

Local Planning Authority means Torbay Council in its capacity of local planning authority;

Longstop Date means 12 months from the date of this Agreement but subject to a maximum extension of 12 months from the date of expiry of the said 12 month period if at the end of that period either:

- (a) a Satisfactory Planning Permission has been granted but this is not yet Free from Challenge; or
- (b) the Developer has within 28 days of a Planning Refusal submitted as an appeal in relation to that Planning Refusal; or
- (c) Proceedings have been issued in relation to a Satisfactory Planning Permission or Planning Refusal

BUT such extension shall determine earlier upon either:

- i (in the case of an extension under paragraph (a) above) seven days after a Satisfactory Planning Permission has been granted which is Free from Challenge; or
- ii in the case of an extension under paragraph (b) 14 days after the determination of the said appeal (but if any Proceedings arising from the said appeal shall be issued within such 14 day period then there shall be a further extension until the date being seven days after the

determination of such Proceedings with no further right of appeal to a higher Court in England and Wales being available); or

- iii in the case of an extension under paragraph (c) seven days after the determination of the said Proceedings with no further right of appeal to a higher Court in England and Wales being available,

save that that the Longstop Date may at any time be postponed by the mutual agreement of the Council and the Developer as confirmed in writing by both of them;

LRF Works means any of the following works that the Developer carries out as part of the Development Works:

- (a) highways enabling works, including associated fees in the design and overseeing of the highways works;
- (b) site surveys and investigations to include undertaking percolation tests and site contamination surveys following demolition of the redundant former farm buildings to the north of the Property;
- (c) grounds maintenance works required in accordance with feedback from RSPB and specialist environmental and legal advice;
- (d) drainage strategy review;
- (e) ecology mitigation works;
- (f) procurement of EIA and HRA advice and reports;
- (g) site servicing and utilities;

Modern Slavery Legislation means the legislation referred to in section 54 Modern Slavery Act 2015;

Notification means a notification by HM Revenue and Customs given under paragraph 6(6) of the Income Tax (Construction Industry Scheme) Regulations 2005 (or under an equivalent provision replacing the same);

Onerous Conditions has the meaning ascribed in Schedule 2;

Overriding interests means interests that override first registration (as defined in schedule 1 to the Land Registration Act 2002), interests that override registered dispositions (as defined in schedule 3 to the Land Registration Act 2002) or interests the status of which is preserved as overriding by schedule 12 to the Land Registration Act 2002;

Parties means the parties to this Agreement (and **Party** shall be construed accordingly);

Planning Agreement means any agreement and/or undertaking required by the Local Planning Authority (or relevant Secretary of State) to be entered into as a condition of the grant or implementation of any planning consent, including any agreement pursuant to any one or more of Section 38 or Section 278 of the Highways Act 1980, Section 33 of the Local Government (Miscellaneous Provisions) Act 1982, Section 111 of the Local

Government Act 1972, Section 106 of the 1990 Act (as amended by the Planning and Compensation Act 1991) or Section 104 of the Water Industry Act 1991 or any agreement with a water or sewerage undertaker or other appropriate authority as to water supply or to drainage or surface water and/or effluent from the Property or any provision of similar intent and any variation, amendment or modification thereof and **Planning Agreements** shall be construed accordingly;

Planning Application means the application to be submitted by the Developer to the Local Planning Authority for the grant of Planning Permission in accordance with the provisions of this Agreement for the Developer's Works;

Planning Permission means detailed planning permission (not being merely a resolution to grant) and any listed building consents (if necessary) for the Developer's Works obtained in accordance with the provisions of Schedule 2 and any revised planning consent issued in place of that consent in obtained by the Developer in accordance with the provisions of this Agreement;

Planning Refusal means a refusal of the Planning Application submitted under this Agreement (including a deemed refusal arising under section 78(2) of the 1990 Act) or the grant of a Planning Permission that is not a Satisfactory Planning Permission;

Proceedings means any application to a competent Court (including but not limited to an application for leave to apply for judicial review) in relation to the Planning Permission;

Professional Team means the Developer's appointed architect, design architect, structural engineer, representative and principal designer;

Project Data means:

- (a) all Design Data; and
- (b) any other materials, documents or data acquired or brought into existence or used in relation to the Developer's Works or this Agreement,

in each case that is used by or on behalf of the Developer or its Sub-Contractors in connection with the provision of the Developer's Works or the performance of the Developer's obligations under this Agreement;

Property means the freehold land situate at Little Blagdon Farm Collaton Saint Mary, Devon comprising approximately [redacted] [acres] shown edged red on the Plan annexed at Annexure 4 to the extent that the said land falls within title numbers DN13535 and allocated title number DN726624 (but to the intent also that the sale hereby agreed will only include the land in allocated title number DN726624 if the Council has on or before the Completion Date been registered at the Land Registry as freehold proprietor of such land);

Property Conditions mean the Standard Commercial Property Conditions (Third Edition);

Purchase Price means the sum of £[redacted];

Commented [JQM1]: NB: The land in DN726624 is pending first registration at the Land Registry, based on a Statement of Truth only. That application may or may not be successful. However, this allocated title number only covers a very small area of land.

Qualifying Occupiers mean such persons nominated by the Local Planning Authority and identified as a class of persons within the Affordable Housing Strategy (or part of any Planning Agreement) whose incomes are insufficient to enable them to afford adequate housing locally on the open market and (if there is in place any eligibility criteria for the occupation of the Affordable Dwellings issued by the Local Planning Authority) persons who at the date of their first occupation of an Affordable Dwelling satisfy such criteria;

Relevant Percentage means the greater of 30% of the dwellings permitted by the Satisfactory Planning Permission or such higher percentage imposed by either the Local Planning Authority or by the relevant Secretary of State;

Request for Information has the meaning ascribed to it in the FOIA or the Environmental Information Regulations (as applicable);

Satisfactory Planning Permission means Planning Permission together with any associated Planning Agreement required to be entered into as a pre-condition to the grant of Planning Permission or required to be entered into prior to commencement of the Development that are (or will be where a Planning Agreement is yet to be entered into) free from any Onerous Conditions;

Site Conditions means the conditions of the Property including but not limited to climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;

Statutory Deduction means such deduction as may be prescribed pursuant to the Construction Industry Scheme;

Sub-Contractor means each of the persons engaged by the Developer from time to time to procure the provision of the Developer's Works;

Transfer means the transfer of the Property in the form of the draft attached at Annexure 1 of this Agreement with such amendments as may be agreed by the Council (acting reasonably) but only to reflect the layout of the relevant site as per the issued Planning Permission;

Unconditional Date means the date the Conditions are and remain satisfied;

VAT means Value Added Tax as charged in accordance with the provisions of the Value Added Tax Act 1994 (**VATA**) and regulations made thereunder (or any amendment or re-enactment thereof) or any equivalent tax or duty which may be imposed in substitution therefor or in addition thereto at the rate application from time to time;

Verification has the meaning set out in paragraph 6 of the income Tax (Construction Industry Scheme) Regulations 2005 (or an equivalent provision replacing the same); and

Working Day means any day which is not a Saturday, Sunday or a statutory or public holiday.

Commented [JQM2]: Developer must assume that the Property has already been elected for VAT purposes OR that this will be the case prior to exchange of contracts

2 Interpretation

- 2.1 Where there are two or more persons included in the expression the Developer covenants and obligations entered into by the Developer will be deemed to be entered into by such persons jointly and severally.
- 2.2 Where there are two or more persons included in the expression the Developer an event or something will be deemed to have occurred if it happens to any one of them for the purposes of this Agreement.
- 2.3 Any covenant by the Developer not to do or omit any act or thing will be taken to include a covenant not to suffer or permit the doing or omission of that act or thing.
- 2.4 The Developer will for the purposes of this Agreement be deemed to have such knowledge in respect of the Development as is held (or ought reasonably to be held) by a Developer Related Party.
- 2.5 Where there are provisions in this Agreement allowing waiver of a term or provision by any party, no term or provision is to be considered or waived unless such waiver is given in writing and any such waiver will not be a waiver of a part or future default or breach nor will it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.
- 2.6 The Council will be at liberty to waive any of the Developer's obligations in this Agreement in its absolute discretion (but any such waiver must comply with the provisions of clause 2.5 above in order to be valid).
- 2.7 For the purposes of this Agreement, two companies are members of the same group if one of them is the subsidiary of the other, or both are subsidiaries of a third company, subsidiary having the meaning given to it in section 1159 of the Companies Act 2006 and **Group Company** will be construed accordingly.
- 2.8 References to **writing** or **written** include faxes but not email.
- 2.9 A **person** includes a corporate or unincorporated body.
- 2.10 Unless otherwise specified, a reference to a particular statute or other law is a reference to it as it is in force for the time being taking account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force made under it and all orders, notices, codes of practice, guidance, standards that have the force of law, directions, impositions and requirements of any competent authority made under it.
- 2.11 A reference to statute or other laws in general is to all local, national and directly applicable supra-national laws in force for the time being, taking account of any amendment, extension, application or re-enactment and includes any subordinate laws for the time being in force made under them and all orders, notices, codes of practice, guidance, standards that have the force of law, directions, impositions and requirements of any competent authority made under them.

- 2.12 Except where a contrary intention appears, a reference to a clause or Schedule is a reference to a clause of or Schedule to this Agreement and a reference in a schedule to a paragraph is to a paragraph in that Schedule.
- 2.13 Clause, Schedule and paragraph headings and the contents pages do not affect the interpretation of this Agreement.
- 2.14 The singular includes the plural and vice versa.
- 2.15 In the event of inconsistency between the provisions of the body of this Agreement and the Schedules to this Agreement the body of this Agreement will take precedence.
- 2.16 Subject to the provisions of this Agreement, the Developer will be responsible for the acts and omissions of the Developer Related Parties as if they were the acts and omissions of the Developer.
- 2.17 Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of the agreement or document nor the review of any document or course of action by or on behalf of the Council nor the failure of the same, will relieve the Developer of any of its obligations or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge.
- 2.18 References to a public organisation will be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation and references to any such organisation will include its successors and assigns.
- 2.19 This Agreement incorporates the Property Conditions save that where there is an inconsistency between the terms of this Agreement and the Property Conditions then the former shall prevail.

3 Conditions

3.1 Covenant to satisfy conditions

- 3.1.1 Subject to the Conditions being and remaining satisfied on the terms of this Agreement by the Longstop Date, the Council will grant and the Developer will complete the Transfer on the terms set out in Schedule 3.
- 3.1.2 This Agreement other than:
- (a) clauses which impose obligations on the Council or the Developer which are to be fulfilled prior to the Unconditional Date; or
 - (b) the clause below which provides for the grant of the Access Licence on the date hereof
- is conditional upon the Unconditional Date occurring before the Longstop Date.
- 3.1.3 The Developer will use all reasonable and commercially sensible endeavours to procure satisfaction of the Condition referred to in paragraph 1 of Schedule 1 before the Longstop Date.

- 3.2 The Council and the Developer agree that the provisions contained in the Schedules to this Agreement are incorporated into this Agreement and the Council and the Developer agree to comply with their respective obligations in the Schedules to this Agreement.
- 3.3 The Parties are to give written notice to each other within five Working Days of each Condition being satisfied.
- 3.4 The Developer may in its absolute discretion waive either of the Conditions by service of notice in writing on the Council which expressly refers to the Condition being waived and in such event the Condition in question shall be deemed to have been satisfied.
- 3.5 If this Agreement does not become unconditional by the satisfaction of the Conditions prior to the Longstop Date the Council (or the Developer provided it has complied with this obligations in this Agreement that fall to be performed prior to the point of such termination) may at any time after the Longstop Date (but not after the Conditions have both been satisfied pursuant to the terms of this Agreement) terminate this Agreement by giving 20 Working Days' notice to the Developer. On the expiry of such notice this Agreement shall terminate without prejudice to any antecedent breaches of this Agreement.
- 3.6 In the event of this Agreement being terminated by either Party pursuant to clause 3.5 or in the event of this Agreement being terminated pursuant to any other provision of this Agreement allowing for termination or rescission by the Council then the Council shall be entitled to retain absolutely the deposit referred to in clause 4 below and the Developer shall promptly withdraw any notice of this Agreement registered against the title(s) to the Property and provide evidence of such withdrawal to the Council.

4 Deposit and Council's Fees

On exchange of this Agreement the Developer shall pay to the Council a deposit of 10% of the Purchase Price to be paid as Stakeholder.

5 Transfer

- 5.1 Subject to satisfaction of the Conditions and in consideration of the Purchase Price, the Council will sell and the Developer will buy the Property on the terms of this Agreement and in accordance with Schedule 3.
- 5.2 Unless the Planning Condition (as hereinafter defined) has been waived by the Developer the Council will not be obliged to complete the Transfer (and the Developer will be deemed to be in breach of this Agreement), if the Developer has not (on or before the Completion Date) unconditionally and irrevocably released to the solicitors acting for the Local Planning Authority a Planning Agreement (under section 106 of the 1990 Act) relevant to the Development where such a Planning Agreement is required to be entered into (pursuant to the resolution to grant the Satisfactory Planning Permission or pursuant to the terms of the Satisfactory Planning Permission) and the Local Planning Authority are ready, willing and able to complete such Agreement (to the intent that the said Planning Agreement and the relevant Transfer for the same land must be completed by the Developer at the same time).
- 5.3 The Parties hereby agree the provisions of Schedule 3.

6 Access Licence

On the date hereof the Access Licence will apply save that it will cease to apply upon the earlier of Completion and the date of determination, repudiation, rescission or frustration of this Agreement.

7 Value Added Tax

7.1 All payments to be made by the Developer to the Council under this Agreement are exclusive of any VAT chargeable on them and such VAT will be added to the amount of those payments and paid in addition to them upon production of a proper VAT invoice (within the meaning of Schedule 11 Paragraph 2 VATA).

Commented [JQM3]: We are advised the site is either elected for VAT currently or that or it will be before actual completion

7.2 The parties will liaise to secure a consistent and efficient analysis and application of the VAT rules to the transactions contemplated by this Agreement. In particular, where a supply is one of two or more mutual supplies between the parties the parties will agree the values to be invoiced to each other in respect of those mutual supplies and will ensure that invoices are issued by each party to the other at, or as near as possible to, the same time and in any event that each party's related input and output tax fall in the same VAT accounting period.

8 Land Release Funding

8.1 Land Release Account

Immediately following completion the Council shall lodge the Land Release Contribution into the Land Release Account and the following provisions shall apply to that account:

8.1.1 the Council shall deal with the monies standing to the credit of the Land Release Account as contemplated in this clause 8 (and where relevant the other provisions of this Agreement) and not otherwise;

8.1.2 no monies shall be released from the Land Release Account, other than:

- (a) as contemplated in this clause 8 (or the other relevant provisions of this Agreement); or
- (b) pursuant to a court order; or
- (c) pursuant to an award of an expert pursuant to the relevant dispute resolution provisions of this Agreement; or
- (d) with the prior written consent of the Council.

8.1.3 The Council shall each issue promptly such directions to its authorised officer and such consent and approval as are contemplated in this clause 8.

8.2 Following Completion the Land Release Contribution shall be paid to the Developer from the Land Release Account as follows:

8.2.1 upon the production from time to time by the Developer to the Council of a written certificate issued by a member of the Developer's Professional Team in respect of any relevant item of the LRF Works (and following verification of

each relevant invoice by the Council's appointed "section 151 officer") and (if required) inspection by the Council to verify the practical completion of the works referred to in the said certifications the relevant amount referred to in that invoice in respect of any such LRF Works shall be paid within 28 days thereafter to the Developer's Bank Account by the Council way of BACS transfer from the monies standing to the credit of the Land Release Account (insofar as not exhausted pursuant to the operation of the provisions of this clause 8);

8.2.2 following the practical completion in full of all elements of the LRF Works any sum remaining in the Land Release Account shall be repaid to the Council.

8.3 LRF Works are to be carried out at the Developer's discretion and at its own cost and without any recourse to the Council other than to the extent of the Land Release Contribution pursuant to the provisions of this clause 8.

8.4 For the avoidance of doubt monies held in the Land Release Account may be applied toward expenditure incurred by the Developer (in relation to LRF Works) prior to Completion save that no part of the said Land Release Account may be accessed by the Developer (pursuant to this clause 8) until after Completion.

9 Construction Industry Scheme

9.1 The Council will inform the Developer prior to Completion as to whether or not it is at the date of this Agreement a CIS Contractor under the Construction Industry Scheme and:

9.1.1 if it is a CIS Contractor clauses 9.3 to 9.10 shall apply; and

9.1.2 if it is not a CIS Contractor clauses 9.3 to 9.10 shall not apply.

9.2 If at any time up to the due date for payment of the Land Release Contribution by the Council under this Agreement the Council becomes a CIS Contractor or ceases to be a CIS Contractor the Council shall so inform the Developer and the provisions of clauses 9.3 to 9.10 shall or shall not apply as the case may be.

9.3 It is acknowledged by the Council and the Developer that the Council shall, prior to making any payment of the Land Release Contribution under or pursuant to this Agreement, obtain a Verification.

9.4 The Council shall use reasonable endeavours to obtain a Verification and the Developer shall provide the Council with the information referred to in regulation 6(2)(b)(iii) of the CIS Regulations to the extent the Council has not already received such information prior to the date of this Agreement.

9.5 Where the Council has obtained or received a Verification or Notification that the Developer is registered under Part 3 Chapter 3 of the Finance Act 2004 for payment under deduction or is not registered under Part 3 Chapter 3 of such Act:

9.5.1 at least five Working Days before the date for payment of the Land Release Contribution due under this Agreement the Developer shall give to the Council a statement showing the Direct Cost of Materials to be included in the payment; and

- 9.5.2 the Council shall make the Statutory Deduction from that part of the payment which is not in respect of the Direct Cost of Materials as stated by the Developer pursuant to clause 9.5.1 or (where appropriate) as estimated by the Council pursuant to clause 9.5.3; and
- 9.5.3 where the Developer fails to comply with clause 9.5.1, or where the Council has reasonable grounds to believe that any statement provided pursuant to clause 9.5.1 is incorrect, the Council shall make a fair and reasonable estimate of the Direct Cost of Materials to be included in the payment.
- 9.6 Where the Council has obtained or received a Verification or Notification that the Developer is registered for gross payment under Part 3 Chapter 3 of the Finance Act 2004 the Council shall pay or procure to be paid any amount due to the Developer in respect of the Land Release Contribution without making the Statutory Deduction.
- 9.7 Where the Council has previously obtained a Verification or Notification as referred to in clauses 9.5 or 9.6 and subsequently receives a Notification the Council shall thereupon notify the Developer and thereafter clauses 9.5 or 9.6 shall apply as appropriate.
- 9.8 The Council shall comply with its obligations towards the Developer under regulation 4 of the CIS Regulations and all other obligations under Part 3 Chapter 3 of the Finance Act 2004 and the CIS Regulations.
- 9.9 Where the Council has made an error or omission in calculating the Statutory Deduction it shall correct the error by:
- 9.9.1 where the initial calculation of the Statutory Deduction was excessive, payment to the Developer of the amount of the underpayment within ten Working Days of the date on which the Council becomes aware (or ought reasonably to have become aware) that an error had been made in calculating the Statutory Deduction; or
- 9.9.2 where the initial calculation of the Statutory Deduction was insufficient, further deduction from payments due to the Developer in respect of the Land Release Contribution under this Agreement of the amount of the overpayment (and if there are no such further payments due to the Developer any overpayment by the Council shall be reimbursed by the Developer to the Council within ten Working Days of the Developer receiving a written demand from the Council specifying in reasonable detail the quantum of and explanation for the overpayment) subject only to an instruction from HM Revenue & Customs to the Council not to make such a correction.
- 9.10 The relevant procedures applicable under this Agreement to the resolution of disputes or differences between the Council and the Developer shall apply to any dispute or difference between the Council and the Developer as to the operation of this clause 9 except where the Finance Act 2004 or the CIS Regulations or any other Act of Parliament or statutory instrument, rule or order made under any Act of Parliament provide for some other method of resolving such dispute or difference.
- 9.11 For the avoidance of doubt, the Council and the Developer hereby acknowledge and agree that:

- 9.11.1 the Council will lodge the Land Release Contribution into the Land Release Account pursuant to clause 8 in full without any deduction, withholding, or set-off whatsoever; and
- 9.11.2 if the Council is a CIS Contractor, clauses 9.3 to 9.10 shall apply to payments to the Developer from the Land Release Account.

10 No warranty as to condition, etc.

In respect of the Property, the buildings on it and the infrastructure and the service conduits in, on or serving the Property and the equipment within the Property, the Council gives no warranty, whether express or implied, as to:

- 10.1 the design, state and condition, quality or fitness for purpose of them;
- 10.2 the materials of construction, manufacture and installation of them;
- 10.3 the compliance of them with the requirements of any laws;
- 10.4 the accuracy of any measurements of land areas which may have been supplied to the Developer; or
- 10.5 the ground conditions of the Property.

10.6 Developer's indemnity

The Developer will indemnify the Council against all future losses, costs and liabilities arising out of the use and condition of the Property or any environmental matters affecting the Property.

10.7 Condition reflected in price.

The Developer acknowledges that the Purchase Price takes account of the present condition of the Property.

11 Developer's indemnity

The Developer will be responsible for and will indemnify and hold harmless the Council on demand from and against all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services) proceedings, demands and charges whether arising under statute, contract or at common law and whether suffered or incurred by the Council or brought by any third party against the Council, in connection with:

- 11.1 the death of and/or personal injury to any person whatsoever; and/or
- 11.2 the loss of and/or damage to any property real or personal including property belonging to the Council or property for which it is responsible

and which may arise out of, or in consequence of, the design, construction, operation or maintenance of the Property or the performance or non-performance by the Developer of its obligations under this Agreement or the presence on the Property of the Developer or any Developer Related Party.

12 Developer's default

12.1 Events of default

For the purposes of this clause 12 an Event of Default occurs if:

12.1.1 the Developer has failed to perform its obligations in this Agreement in any material respect which:

- (a) is not capable of remedy; or
- (b) if the breach is capable of remedy it has not been remedied after receipt of notice from the Council specifying the particular breach complained of requiring the Developer to remedy the breach and allowing reasonable time to the Developer to do so; or

12.1.2 the Developer or either being more than one person any one of them becoming Insolvent.

12.2 Other remedies unaffected

Nothing in this clause 12 affects any other remedy available to the Council as a result of the occurrence of any Event of Default.

12.3 Termination

12.3.1 On the occurrence of an Event of Default the Council may, in addition to any other rights and remedies it may have, rescind this Agreement by giving notice to the Developer to that effect (a **Termination Notice**) in which case this Agreement will terminate with immediate effect but without prejudice to any claim in respect of any antecedent breach.

12.4 Meaning of Insolvency

12.4.1 Meaning of *Insolvent*

In this clause 12 in relation to any person **Insolvent** means any of:

- (a) being unable or admitting inability to pay debts as they fall due;
- (b) suspending payments of any debts;
- (c) the value of assets being less than liabilities (taking into account contingent and prospective liabilities);
- (d) a moratorium being declared for the whole or any part of indebtedness;
- (e) a winding-up order is made;
- (f) dissolution, administration, or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) except (in the case of a corporation) solvent liquidation or reorganisation;

- (g) composition, compromise, assignment, or arrangement with any creditor;
- (h) appointment of a liquidator (except on a solvent liquidation), receiver, administrative receiver, administrator, compulsory manager or similar officer for the person or any part of its assets;
- (i) (in the case of an individual) appointment of a trustee in bankruptcy or a provisional receiver or similar officer for that individual or any part of his assets; or
- (j) the enforcement of any security or distraint by anyone over any assets.

13 **Dispute Resolution**

13.1 **Parties must try to resolve by agreement**

13.1.1 If the Council and the Developer are in dispute about anything arising out of this Agreement the parties will initially try to resolve the dispute by agreement as quickly as possible. If the dispute has not been resolved within 21 days it will be referred (in the absence of any express provision to the contrary) to an Independent Person (as defined below) appointed jointly by the Council and the Developer.

13.1.2 Clause 13.1.1 will not apply in relation to any matter related to or following an Event of Insolvency.

13.2 **Meaning of Independent Person**

The Independent Person is to have suitable relevant post qualification experience and his identity will be agreed between the Council and Developer.

13.3 **Appointment by third party**

If the Council and the Developer cannot agree on the Independent Person's identity he is to be appointed at the request of either the Council or the Developer by the president or chairman for the time being (the **President**) of whichever of the following bodies is most appropriate having regard to the nature of the dispute:

- 13.3.1 The Royal Institution of Chartered Surveyors;
- 13.3.2 The Royal Institute of British Architects;
- 13.3.3 The Institution of Electrical Engineers;
- 13.3.4 The Institution of Structural Engineers;
- 13.3.5 The Institute of Chartered Accountants in England & Wales;
- 13.3.6 The Law Society of England and Wales; or
- 13.3.7 The General Council of the Bar (of England and Wales)

13.4 Arbitrator not expert

- 13.4.1 If the dispute in question relates to the Council's comments in respect of any proposed plan, specification or other relevant document which relate to the Developer's Works then the Independent Person is to act as expert.
- 13.4.2 Unless otherwise required by the Council the Independent Person is to act as arbitrator in accordance with the Arbitration Act 1996 and the costs of the arbitration will be payable by the Council and the Developer in the proportions determined by the Independent Person.

13.5 Expert provisions if needed

If the Independent Person is to act as expert then the following provisions will apply:

- 13.5.1 the Independent Person will be instructed to allow each of the Council and the Developer to make representations and counter-representations as to the matters in dispute and to give them due consideration (but the Independent Person is not to be bound by them);
- 13.5.2 the Independent Person will be instructed to give his decision as quickly as possible in writing with copies being sent simultaneously to the Council and the Developer and to give reasons for his decision;
- 13.5.3 the Independent Person's determination will be final and binding on the Council and the Developer and the Surety (except in cases of manifest error);
- 13.5.4 if the Independent Person dies, delays or becomes unwilling or incapable of acting, either the Council or the Developer may ask the President to discharge and replace the Independent Person; and
- 13.5.5 the costs of the appointment of the Independent Person will be paid by the Council and the Developer in the proportions that the Independent Person decides or in the absence of any such decision from the Independent Person in equal shares.

13.6 Costs

Where costs of the Independent Person remain unpaid by the party liable to pay them pursuant to this clause, the other party may discharge those costs and recover the sum so paid from the defaulting party as a debt on written demand.

14 Continuation of this Agreement

Each of the obligations undertaken by the parties to this Agreement will (unless already performed) continue in full force and effect notwithstanding completion.

15 No Partnership or Council

- 15.1 This Agreement does not constitute a partnership or joint venture or any contract of employment between the Council and the Developer and the Surety.

15.2 The Developer will not be, or be deemed to be, an agent of the Council and the Developer will not hold itself out as having authority or power to bind the Council in any way.

16 **Waiver**

No failure on the part of any party to exercise or any delay on its part in exercising or enforcing a right or obligation arising under this Agreement will operate as a waiver thereof, nor will any single waiver or partial exercise or enforcement of any such right or obligation preclude any further other exercise or enforcement of that or any other rights or obligations.

17 **Joint And Several Liability**

Where the Developer is more than one person the Council may release or compromise the liability of any of those persons under this Agreement or grant time or other indulgence without affecting the liability of any other of them.

18 **Contracts (Rights Of Third Parties) Act 1999**

18.1 **No intended third party benefits**

Nothing in this Agreement is intended to confer any benefit on any person who is not a party to it.

18.2 **Parties free to vary Agreement**

The parties may, by agreement, rescind or vary this Agreement without the consent of any third party to whom the right of enforcement of any of its terms has been expressly provided.

19 **Entire Agreement**

19.1 **Previous agreements superseded**

This Agreement and the documents annexed to it constitute the entire agreement and understanding of the parties and supersede any previous agreement between them relating to the subject matter of this Agreement.

19.2 **No warranty relied on**

The Developer acknowledges and agrees that in entering into this Agreement, it does not rely on and will have no remedy in respect of any statement, representation, warranty, collateral agreement or other assurance (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly set out in this Agreement or in any written replies which the Council's Solicitors have given to any enquiries raised by the Developer's Solicitors before the date of this Agreement. Nothing in this clause 19.2 will, however, operate to limit or exclude any liability for fraud.

19.3 **Duplicate parts form one Agreement**

This Agreement may be executed in any number of duplicate parts all of which taken together will on exchange constitute one Agreement.

19.4 **Severability**

If any term, condition or provision of this Agreement is held to be invalid, unlawful or unenforceable to any extent such term, condition or provision will not affect the validity, legality and enforceability of the other provisions of this Agreement or any document referred to in this Agreement.

20 **Notices**

20.1 **Notices to be written**

Any notice given under this Agreement must be in writing and must be served by delivering it personally or sending it by pre-paid first class post, or special delivery post to the address and for the attention of the relevant party as follows:

20.1.1 to the Developer at:

[ADDRESS]

marked for the attention of [NAME]

or at the Developer's Solicitors, quoting the reference [REFERENCE];

20.1.2 to the Council care of:

TDA
Tor Hill House
Union Street
Torquay
TQ2 5QW

marked for the attention of the Director of Asset Management, Investment and Housing (Liam Montgomery)

with a copy sent to the Council's Solicitors, quoting the reference JQM.32998.58.

20.2 **Deemed time of receipt**

Any such notice will be deemed to have been received:

20.2.1 if delivered personally, at the time of delivery but if delivery occurs before 9.00 am on a working day the notice will be deemed to have been received at 9.00 am on that day, and if delivery occurs after 5.00 pm on a working day, or on a day which is not a working day, the notice will be deemed to have been received at 9.00 am on the next working day;

20.2.2 in the case of pre-paid first class or special delivery post at 9.00 am on the second working day after posting.

20.3 **Proof of service**

In proving service it will be sufficient to prove that delivery was made or that the envelope containing the notice was properly addressed and posted as a prepaid first class or recorded delivery letter, as the case may be.

20.4 **Email or fax**

A notice given under this Agreement will not be validly served if sent by e-mail or by fax.

20.5 **Condition 1.3 disapplied**

This clause replaces Property Condition 1.3.

21 **Confidentiality and freedom of information**

21.1 **Confidential Agreement**

Subject to clause 21.2 the parties will keep in confidence the details of this Agreement and all Confidential Information received from the other party relating to this Agreement the Development and the Developer's Works and will use reasonable endeavours to prevent their employees and agents from disclosing any such details or Confidential Information.

21.2 **Permitted disclosures**

Clause 21.1 will not apply to:

- 21.2.1 any disclosure of information that is reasonably required by any persons engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- 21.2.2 any matter which either party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this clause 21;
- 21.2.3 any disclosure to enable a determination to be made under clause 13 or in connection with a dispute between the Developer and any Sub-Contractor;
- 21.2.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 21.2.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 21.2.6 any provision of information to the parties' own professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Developer in connection with carrying out its obligations under

this Agreement, in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

- 21.2.7 any disclosure by the Council of information relating to the design, construction, operation and maintenance of the Development and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to any proposed new developer, its advisers and lenders should the Council decide to re-tender this Agreement;
- 21.2.8 any application for registration or recording of the Planning Permission or Relevant Consents and any property registration required;
- 21.2.9 any disclosure of information by the Council to any other department, office or Council of the Government or their respective advisers or to any person engaged in providing services to the Council for any purpose related to or ancillary to this Agreement; and
- 21.2.10 any disclosure for the purpose of:
 - (a) the examination and certification of the Council's or the Developer's accounts; or
 - (b) any examination pursuant to the Local Government Act 1999 of the economy, efficiency and effectiveness with which the Council has used its resources; or
 - (c) complying with a proper request from either party's insurance advisers, or insurers on placing or renewing any insurance policies; or
 - (d) (without prejudice to the generality of clause 21.2.4) compliance with the FOIA or the Environmental Information Regulations.

21.3 **Exploitation of information**

The Developer will not make use of this Agreement or any information issued or provided by or on behalf of the Council in connection with this Agreement otherwise than for the purposes of this Agreement, except with the prior written consent of the Council.

21.4 **Freedom of information**

- 21.4.1 The Developer acknowledges that the Council is subject to the requirements of the FOIA and the Environmental Information Regulations and will facilitate the Council's compliance with its information disclosure requirements pursuant to the same in the manner provided for in this clause 21.4.
- 21.4.2 Where the Council receives a Request for Information in relation to Information that the Developer is holding on its behalf the Council will transfer to the Developer such Request for Information that it receives as soon as practicable and in any event within seven Working Days of receiving a Request for Information and the Developer will:

- (a) provide the Council with a copy of all such Information in the form that the Council requires as soon as practicable and in the event within seven Working Days (or such other period as the Council acting reasonably may specify) of the Council's request; and
 - (b) provide all necessary assistance as reasonably requested by the Council in connection with any such Information, to enable the Council to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- 21.4.3 Following notification under clause 21.4.2 and up until such time as the Developer has provided the Council with all the Information specified in clause 21.4.2(a), the Developer may make representations to the Council as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the Information requested, provided always that the Council will be responsible for determining at its absolute discretion:
 - (a) whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and
 - (b) whether the Information is to be disclosed in response to a Request for Information, and

in no event will the Developer respond directly or allow its Sub-Contractors to respond directly to a Request for Information unless expressly authorised to do so by the Council.
- 21.4.4 The Developer will ensure that all Information held on behalf of the Council is retained for disclosure for at least twelve years from the date it is acquired and will permit the Council to inspect such Information as requested from time to time.
- 21.4.5 The Developer will transfer to the Council any Request for Information received by the Developer as soon as practicable and in any event within two Working Days of receiving it.
- 21.4.6 In the event of a Request for Information from the Council pursuant to clause 21.4.2 the Developer will as soon as practicable, and in any event within five Working Days of receipt of such Request for Information, inform the Council of the Developer's estimated costs of complying with the Request for Information to the extent these would be recoverable if incurred by the Council under section 12(1) of the FOIA and the FOIA Fees Regulations. Where such costs (either on their own or in conjunction with the Council's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the FOIA Fees Regulations the Council will inform the Developer in writing whether or not it still requires the Developer to comply with the Request for Information and where it does require the Developer to comply with the request the seven Working Days period for compliance will be extended by such number of additional days for compliance as the Council is entitled to under Section 10 of the FOIA. In such

case the Council will notify the Developer of such additional days as soon as practicable after becoming aware of them and will reimburse the Developer for such costs as the Developer incurs in complying with the request to the extent the Council is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.

21.4.7 The Developer acknowledges that (notwithstanding the provisions of clause 21.1) the Council may, acting in accordance with any code of practice under Part 1 of the FOIA, be obliged under the FOIA or the Environmental Information Regulations to disclose Information concerning the Developer or the Development:

- (a) in certain circumstances without consulting with the Developer; or
- (b) following consultation with the Developer and considering its views.

21.5 Disclosure to financiers

Clause 21.1 will not prevent disclosure to a party's advisers, bankers or financiers or to the Professional Team on a confidential basis.

22 HM Land Registry

The Developer may apply for the entry of a unilateral notice on the Council's title to the Property to protect the Developer's interest under this Agreement.

23 Jurisdiction

The parties irrevocably:

- 23.1 submit to the exclusive jurisdiction of the English courts in relation to and waive, and agree not to raise, any objection which they may now or in the future have to the jurisdiction of the English courts dealing with any proceedings for enforcement of the obligations in this Agreement,
- 23.2 agree that any process may be served upon them by leaving a copy addressed to them at their addresses from time to time applicable to them under clause 20,
- 23.3 agree that this Agreement will be governed by and construed in all respects in accordance with the laws of England and that all proceedings in connection therewith will be the subject (and the parties hereby submit) to the exclusive jurisdiction of the English courts.

24 Council's capacity

- 24.1 Nothing contained or implied in this Agreement or any consent or approval granted pursuant to it will prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as the local authority or Local Planning Authority or as agent for the highway authority and/or water authority.
- 24.2 Such rights, powers, duties and obligations under all public and private statutes, bylaws, regulations and statutory instruments may be as fully and effectually exercised in relation to the Property or any other property as if it were not party to this Agreement and any approval, consent, direction or authority given by the Council as local or other statutory

authority will not be or be deemed to be an approval, consent, direction or authority given under this Agreement and vice versa.

24.3 Without prejudice to the remedies and contractual rights of the Developer in respect of a risk or liability or obligations expressly provided in this Agreement as being a risk, liability or obligations of the Council:

24.3.1 nothing in this Agreement will operate as an obligation upon, or in any other way fetter or constrain, the Council in any capacity other than as a contracting party; and

24.3.2 the exercise by the Council of its duties powers and functions in any other capacity will not lead to any liability under this Agreement on the part of the Council to the Developer.

25 **Developer warranties**

The Developer warrants and represents to the Council that on the date of this Agreement:

25.1 it is properly constituted and incorporated under the laws of England and Wales and has the corporate power to own its assets and to carry on its business as it is now being conducted;

25.2 it has the corporate power to enter into and to exercise its rights and perform its obligations under this Agreement;

25.3 all action necessary on the part of the Developer to authorise the execution of and the performance of its obligations under this Agreement has been taken or, in the case of any agreement relating to the Development executed after the date of this Agreement, will be taken before such execution;

25.4 the obligations expressed to be assumed by the Developer under this Agreement are, or in the case of any agreement relating to the Development executed after the date of this Agreement will be, legal, valid, binding and enforceable to the extent permitted by law and each such agreement is or will be in the proper form for enforcement in England;

25.5 the execution, delivery and performance by it of any agreement relating to the Development does not contravene any provision of:

25.5.1 any existing legislation either in force or enacted but not yet in force binding on the Developer;

25.5.2 the constitution of the Developer;

25.5.3 any order or decree of any court or arbitrator which is binding on the Developer; or

25.5.4 any obligation which is binding upon the Developer or upon any of its assets or revenues;

25.6 no claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of the Developer, pending or threatened against it or any of its assets which will or might have a material

adverse effect on the ability of the Developer to perform its obligations under this Agreement or any other agreement relating to the Development;

25.7 it is not the subject of any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement or any other agreement relating to the Development;

25.8 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Developer, threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;

and the Council relies upon such warranties and representations.

26 **Developer undertakings**

The Developer undertakes with the Council that for so long as this Agreement remains in full force:

26.1 it will upon becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or authority may be threatened or pending and immediately after the commencement thereof (or within ten Working Days of becoming aware the same may be threatened or pending or with ten Working Days after the commencement thereof where the litigation or arbitration or administrative or adjudication or mediation proceedings is against a Sub-Contractor) give the Council notice of such litigation, arbitration, administrative or adjudication or mediation proceedings which would adversely affect to an extent which is material in the context of the Development and the Developer's ability to perform its obligations under this Agreement;

26.2 it will not without the prior written consent of the Council (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Developer to perform its obligations under this Agreement;

26.3 it will not undertake the performance of its obligations under this Agreement otherwise than through itself or a Sub-Contractor.

27 **Status of warranties**

All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Developer in this Agreement are cumulative and none will be given a limited construction by reference to any other.

28 **Developer's Due Diligence**

The Developer will be deemed to have:

28.1 satisfied itself as to the condition of the Property and the nature and extent of the risks assumed by it under this Agreement; and

28.2 satisfied itself as to any encroachments onto the Property; and

28.3 gathered all information necessary to perform its obligations under this Agreement and with a view to carrying out the Development including:

28.3.1 Site Conditions; and

28.3.2 information as to the nature, location and condition of the Property (including as to the presence of Hazardous Substances and Contamination, as to hydrological, geological, geotechnical and sub-surface conditions and as to service conduits that may traverse the Property); and

28.3.3 information relating to archaeological finds, areas of archaeological scientific or natural interest, local conditions and facilities and the quality of existing structures; and

28.3.4 any information made available to the Developer by the Council.

29 **No relief**

The Developer will not in any way be relieved from any obligation under this Agreement nor will it be entitled to claim against the Council on grounds that any information, whether obtained from the Council or otherwise (including information made available by the Council in reports, results of searches and other documentation supplied), is incorrect or insufficient other than information given in replies to written enquiries by the Council's Solicitors and will make its own enquiries as to the accuracy and adequacy of that information.

30 **Interest**

Without prejudice to any other right, remedy or power contained in this Agreement or otherwise available to any party, if any sums payable by one party to another party under this Agreement are not paid on the due date for payment or within the period specified for payment under this Agreement, whether legally demanded or not, the former will pay on demand to the latter interest thereon at the Contract Rate from the due date for payment calculated and accruing on a daily basis and compounded quarterly on the usual quarter days.

31 **Council's dealing rights**

For the avoidance of doubt and notwithstanding any other provision in this Agreement the Council may assign or otherwise deal with the whole or part of its interest and/or rights under this Agreement.

32 **Personal covenants and restrictions on dealings**

The Developer will not assign or otherwise deal with the benefit of its interest under this Agreement in whole or in part and the Council will not be obliged to grant the Transfer to any person other than the Developer. Further the Council will not be obliged to Transfer the Property other than as a whole.

33 **Co-operation**

The Council and the Developer agree to co-operate (but without being compelled to incur material expenditure in that respect) with the other in the fulfilment of the purposes and

intent of this Agreement except that neither the Council nor the Developer will be under any obligation to perform any of the obligations on the part of the other under this Agreement.

34 **Project Data**

The Developer will make available to the Council free of charge (and hereby irrevocably licences the Council to use) all Project Data that might reasonably be required by the Council and the Developer will ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Council on these terms for the purposes of:

34.1 the Council performing its duties under this Agreement and any statutory duties which the Council may have; and

34.2 the design or construction of the Development, the operation, maintenance or improvement of the Development or the provision of works the same as or similar to the Developer's Works if this Agreement is terminated rescinded, repudiated, frustrated or otherwise determined

(together, the **Approved Purposes**), and in this clause **use** will include the acts of copying, modifying, adapting and translating the material in question or incorporating them with other materials and the term **the right to use** will be construed accordingly.

35 **Licence in respect of Intellectual Property Rights**

The Developer:

35.1 hereby grants to the Council, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in the Developer; and

35.2 will, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in clause 35.1 to the Council,

in both cases, solely for the Approved Purposes.

35.3 Upon the determination of this Agreement (however determined), the Developer shall use its best endeavours (where requested to do so by the Council) to novate the benefit of all agreements that the Developer may have entered into with each and every utility company and highways authority as part of the Development and this obligation shall survive the determination of this Agreement.

36 **Vesting of Intellectual Property Rights**

The Developer will use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in the Developer and the Developer will enter into appropriate agreements with any Developer Related Party (or

other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

37 Anti-bribery

37.1 The Developer shall:

- 37.1.1 comply with all applicable laws, statutes, regulations, and codes relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 (Requirements);
- 37.1.2 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;
- 37.1.3 comply with the Council's Ethical, Anti-bribery and Anti-corruption Policies a copy of which is available from the Council upon request in each case as the Council or the relevant industry body may update from time to time (Relevant Policies);
- 37.1.4 have and shall maintain in place throughout the term of this Agreement its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Requirements, the Relevant Policies and clause 37.1.2, and will enforce them where appropriate;
- 37.1.5 immediately report to the Council's Head of Risk and Assurance Services any request or demand for any undue financial or other advantage of any kind received by the Developer in connection with the performance of this agreement;
- 37.1.6 if required by the Council, produce a written certificate to it signed by an officer of the Developer, confirming compliance with this clause 37.1 by the Developer and all persons associated with it under clause 37.2. The Developer shall provide such supporting evidence of compliance as the Council may reasonably request.

37.2 The Developer shall ensure that any person associated with the Developer who is performing services or providing goods in connection with this Agreement does so only on the basis of a written contract which imposes on and secures from such person terms equivalent to those imposed on the Developer in this clause 37. The Developer shall be responsible for the observance and performance by such persons of the Relevant Terms, and shall be directly liable to the Council for any breach by such persons of any of the Relevant Terms.

37.3 Breach of this clause 37 shall be deemed a material breach.

37.4 For the purpose of this clause 37, the meaning of adequate procedures and foreign public official and whether a person is associated with another person shall be determined in accordance with section 7(2) Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively. For the purposes of this clause 37 a person associated with the Developer includes but is not limited to any subcontractor of the Developer.

38 **Anti-Modern Day Slavery**

38.1 The Developer undertakes to the Council that the Developer:

38.1.1 has not and its current and former directors, officers and employees have not and shall not engage in any activity, practice or conduct which could or would place the Developer or the Council in breach of the Modern Slavery Legislation or activity which would constitute an offence under the Modern Slavery Legislation if the conduct took place in the United Kingdom;

38.1.2 has and shall maintain and implement:

(a) procedures to ensure compliance with the Modern Slavery Legislation; and

(b) adequate procedures designed to prevent conduct that would give rise to an offence under the Modern Slavery Legislation;

38.1.3 shall include undertakings (on the part of the parties hereafter mentioned) similar to those contained in this clause 38 in any contract it may enter into with sub-consultants, sub-contractors and suppliers;

38.1.4 from time to time, at the reasonable request of the Council, will confirm in writing that it has complied with its undertakings in this clause and will provide any information reasonably requested by the Council in support of such compliance.

38.2 The Developer shall maintain adequate records to assist in verifying its compliance with the provisions of this clause 38 and shall permit the Council and its third party representatives, immediately upon request during normal business hours to assess and take copies of such records and to meet with the Developer's personnel to audit the Developer's compliance with its obligations under this clause. The Developer shall give all necessary assistance to the conduct of such audits.

38.3 Audit access by any third party representative of the Council in accordance with clause 38.2 shall be subject to such representative agreeing to be bound by confidentiality obligations equivalent to those in clause in respect of the information obtained provided that all information obtained may be disclosed to the Council.

38.4 In the event of breach of this clause by the Developer and/or breach by any sub-consultant or sub-contractor or supplier of equivalent clauses required under clause 38.1.4 and/or if the Developer, sub-consultant, sub-contractor or supplier is convicted of an offence under the Modern Slavery Legislation in relation to this Agreement or any other contract (whether or not the Council is a party to that contract), the parties agree that the Council may at its sole discretion terminate this Agreement in which case:

38.4.1 the provisions of clause 12 shall apply; and

38.4.2 (if applicable) the Council shall be at liberty to terminate any other contract entered into between the same parties (whether in relation to the Development, the Property, the Works or otherwise) and any such termination shall be deemed to be termination for the Developer's default.

- 38.5 The Developer further undertakes to the Council that:
- 38.5.1 if required by law to do so, it shall, for each and every financial year of the Developer, comply with its obligations under S.54 of the Modern Slavery Act by publishing a Human Trafficking Statement; and
 - 38.5.2 it shall conclude an undertaking similar to that contained in clause 38.5.1 in any contract it may enter into with sub-consultants, sub-contractors and suppliers.
- 38.6 In the event of any breach of this clause 38 the parties agree that the Council may by notice in writing to the Developer require that such breaches will be rectified within seven days of receipt of such notice. If the Developer fails to rectify such breaches in accordance with the notice the Council may in its sole discretion terminate the Agreement in which case:
- 38.6.1 this Agreement and the provisions of clause 12 shall apply; and
 - 38.6.2 (if applicable) the Council shall be at liberty to terminate any other contract entered into between the same parties (whether in relation to the Development, the Property, the Works or otherwise) and any such termination shall be deemed to be termination for the Developer's default.
- 38.7 The Developer shall indemnify the Council against any losses, liabilities, damages, costs (including but not limited to legal fees) and expenses incurred by, or awarded against, the Council as a result of:
- 38.7.1 any breach of this clause 38 by the Developer;
 - 38.7.2 any breach of provisions equivalent to those contained in this clause in any contract with a sub-consultant, sub-contractor or supplier; or
 - 38.7.3 any act or omission by a sub-consultant or sub-contractor or supplier which would have amounted to a breach of the relevant sub-contract had the Developer complied with its undertaking set out in this clause 38.
- 39 **Press announcements**
- 39.1 Prior to making any announcements or similar public statements on this Agreement and/or any document referred to in it each party shall obtain the prior written approval of the other to the wording of the press statement or similar public announcement (such approval not to be unreasonably withheld or delayed).
 - 39.2 All publicity and/or media announcements or statements to be made by the Developer must be sent in draft form to the Council within a minimum of five Working Days to review and approve prior to release.

This Agreement has been executed as a deed and is delivered on the date stated at the beginning of it.

The common seal of **Torbay Council** was
hereunto affixed in the presence of:

[]

Executed as a deed by **Developer** acting by:

Director

Director/Secretary

Schedule 1

Conditions

The Conditions comprise:

1 The grant of Satisfactory Planning Permission which is Free from Challenge (the **Planning Condition**).

2 *[Final resolution of the judicial review at CSM site without further right of appeal]*

Commented [JQM4]: To be confirmed if this is still needed

Schedule 2

Planning Conditions

1 Working up the Planning Application

The Developer will at its own expense prepare the Planning Application in consultation with the Council and will use all reasonable endeavours to obtain the Satisfactory Planning Permission as soon as reasonably practicable after the date of this Agreement. For the avoidance of doubt, this obligation shall include attendance at any public enquiry convened in relation to the Planning Application with appropriate representation from an appropriate planning counsel of at least ten years' call with at least five years of relevant experience acting as lead counsel in planning enquiries of a similar type.

2 The Developer shall use all reasonable endeavours to agree as quickly as possible with the Council and the Local Planning Authority any matters and arrangements necessary to facilitate the requirements of any Planning Agreement.

3 The Developer may not amend, substitute, vary or withdraw any Planning Application or make any new or additional application or any application for reserved matters approval without the Council's prior written approval (not to be unreasonably withheld or delayed).

4 The Developer will submit the Planning Application to the Local Planning Authority and submit all necessary information and documentation for the same to be validated all within six months following the date of this Agreement and the Developer shall take all necessary steps to procure that the said application is validated by the Local Planning Authority promptly following submission.

5 Duty to consult

Before and/or following the submission of the Planning Application the Developer in order to increase the likelihood of the grant of a Planning Permission may enter into discussions or negotiations with the Local Planning Authority (and the Developer shall in consequence of such discussions or negotiations with the Local Planning Authority if it appears requisite or desirable in order to obtain a Planning Permission amend or withdraw and immediately submit a fresh application or an additional application for Planning Permission) but subject to paragraphs 3 and 4 above.

6 Notwithstanding paragraph 5 above no further Planning Application shall be submitted after the period of 12 months from the date of this Agreement without the prior written consent of the Council.

7 Extension of time for decision

The Developer may agree with the Local Planning Authority the extension of the statutory period for the giving of its notice under section 78(2) Town and Country Planning Act 1990 subject to the prior written consent of the Council such consent not to be unreasonably withheld or delayed.

8 **Duty to report progress**

The Developer will keep the Council informed as to the progress of the Planning Application and will in particular give the Council a copy of all applications, material correspondence and documents relating to the Planning Application. The Developer will also give the Council as much notice as practicable of meetings with the Local Planning Authority and the Council or its duly appointed representative and the Council's professional advisors may when practicable attend and participate at agreed meetings with the Local Planning Authority to discuss the progress of the application and the Developer will have due regard to any representatives of the Council except where they are otherwise contrary to the Developers or the Council's obligations in this Agreement.

9 **Appeals**

- 9.1 In the event of a Planning Refusal then the Developer will promptly appeal against the Planning Refusal but in the event that the Developer shall notify the Council and the Council's Representative in writing that it does not consider that such an appeal will result in a Satisfactory Planning Permission and the Council supplies the Developer with a statement in writing that it disagrees (or does not fully agree) with that assertion then either party may thereafter refer the matter to the Expert who will be obliged to advise on the chance of success of such an appeal in percentage terms. If neither the Council nor the Council's Representative shall supply the Developer a statement in writing stating that the Council disagrees (or does not fully agree) with the Developer's assertion regarding the success of an appeal within 20 Working Days of receipt of the Developer's notice (which is accompanied by a written notice referring to the aforementioned 20 Working Day deadline) then it is deemed that the Council agrees with the Developer's notice.
- 9.2 The Developer will thereafter be obliged to pursue an appeal at its own cost if the Expert has advised in writing that such an appeal is at least 60% likely to result in a successful outcome.
- 9.3 Similarly, any dispute over whether the Planning Condition has been satisfied and/or over whether the Planning Permission is a Satisfactory Planning Permission shall be referred on the application of either party to the Expert.
- 9.4 The Parties shall be required to share with each other the Expert's written advice and both parties shall be afforded all reasonable opportunity to make representations to the Expert including in conference where either party shall require.
- 9.5 The Expert's costs shall be discharged by the Developer in full.

10 **Challenge**

- 10.1 In the event of Proceedings then the Developer will promptly and actively participate as an interested party in defending such proceedings but in the event that the Developer shall notify the Council in writing that it does not consider that such action will be successful and the Council supplies the Developer with a statement in writing that it disagrees (or does not fully agree) with that assertion then either party may thereafter refer the matter to the Expert who will be obliged to advise on the chance of success of such action in percentage terms. If neither the Council nor the Council's Representative shall supply the Developer a statement in writing stating that the Council disagrees (or does not fully agree) with the Developer's assertion regarding the success of such action within 20

Working Days of receipt of the Developer's notice (which is accompanied by a written notice referring to the aforementioned 20 Working Day deadline) then it is deemed that the Council agrees with the Developer's notice.

10.2 The Developer will thereafter be obliged to pursue such action at its own cost if the Expert has advised in writing that such action is at least 60% likely to result in a successful outcome.

10.3 The Parties shall be required to share with each other the Expert's written advice and both parties shall be afforded all reasonable opportunity to make representations to the Expert including in conference where either party shall require.

10.4 The Expert's costs shall be discharged by the Developer in full.

11 **Grant of planning permission**

The Planning Condition will be discharged by the grant of the Satisfactory Planning Permission either by the Local Planning Authority or by or on behalf of the relevant Secretary of State acting under section 77 or 79 of the 1990 Act upon the Planning Permission being Free from to Challenge.

12 **Onerous conditions**

12.1 **Deemed refusal**

If a Planning Permission is not a Satisfactory Planning Permission it will be a Planning Refusal for the purposes of this Agreement.

12.2 **Meaning of Onerous Condition**

An Onerous Condition means in this context an obligation or restriction or condition contained within a Planning Permission or any associated Planning Agreement of any one or more of the following kinds:

12.2.1 makes the Planning Permission personal to the Developer; or

12.2.2 limits the occupation or use of the whole or any part of the Development to any designated person or occupier other than in respect of Affordable Housing; or

12.2.3 causes or is likely to cause the Planning Permission to be limited in time so that the Development must be commenced less than 3 (three) years calculated from the date of the grant; or

12.2.4 grants a temporary planning permission; or

12.2.5 prevents the carrying out of the Development and/or the use or occupation of the Development without the agreement or co-operation of an independent third party which cannot be obtained on terms or at a cost or within a time that in any such case is reasonable in the circumstances including but not limited to one that requires the dedication, provision, transfer or disposition of or the granting of any right to or entering into of any covenant benefitting any land not forming part of the Property (but the term "independent third party" shall exclude any highway authority, Local Planning Authority or any statutory undertaker); or

12.2.6 requires the development of land or carrying out of works on land other than the Property (unless such land is in control of the highways authority, drainage authority, or a utilities undertaker); or

12.2.7 imposes any restriction on the type, location, lay-out, positioning, number or size of any key element of the Development which is materially different from that proposed in the relevant Planning Application which in the Developer's reasonable opinion would be materially detrimental to the operation of the Development

but a condition or obligation shall not be an Onerous Condition if it is a condition or obligation that is consistent with those matters that are approved by the Council pursuant to the terms of this Agreement.

12.3 For the avoidance of doubt the Condition referred to in paragraph 1 of Schedule 1 shall be deemed to have been satisfied where the Developer shall have purchased any part of the Property by way of freehold transfer or by way of the grant of a Lease for a fixed term exceeding 21 years.

13 Planning obligations

13.1 The Developer will, if required, negotiate the terms of any Planning Agreement needed to obtain the Planning Permission but will not settle the terms of those documents without the prior written approval of the Council. The Council will not unreasonably withhold or delay its approval of those documents.

13.2 Unless the Planning Condition is waived in accordance with the terms of this Agreement then if required by the Local Planning Authority or by the relevant Secretary of State the Developer will enter an agreement with the Local Planning Authority prior to its acquisition of the Property obliging the Developer to enter into an agreed form of Planning Agreement upon acquisition of the Property and prior to commencement of the Developer's Works.

13.3 If a requirement to enter into a Planning Agreement is a requirement of the resolution to grant a Planning Permission (or it is a term of the Planning Permission) then the Developer shall complete the said Planning Agreement in respect of the Property either prior to or at the same time as completing the acquisition of the Property in such form as may be required by Local Planning Authority or relevant Secretary of State AND:

13.3.1 the Planning Permission shall not be implemented in relation to the Property until such Agreement is entered into; and

13.3.2 unless the Planning Condition is waived in accordance with the terms of this Agreement the Council shall not be obliged to complete the Transfer of the Property unless the Developer is ready, willing and able to complete the said Planning Agreement at the same time.

13.4 The Developer shall indemnify and to keep indemnified the Council from and against all claims, demands, costs, obligations and liabilities howsoever arising from any breach of any Planning Agreement.

14 The Developer shall indemnify and keep indemnified the Council from and against all claims, demands and liabilities howsoever arising from the use or occupation of the

Commented [JQM5]: The LPA may issue the P/P subject to a condition not to commence development until a s106 agreement is entered into in an agreed form and/or it might require the completion of a s111 Agreement (prior to acquisition of the site) and which will oblige the Developer to enter into the agreed form of s.106 upon acquisition.

Property or its condition or any breach by the Developer of the provisions of this Agreement.

- 15 The Developer shall keep the Council fully and effectively indemnified in respect of all Community Infrastructure Levy liabilities arising in connection with the Development and without making any claim for social housing or charity relief in relation to any of the Affordable Housing without the prior written consent of the Council as to the details of any such application for relief (such consent only to be granted at the absolute discretion of the Council).

Schedule 3

Land Dealings

1 Transfer

1.1 Completion of Transfer Date

- 1.1.1 Upon the Completion Date the Council shall transfer the Property and the Developer shall take a transfer of the Property by means of the Transfer.
- 1.1.2 Upon Completion of the Transfer the Developer will pay the Purchase Price to the Council.
- 1.1.3 The Property is to be transferred with vacant possession upon Completion but subject to the terms of this Agreement.

1.2 No presumption

Unless expressly agreed in writing to the contrary, the Council's Solicitors will not be deemed to be acting as the Developer's Solicitor's agents on Completion.

1.3 Deeds delivery method

Unless the Developer's Solicitors collect the deeds and documents to which the Developer is entitled on Completion under this Agreement, the Council's Solicitors will send them to the Developer's Solicitors by special delivery post or by document exchange or by hand and neither the Council nor the Council's Solicitors will be liable for their loss in transit.

1.4 Timing

The Council will not be required to complete before 9.30 am or after 3.30 pm on a Working Day nor at any time on a day which is not a Working Day.

2 Mechanics of completion

2.1 Engrossments and execution

The Council will instruct the Council's Solicitors to prepare engrossments of the original and counterpart of the Transfer not less than ten Working Days prior to the relevant Completion Date. The Developer will promptly execute the counterpart of the Transfer on receipt preparatory to their grant.

2.2 Completion: location and timing

The Transfer will be completed at the offices of the Council's Solicitors or at such other place as the Council's Solicitors reasonably require on the Completion Date.

3 Title

3.1 Evidence of title

The Developer admits and agrees that:

3.1.1 in respect of the parts of the Property title to which is registered at HM Land Registry, the Council has supplied to the Developer official copies of the registers and all documents referred to in the registers of title (except for any documents identified as missing in Schedule 1) maintained at HM Land Registry;

3.2 No requisitions

The Developer is deemed to have investigated and accepted that title and the Developer will raise no requisitions or objections concerning it save in respect of any matters revealed by the usual pre-completion searches.

3.3 Condition 6 (title and transfer)

Property Conditions 6.1 and 6.2 do not apply to this Agreement.

3.4 No Warranty

Except as otherwise expressly provided in this Agreement the Developer will take the Property in its state and condition in all respects as at the date of the Transfer and nothing in this Agreement or otherwise will constitute or imply a warranty by or on the part of the Council as to the fitness and suitability of the Property or any part thereof for the Developer's Works or for any other purpose.

3.5 Defects

The Developer accepts, in relation to any building or structure on the Property, entire responsibility (including any financial and other consequences which result whether directly or indirectly) for any Defects.

4 Matters Affecting The Property

4.1 Incumbrances

For the purposes of Property Condition 4.1.2(a) the specified incumbrances are:

4.1.1 all matters contained or referred to in the entries or records made in registers maintained by HM Land Registry as at [redacted] under title number DN13535 as at [redacted] and (if the Council's freehold title to the land in allocated title number DN726624 shall be registered at the Land Registry on or before the Completion Date) then all matters contained or referred to in the entries or records made in registers maintained by HM Land Registry under title number DN726624; and;

4.1.2 interests that override first registration (as defined in schedule 1 Land Registration Act 2002), interests that override registered dispositions (as defined in schedule 3 to the Land Registration Act 2002) or interests the status of which is preserved as overriding by schedule 12 Land Registration Act 2002.

4.2 Developer's deemed knowledge

The Developer is deemed to have full knowledge of the matters referred covered by or to in Property Condition 3.1 and will not raise any enquiry, requisition or claim about or objection to any of them.

5 Property Conditions

5.1 Incorporation of Property Conditions

Part 1 of the Property Conditions are incorporated into this Agreement and apply to the sale effected by it so far as they are:

- 5.1.1 applicable to a sale by private treaty;
- 5.1.2 not varied by or inconsistent with the express terms of this Agreement; and
- 5.1.3 applicable to the grant of a lease.

5.2 Further Property Conditions disappplied

- 5.2.1 Part 2 of the Property Conditions do not apply to this Agreement.
- 5.2.2 The following Property Conditions in Part 1 of the Property Conditions do not apply to this Agreement: Property Conditions 1.3, 7.1.3(b), 7.2, 7.3 and 7.4.

5.3 Contract Rate

The contract rate for the purposes of the Property Conditions is 4% above the annual base lending rate of The Royal Bank of Scotland plc from time to time.

5.4 Property Condition 1.2

Property Condition 1.2 is varied by adding to the end of it:

[where the Developer or the Surety is more than one person, the Developer may release or compromise the liability of any of them under this contract or grant time or indulgence without affecting the liability of any other of them.]

6 Affordable Housing

- 6.1 Save where the Planning Condition has been waived in accordance with the terms of this Agreement the Developer will on the Unconditional Date enter into the Affordable Housing Contract with one of the following entities nominated by the Council at its absolute discretion: either (i) Torvista Homes Limited (Company Number 12044007) or (ii) the Council or (iii) a Registered Provider of Social Housing (an **RP**) nominated by the Council.
- 6.2 Save where the Planning Condition has been waived in accordance with the terms of this Agreement the Council will not be required to complete the Transfer unless the Developer is ready willing and able to enter into the Affordable Housing Contract and the Developer will be deemed to be in breach of this Agreement if it is not ready willing and able to enter into the Affordable Housing Contract on the Unconditional Date.
- 6.3 An Affordable Housing Contract shall be entered into (with one of the entitles nominated by the Council as referred to in paragraph 6.1 above) on each and every occasion that development is to be carried out on the Property which is to include the construction of any Dwelling or Dwellings, to the intent always that the Relevant Percentage (as defined below) of Dwellings to be built on the Property are to be Affordable Dwellings, and such Contract shall be entered into prior to the implementation of each and every such

development (the term "implementation" to be construed by reference to the carrying out of a "material operation" as defined as at the date of this Agreement by section 56(4) of the Town and Country Planning Act 1990) and the Developer shall not be permitted to procure the implementation of any development on the Property that includes any proposed Dwelling until an Affordable Housing Contract is entered into as aforesaid.

6.4 For the avoidance of doubt the obligation contained in paragraph 6.3 immediately above shall apply even if the Planning Condition is waived prior to the acquisition of the Property.

6.5 The Developer (for itself and its successors in title) hereby covenants with the Council not to make any disposition (as such term is at the date of this Agreement defined by section 205 of the Law of Property Act 1925) of any part of the Property without previously procuring that the disponee thereunder enters into a Deed of Covenant with the Council to comply with the terms of this paragraph 6 of this Schedule 3 (including the provisions of this paragraph 6.5) such Deed to be in a form that the Council requires (acting reasonably) and which shall include provision for the registration of the Restriction referred to below against the disponee's title. This requirement shall not apply to the disposition of any part of the Property that has been or is being developed and where an Affordable Housing Contract has already been entered into in relation to the Relevant Percentage of Dwellings to be erected as part of that development (the term "Relevant Percentage" being as defined below).

6.6 The Developer hereby consents to the registration of the following Restriction against the Developer's title to the Property subsequent to the completion of the Transfer and the Developer (and any disponee who shall enter into a Deed of Covenant pursuant to paragraph 6.5 above) shall procure that its instructed solicitors shall register the said Restriction in priority to any charge over the Property (or any part or parts thereof):

"No disposition by the proprietor of the registered estate or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a certificate signed by The Council of the Borough of Torbay or by its conveyancer that the provisions of paragraph 6 of Schedule 3 of an Agreement dated [] and made between The Council of the Borough of Torbay and [] have been complied with or do not apply."

6.7 Subject as provided below each Affordable Housing Contract will provide for the delivery (to the Council or the RP as applicable) of the Relevant Percentage of the Dwellings to be built on the Property as Affordable Dwellings. The **Relevant Percentage** shall be the greater of 30% or such higher percentage as imposed by the Local Planning Authority or relevant Secretary of State for the development in question.

6.8 The mix of units in terms of number of bedrooms, number of bedspaces, number of storeys and GIA's (as defined below) to be delivered pursuant to each Affordable Housing Contract shall be as set out in the Affordable Housing Values table and the tenure type applied to each such Dwelling shall be at the discretion of the Local Planning Authority and/ or the Council. Where the Local Planning Authority or relevant Secretary of State shall require the delivery of any Affordable Dwellings which are not of a type listed in the Affordable Housing Values table (or where the required tenure type for the Dwelling of that description (as imposed by the Local Planning Authority) is marked "N/A") then the Council shall (at its discretion) be permitted not to include any such Dwellings within the Affordable Housing Contract (though they may remain Affordable Dwellings for the purposes of a

Planning Agreement and/or a Planning Permission) and in the event that the Council does elect to include any such Dwellings in the Affordable Housing Contract then the relevant price for each such Dwelling shall be the price listed in the Affordable Housing Values table for the nearest equivalent Dwelling (unless there is no nearest equivalent stated for the tenure type in question in which case the price may be negotiated separately).

- 6.9 To the extent reasonably practicable (but subject to the requirements of the Local Planning Authority) the Relevant Percentage shall be applied to each and every Dwelling type (in terms of numbers of bedrooms) to be built as part of the development so that for example the Relevant Percentage of 2 bedrooomed Dwellings to be constructed as part of each development on the Property shall be Affordable Dwellings.
- 6.10 The prices to be paid for each Affordable Dwelling shall be ascertained from the Affordable Housing Values table save that in relation to each and every Affordable Housing Contract that is required to be entered into after the Unconditional Date the said prices shall be adjusted according to the percentage rise or fall in the Retail Prices Index (All Items) as published from time to time by the Office for National Statistics (or such equivalent index as may replace the same) between the period commencing on the month before the date of this Agreement and the month before the Affordable Housing Contract in question is entered into.
- 6.11 Prior to entering into an Affordable Housing Contract the Developer and the Council will (both acting reasonably and with reasonable expedition) seek to agree the Approved Plans, the Specifications and the Buyer's Hand Over Process (as such terms are defined in the Affordable Housing Contract) **save that** these must adhere in any event to the Affordable Housing Values table (including as to the GIA, number of storeys and number of bedspaces as stated therein, all to be treated as bare minimum requirements), to the terms of the Affordable Housing Contract as currently drafted, to the nationally described space standards as published by the Department for Communities and Local Government in March 2015 (or any UK Government standard that shall replace the same) and to the grant funding requirements imposed by Homes England/ the Homes and Communities Agency (whether or not any of the Affordable Dwellings are to benefit from grant).
- 6.12 For the purposes of this paragraph 6, the term GIA refers to the Gross Internal Area of a Dwelling which in turn refers to the total floor space measured between the internal faces of perimeter walls (including partitions, structural elements, cupboards, ducts, flights of stairs and voids above stairs) that enclose the Dwelling.
- 6.13 The Developer will not seek to amend the obligations relating to the delivery and/or use of affordable housing units as contained in any Planning Permission and/or in any ancillary Planning Agreement without the prior written consent of the Council.
- 6.14 For the avoidance of doubt the Affordable Housing Contract to be entered into on the Unconditional Date and/or pursuant to paragraph 6.3 must be entered into by the Developer (not a nominee of the Developer) and each and every Affordable Housing Contract entered into pursuant to an obligation contained in a Deed of Covenant of the nature referred to in paragraph 6.5 above must not be entered into by a nominee either.

Schedule 4

Terms of Access Licence

1 In this Schedule 4 the following terms shall have the meanings set out below:

Licence refers to the Access Licence provided for by this Schedule 4;

Licence Period means the Licence Period provided for by this Schedule 4 starting on (and including) [] and ending on (and including) [];

Commented [JQM6]: Bidder to confirm required reasonable period- which is to be reflected here

Rights means the right to carry out the following preliminary works and investigations on the Property;

[Insert the Preliminary Works here] – [NB: This must be confined to preliminary site surveys and investigations only]

Commented [JQM7]: Please note

Permitted Hours means the hours of 9 am to 5 pm Monday to Friday only but excluding public holidays.

2 Before the Rights are exercised

The Developer agrees with the Council before exercising the Rights:

2.1 to obtain all necessary statutory consents required to exercise the Rights at its own expense; and

2.2 to provide copies of the said consents to the Council.

3 During the exercise of the Rights

3.1 The Developer agrees with the Council, if the Rights are exercised:

3.1.1 not to exercise the Rights other than during the Licence Period in accordance with:

- (a) its obligations in this Licence;
- (b) all necessary statutory consents; and
- (c) the terms of all applicable laws (including but not limited to all relating to health and safety and environmental protection) and all other legal requirements;

3.1.2 to exercise the Rights in a manner which does not cause any nuisance, damage (other than the minimum damage to the Property necessitated by the exercise of the Rights), inconvenience or annoyance to the Council or to any other person, and to make good any such damage caused to the Property quickly and to the satisfaction of the Council;

- 3.1.3 not to:
- (a) keep on the Property any potentially dangerous liquids, materials, substances or other articles without the prior written consent of the Council;
 - (b) install or use on the Property any ancillary instrument apparatus machinery or equipment without the prior written consent of the Council;
 - (c) release from the Property into any environmental medium any substance in quantities or concentration that may pollute the environment or cause harm to the health of persons or other living organisms land surface or ground water or ecology systems; and
 - (d) permit any vehicles belonging to the Developer or any other persons calling on the premises expressly or by implication with the authority of the Developer to cause any obstruction or nuisance;
- 3.1.4 to supply to the Council on demand all such documents, information and evidence as it may reasonably require to satisfy itself that the terms of this Licence have been complied with;
- 3.1.5 not to leave or store on the Property any debris;
- 3.1.6 during the exercise of the Rights not to:
- (a) infringe, interrupt or destroy any right, easement or privilege;
 - (b) interrupt any service to or from or within adjoining or neighbouring property; or
 - (c) damage or disturb any service media within the Property.
- 3.1.7 to observe such reasonable rules and regulations as the Council may make and of which the Council shall notify the Developer governing the Developer's access to the Property;
- 3.1.8 to keep the Property secure and to take all reasonable steps in order to prevent unauthorised access to the Property;
- 3.1.9 not to do or permit to be done upon the Property anything which may render void or voidable any policy or policies of insurance including but not limited to those effected in pursuance of this Licence or make any increased premium payable in respect of such policy or policies unless the Developer first makes payment of such increased premium;
- 3.1.10 to at all times comply with all obligations, requirements and duties arising under general Health and Safety legislation and HSE industry specific Approved Codes of Practice and Guidance where applicable to the activity;
- 3.1.11 where applicable to the activity to ensure that a sufficient number of suitably trained and competent marshals are present at the Property during the exercise of the Rights.

- 3.2 The Developer appoints a Competent Person pursuant to Regulation 7 of The Management of Health at Work Regulations 1999 to assist the Developer in carrying out the necessary measures that need to be taken in order to ensure the safety and health of any person affected by the Developer exercising their Rights at the Property. The Developer will be responsible for health, safety, environmental and security issues and will ensure that a sufficient number of competent staff are available and responsible for all health, safety and welfare matters relating to their exercised Rights at the Property.
- 3.3 The Developer shall notify the Council's Health and Safety Manager immediately on the occurrence of any of the following events which arise out of or in connection with the exercise of the Rights and / or the grant of this Licence generally and / or the Developer's presence at the Property:
- 3.3.1 a fatal accident to any worker or a member of the public;
 - 3.3.2 any injury to a member of the public requiring reporting under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (as amended from time to time) (**RIDDOR**);
 - 3.3.3 any dangerous occurrence, as defined by RIDDOR;
 - 3.3.4 the service of any improvement or prohibition notice under the Health & Safety at Work etc. Act 1974;
 - 3.3.5 any incident having health & safety implications which attracts the attention of the police and/or the media;
 - 3.3.6 the commencement of any criminal prosecution under the Health & Safety at Work etc. Act 1974;
 - 3.3.7 any occurrence or incident of pollution.

4 Indemnity

The Developer agrees with the Council to indemnify the Council and keep the Council indemnified against all actions, proceedings, liability, claims, demands, damages, costs, losses and expenses in any way arising out of:

- 4.1 this Licence;
- 4.2 the exercise or purported exercise of the Rights; or
- 4.3 any breach by the Developer of the terms of this Licence,

including (without limit) any arising from personal injury to or the death of any person and any injury or damage to any property and any condition, requirement, charge or levy imposed under any law.

5 Insurance

The Developer agrees with the Council:

- 5.1 to take out and maintain, with an insurer of repute insurance in the sum of not less than £10,000,000 against any liability in respect of any injury or damage whatsoever to any person or to any property real or personal (including property of the Council) arising out of the exercise of the Rights by the Licensee or out of or in the course of or by reason of the breach of any statutory or common law duty or the negligent execution of any actions in relation to the Property and to indemnify and keep indemnified the Council (notwithstanding any supervision by or approval of the Council or any person acting on behalf of the Council) against any such liability (and, prior to the date of first exercising the Rights, the Developer shall provide to the Council its Public Liability Insurance Certificate);
- 5.2 to provide to the Council on request reasonable evidence of the terms of the insurance policy referred to in paragraph 5.1 and the fact that the policy is in force;
- 5.3 to comply with all terms and conditions imposed by the insurer of the Property in respect of the exercise of the Rights;
- 5.4 to pay on demand any extra premium for insuring the Property which becomes payable because of the exercise of the Rights;
- 5.5 to ensure that the insurance policy referred to in paragraph 5.1 extends to indemnifying the Council and any neighbouring or adjoining owner or occupier;
- 5.6 not to do anything which could adversely affect any insurance policy relating to the Property;
- 5.7 immediately to give written notice to the Council of any circumstance which might affect, or lead to a claim on, any insurance policy relating to the Property.

6 Reinstatement

- 6.1 The Developer agrees with the Council prior to the expiry of the Licence Period:
- 6.1.1 to reinstate and make good the Property and to restore the Property to its appearance immediately before the start of the Licence Period; and
- 6.1.2 to clean the areas of the Property made unclean by the exercise of the Rights
- in each case to the satisfaction of the Council.
- 6.2 The Developer agrees with the Council in carrying out such works of reinstatement to comply with the terms of this Licence.
- 7 This Licence is personal to the Developer and the Developer shall not in any way dispose of the benefit of this Licence.
- 8 The parties to this Licence do not intend that any term of this Licence shall be enforceable solely because of the Contracts (Rights of Third Parties) Act 1999 by any person who is not a party.

9 Limitation of Council's liabilities

- 9.1 Subject to paragraph 9.2, the Council is not liable for:

- 9.1.1 the death of, or injury to the Developer, its employees or invitees to the Property; or
 - 9.1.2 damage to any property of the Developer or that of the Developer's employees or other invitees to the Property; or
 - 9.1.3 any losses, claims, demands, actions, proceedings, damages, costs or expenses or other liability incurred by the Developer or the Developer's employees or other invitees to the Property in the exercise or purported exercise of the Rights.
- 9.2 Nothing in paragraph 9.1 shall limit or exclude the Council's liability for:
- 9.2.1 death or personal injury or damage to property caused by negligence on the part of the Council or its employees or agents; or
 - 9.2.2 any matter in respect of which it would be unlawful for the Council to exclude or restrict liability.

Annexure 1

Transfer

Annexure 2
Affordable Housing Contract

Annexure 3

Affordable Housing Values

House type	GIA (sq m)	Number of Bedspaces	Number of Storeys		Social Rent	Affordable Rent	Shared Ownership
1b2p flat	50.00	2	1		£45,000	£60,000	N/A
2b3p flat	62.00	3	1		£57,000	£70,000	N/A
2b4p coach house	72.00	4	1		£77,000	£90,000	N/A
2b4p house	79.00	4	2		£80,000	£100,000	£135,000
3b5p house	93.00	5	2		£87,000	£110,000	£165,000
4b6p house	106.00	6	2		£93,000	£120,000	N/A

Annexure 4

Plan showing the Property