

**PRECEDENT**

**SECTION 38 AGREEMENT with bond/performance security and Owner/Developer**  
WP REF: Precedents/S38 agmt with bond

**DATE APPROVED:**

**01.04.10**

**MODEL SECTION 38 AGREEMENT  
(HOUSING)**

DATED \_\_\_\_\_ 20\_\_\_\_

**THE KENT COUNTY COUNCIL (1)**

- and -

(Owner) **(2)**

- and -

(Developer) **(2/3)**

- and -

Delete if Performance Security - (Surety) **(3/4)**

*-and-*

(Mortgagee) **(4/5)**

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**AGREEMENT**

made under Section[s] 38 *[and 184]* of the Highways Act 1980  
and Section 111 of the Local Government Act 1972  
and Section 2 of the Local Government Act 2000  
in connection with development at *[site]*

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WP Ref:

**THIS DEED OF AGREEMENT** is made the                    day of                    Two  
thousand and

**BETWEEN**

- (1)     **THE KENT COUNTY COUNCIL** of Sessions House County Hall Maidstone Kent  
ME14 1XQ (“the Council”) and
- (2)     of/whose registered office is at (“the Owner) and
- (2/3)   of/whose registered office is at (“the Developer”) and
- (3/4)   Delete if Performance Security - of/whose registered office is at (“the Surety”) and
- (4/5)   of/whose registered office is at (“the Mortgagee”)

**RECITALS**

- (1)     The Council is the local highway authority for the purposes of the Highways Act  
1980 for the area in which the land referred to in Recital (2) is situate
- (2)     The Owner / Developer is the registered proprietor at the Land Registry with Title  
Absolute under Title Number[s][K                    ] of the land known as [                    ]  
shown for the purpose of identification only by red edging on the Drawing  
numbered [                    ] (“the Plan”) which includes the site of the proposed Road  
or Roads (as defined in Clause 1.1) shown coloured pink (“the Pink Land”) [and in  
part hatched red [see clause 4 page 4] on the Plan and all other land required for  
the Works (as defined in Clause 1.1) and is desirous of making up the Road or  
Roads so that the same shall become a highway or highways maintainable at the  
public expense
- (3)     Any part of the Road or Roads shown coloured pink hatched black on the Plan is  
land for which the Owner / Developer cannot show a freehold title absolute in  
possession and is not included in the Road or Roads intended to be adopted as  
publicly maintained highway under the terms of this Agreement
- (4)     The Owner has agreed with the Developer that the Developer shall execute and  
maintain the Works

- (4/5) The Owner / Developer has requested that when the Works have been executed and maintained in accordance with the provisions of this Agreement and the Specification the Council shall take over the maintenance of the Road or Roads as a highway or highways maintainable at the public expense which the Council has agreed to do upon the terms and conditions contained in this Agreement
- (5/6) The Owner and the Developer / Developer has / have entered into an Agreement with the Council pursuant to Section 278 of the Highways Act 1980 for [the adoption by the Council of the road[s] shown hatched red on the Drawing numbered [ ] as a [highway][highways] maintainable at the public expense]
- [(6/7) The Surety has agreed to enter into this Agreement for the purposes set out in Clause 2221] - Delete if Performance Security
- (7/8) The Developer is hereby permitted under Section 278 of the Highways Act 1980 to open up and amend the existing highway where minor tie-in works are required provided that the Developer has implemented the requirements of the Kent Permit Scheme under the Traffic Management Act 2009
- (8/9) The Mortgagee is the registered proprietor of the Charge dated [ ] referred to in Entry No. [ ] of the Charges Register of the said Title Number [ ] and has agreed to enter into this Agreement to grant the consent contained in Clause 29]

### **STATUTORY PROVISIONS**

This Agreement is made pursuant to Section 38 and Section 278 (in so far as is necessary for the opening of existing highway and adoption of the Highway Works) of the Highways Act 1980 Section 111 of the Local Government Act 1972 Section 2 of the Local Government Act 2000 Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 and all other powers enabling the Council in that behalf and the covenants on the part of the Owner and the Developer / Developer hereinafter contained shall be covenants to which the provisions of Section 38 and Section 278 of the 1980 Act shall apply and Section 305 of the 1980 Act shall apply to any expenses recoverable by the Council

**IT IS HEREBY AGREED AND DECLARED** as follows:

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

**IN** this Agreement the following terms shall have the meanings set out below:

“the APC security”

the bond, cash payment or other security delivered to the Council by the Developer under sections 219-220 Highways Act 1980

“the Bond Figure”

the sum of [ ] pounds (£ [ ]) to be secured by the Bond or Performance Security to be delivered under this Agreement

“the Drawings“

the Plan and the Section Drawings numbered [ ] signed by the Proper Officer together with such other drawings as the Proper Officer may from time to time agree shall be used in addition to or in substitution for the Plan and the said Section Drawings

“the Estimated Cost”

the sum of [ ] pounds (£[ ]) being the amount which is in the opinion of the Proper Officer the cost of carrying out the Works within the period specified in Clause 2.1(iv)

“the Maintenance Period”

the period of twelve calendar months

“the Part 1 Works”

the works set out in Part 1 of the First Schedule

“Certificate No 1”

the Certificate to be issued under Clause 12 on satisfactory completion of the Part 1 Works

“the Part 2 Works”

the works set out in Part 2 of the First Schedule

“Certificate No 2”

the Certificate to be issued under Clause 14 on satisfactory completion of the Part 2 Works

“Final Certificate”

the Certificate to be issued under Clause 16 on satisfactory completion of the Works

“the Performance Security”

the sum of [ ] pounds (£ [ ] )

“Proper Officer”

the Council’s Managing Director of Environment, Highways and Waste or his delegated subordinate officers or otherwise the officer for the time being appointed by the Council for the purposes of this Agreement or of any provision contained in it

“the Road or Roads”

the carriageways and footways of the private road or roads referred to in Recital (2) including any off-site highway drainage works shown on the Drawings and the footpaths street lighting all verges services strips [Structures and/or Non-Structures Soakaways to be adopted as listed in Part 3 of the First Schedule] Traffic Signal Equipment Non-Standard Traffic Systems Equipment Soft Landscaping Works Non-standard street lighting and Non-standard or enhanced surfacing and street furniture as listed in Part 4 of the First Schedule vehicular crossings road surface water drainage system Sustainable Drainage System (if any) and all other things ancillary thereto

“Soft Landscaping Works”

*the works of [insert description of soft landscaping works] on the land shown hatched green] on Drawing number [ ] together with such other drawings*

*and documents as the Proper Officer may from time to time agree shall be used in addition thereto or in substitution therefor*

“the Specification”

the latest edition of the publication entitled The Kent Design Guide (including all updates and revisions current at the date of this Agreement) a copy of which the Owner / Developer acknowledges as being in the Owner's / Developer's possession

“Structure(s)”

any structure(s) built in under or over any public highway or public highway to be constructed as part of the Highway Works where the least internal span dimension is equal to or exceeds 0.9 metres (aggregate spans for multiple pipes/structures) This includes among other structures bridges footbridges pipe gantries culverts pipes tunnels chambers cellars shafts soakaways manholes and storm water balancing tanks etcetera; or

any structure(s) built in or within 3.66 metres of any public highway or public highway to be constructed as part of the Highway Works which support(s) any public highway or public highway to be constructed as part of the Highway Works or ground above it or them and where the retained height either above or below the said public highway or public highway to be constructed as part of the Highway Works is 1.4 metres or more This includes among other structures retaining walls headwalls basements cellars and reinforced earth where the face is at an angle of 70 degrees or more etcetera; or miscellaneous structures including projecting or spanning buildings environmental barriers high mast lighting CCTV masts and portal and cantilever sign/signal gantries etcetera

“Non-Structure(s) Soakaways”

*any soakaway which is not within the highway boundary or does not fall within the definition of a structure(s)*

“Non-Standard Surfacing Materials”

*non-standard or enhanced higher cost maintenance materials as agreed with the Proper Officer*

**“Street Lighting”**

*street lighting as defined in the Specification*

**“Non-Standard Street Lighting”**

*non-standard or higher specification street lighting as agreed with the Proper Officer*

**[“the Surety”**

such bank or other financial institution as may be nominated by the Developer and approved by the Council for the purposes of the Bond] - Delete if Performance Security

**“Sustainable Drainage Systems”**

*the drainage systems described in “Framework for Sustainable Drainage Systems SUDS in England and Wales published by the Environment Agency 2003 including updates and revisions current at the date of this Agreement*

**“Undertaker(s)”**

any person company corporation board or authority whose apparatus is at the date of this Agreement already installed in under over or upon the land on which the Works are to be carried out pursuant to a statutory right or licence granted under Section 50 of the New Roads and Street Works Act 1991 PROVIDED THAT such expression shall include the authorised successor to any such person company corporation board or authority and to the assignee or the successor in title to any such person

**“the Works”**

the works specified in Part 1 and Part 2 [and Part 3] of the First Schedule for the making up of the Road or Roads including where necessary minor tie-in works to the existing adjoining highway

**1.2 Interpretation**



- 1.2.1 Where the context so admits the expressions “the Council” “the Owner” “the Developer” [*and*] “the Surety” – Delete if Performance Security [*and* “the Mortgagee”] shall include their respective successors in title
- 1.2.2 Unless the context otherwise requires reference to any recital clause sub-clause schedule drawing or plan without further designation is a reference to the recital clause sub-clause schedule drawing or plan of (or in the case of a Drawing or Plan annexed to) this Agreement so numbered
- 1.2.3 Reference to any statute or statutory provision includes a reference to that statute or statutory provision as from time to time amended extended re-enacted or consolidated and all statutory instruments or orders made pursuant to it
- 1.2.4 Words denoting the singular number only shall include the plural and vice versa words denoting any gender include all genders and words denoting persons shall include firms and corporations
- 1.2.5 Covenants of a positive nature made by the Developer and/or the Owner in this Agreement are covenants to which Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 apply
- 1.2.6 The headings in this Agreement are inserted for convenience only and shall not affect the construction or interpretation thereof

## **2. DEVELOPER’S LIABILITY**

2.1 **CONTEMPORANEOUSLY** with the execution of this Agreement the Developer shall deposit the Performance Security in an interest bearing account in the name of the Council with National Westminster Bank Plc 91 High Street Maidstone Kent for the due performance of the Developer’s obligations under this Agreement

(2.1/2/2) **THE** Developer shall carry out and complete the Works at the Developer’s expense:

- (i) in a good and workmanlike manner and with materials approved in writing by the Proper Officer;

- (ii) in accordance in all respects with the Specification and the Drawings or other written instruction by the Proper Officer;
- (iii) to the satisfaction of the Proper Officer; and
- (iv) either within [ 36 maximum ] calendar months from the date of this Agreement or within 6 months of the completion of all dwellings on the site whichever is earlier, or
- (v) provided that the Developer has applied in writing to the Proper Officer for an extension of time to complete the Works and that application was delivered not less than six months before the earlier maximum period set out in (iv) and the Developer has stated sufficient reason for the application and the Proper Officer has in writing accepted the application then such further period of time as the Proper Officer shall in his absolute discretion allow.

(2.2/2.3) **SAVE** as provided in Clause 14.2 the Developer shall maintain the Road or Roads until the issue of the Final Certificate

### **3. DISCLOSURE**

The Owner and the Developer shall make full disclosure to the Council of all Structures including those that overhang or which will overhang the site of the Road or Roads and all retaining walls under or adjoining the proposed Road or Roads and those that will be privately maintained prior to the date of this Agreement

### **4. DECLARATION**

**THE** Owner and the Developer hereby declare[s] and warrant[s] to the Council that they have / the Developer has and will maintain throughout the duration of this Agreement full right and liberty and consent to carry out such works as may be deemed by the Council to be necessary to connect the Road or Roads to a vehicular highway or highways that is or are or that will be maintainable at the public expense

### **5. UNDERTAKERS - CONNECTIONS TO EXISTING SERVICES**

**THE** Owner (or the Developer acting on behalf of the Owner) / Developer shall before carrying out the Works and connecting the Road or Roads with any existing highway or highways maintainable at the public expense give notice to each Undertaker of any service or services laid in upon or under such highway or highways of the proposal to carry out the Works and to make such connection as if the connection were a work to be executed for road purposes and/or major highway works as defined in Section 86 of the New Roads and Street Works Act 1991 and shall bear the cost of any works or measures deemed necessary by the Undertakers in consequence of the proposal to carry out the Works and to make such connection and the Owner and/or the Developer shall indemnify the Council in respect of the cost of any works or measures considered necessary by any Undertakers in consequence of such proposal

**6. PROVISION OF BOND**

Prior to commencement of the Highway Works [and the Soft Landscaping Works] and without expense to the Council to procure from the Surety a Bond in the Council's favour for the Bond Figure for the due performance of the Developer's obligations under this Agreement including the payment of all invoices and costs, all Professional Costs and all claims made under Part 1 of the Land Compensation Act 1973 associated with the Highway Works [and the Soft Landscaping Works]

**AND/OR PROVISION OF PERFORMANCE SECURITY**

6. Prior to commencement of the Highway Works [and the Soft Landscaping Works] to deposit the Performance Security in an interest bearing account in the name of the Council with National Westminster Bank plc 91 High Street Maidstone Kent for the due performance of the Developer's obligations under this Agreement including payment of all invoices and costs, all Professional Costs and all claims under Part 1 of the Land Compensation Act 1973 associated with the Highway Works [and the Soft Landscaping Works]

**7. INDEMNITY**

**THE** Owner and the Developer / Developer hereby indemnify[ies] the Council in respect of all actions claims demands expenses and proceedings arising out of or in connection with or incidental to the carrying out of or the use of the Works (including any claims under Part 1 of the Land Compensation Act 1973) other than those arising out of or in consequence of any negligent act default or omission on the part of the Council

**8. APPROVED MATERIALS**

**NO** materials shall be used by the Developer unless approved by the Proper Officer and complying with the Specification Any material may be required to be tested before being approved and this shall be at the sole expense of the Developer and at a testing laboratory approved by the Council Any materials rejected by the Proper Officer shall not be used by the Developer for any of the Works

**9. ACCESS TO THE SITE AND THE PUBLIC HIGHWAY**

9.1 **THE** Owner and the Developer / Developer will during the carrying out of the Works give to the Proper Officer and any other officer of the Council access to every part of the Works and the sites thereof for the purpose of inspecting the Works and all materials used or intended to be used therein

9.2 Provided that the Developer has:

- (a) provided the [Bond/Performance Security] in accordance with Clause 6
- (b) paid all sums due or demanded pursuant to Clause 19
- (c) provided evidence that a relevant notice under the Traffic Management Act 2004 has been issued by the Developer [on behalf of the Council] in relation to the Highway Works, and
- (d) provided evidence that all necessary consents have been obtained (including permits under Part 3 of the Traffic Management Act 2004) in relation to the Highway Works, the Council, without prejudice to its statutory powers and duties and the provisions of any permit issued pursuant to Part 3 of the Traffic Management Act 2004, grants to the Developer licence to enter and to remain

upon with or without workmen plant and machinery the Highway Works Land and so much other public highway under the Council's control as the Proper Officer shall agree is necessary for the Developer to carry out its obligations under this Agreement and it is hereby agreed and declared that such licence extends to breaking open (subject where appropriate to making good its surface) and without limitation to the foregoing carrying out works in on or under the said highway

**10. GRANT OF EASEMENTS**

10.1 **BEFORE** the issue of the Final Certificate but after completion of, or simultaneous to, the Transfer referred to in Clause 14.3 the Owner (or the Developer as the case may be) / the Developer shall without cost to the Council execute and complete or procure the execution and completion by all necessary parties of:

- (i) such deeds (in the form set out in the Second Schedule) as are in the opinion of the Council necessary to secure to the Council full drainage rights in respect of such part or parts of the surface water drainage system [including Non-Structure Soakaways] of the Road or Roads as are situate outside the limits of the Road or Roads or
- (ii) such rights granted in transfer by the Developer of adjacent land as in the opinion of the Council secure to the Council such full drainage rights, and
- (iii) such other deeds of easement as may be required by the Council for full exclusive drainage rights visibility splay or the future maintenance by the Council of any street furniture situate outside the limits of the Road or Roads or connecting to or attached to private property [and the Structures and/or Non-Structure(s) Soakaways as listed in Part 3 of the First Schedule together with any street lighting and traffic signal equipment non-standard traffic systems equipment non-standard street lighting and street furniture as listed in Part 4 of the First Schedule]

and shall pay the Council's legal costs and disbursements in connection with such deeds of easement and the Council shall not be liable for the payment of compensation or legal or any other costs or fees arising on account of the completion of any such Deeds

**11. CANCELLATION OF ADVANCE PAYMENT SECURITY (APC SECURITY)**

On completion of the Bond or delivery of the Performance Security intended to be secured under this Agreement the APC Security in favour of the Council provided by [APC Surety] in the amount of [£ ] shall be released or if a cash payment was made that payment (together with all accrued interest) shall be returned to the Developer

**12. CERTIFICATE No 1**

**ON** completion of the Part 1 Works to the satisfaction of the Proper Officer in all respects the Proper Officer shall issue Certificate No 1 to the Developer within 28 days, and if requested, also to the Owner

**(ii) OCCUPATION OF BUILDINGS**

**NO** dwelling erected by the Developer on behalf of the Owner / Developer or on the Developer's behalf fronting adjoining or abutting on to the Road or Roads shall be occupied until:

- (i) the Proper Officer has agreed that such part or parts of the Road or Roads as will provide the occupier of the said dwelling with both pedestrian and vehicular access to a highway maintainable at the public expense has or have been constructed to at least the standard of Part 1 of the First Schedule; and
- (ii) the Road or Roads or that part of parts of the Road or Roads referred to in (i) above has or have columns erected and in lighting in accordance with the Specification and the Drawings

- (iii) the Road or Roads or that part or parts of the Road or Roads referred to in (i) above has or have street name plates erected as agreed with the Proper Officer

### **13. DRAWINGS AND RECORDS**

13.1 **PRIOR** to the issue of Certificate No 2 the Developer shall deliver to the Proper Officer in accordance with the Specification:

- (i) six full size paper sets of coloured drawings and one copy of pdf computer files on disk showing to a scale of 1:500 (or such other scale as the Proper Officer shall reasonably require) the Works as constructed. The Works shall be shown by means of the following colour code:
  - a) Pink – all new highway land to be adopted
  - b) Red hatched – areas of works within the existing highway
  - c) Blue dotted – all pre-existing highway surface water drainage
  - d) Blue solid or blue hatched – all new highway surface water drainage including drainage situated outside the Road or Roads to be adopted (covered by an easement)
  - e) Red line – new highway boundary
  - f) Green hatched – soft landscaping areas
  - g) Black circle – all street lighting illuminated signs bollards and cables distinguishing between private cables and Seeboard cables (and all street lights shall be identified by their respective □ cipher reference numbers)
- (ii) two copies of the Health and Safety File maintained by the Developer relating to the Works pursuant to the Construction (Design and Management) Regulations 1994; and
- (iii) "as-built" records for all Structures; and an electronic pdf copy, if appropriate

### **14 CERTIFICATE No 2**

14.1 **ON** completion of the Part 2 Works to the satisfaction of the Proper Officer in all respects in accordance with Clause 2 the Proper Officer shall if any sewer constructed under the Road or Roads under an Agreement under Section 104 of the Water Industry Act 1991 has been certified by the Undertaker as being on maintenance issue Certificate No 2 to the Developer within 28 days and, if requested, also to the Owner

14.2 **ON** the date of the issue of Certificate No 2 the Road or Roads shall become a Road or Roads dedicated by the Owner / Developer as highway or highways open for use by the public at large and the Maintenance Period shall begin to run **PROVIDED THAT:**

(i) the said highway or highways shall not be highways maintainable at the public expense;

(ii) the Owner (or the Developer on behalf of the Owner) has obtained and delivered to the Council all necessary Deeds of Grant and Drawings and Records as listed in clause 13; and

(iii) the Owner (or the Developer on behalf of the Owner) / Developer shall remain the street manager for the purposes of Section 49(4) of the New Roads and Street Works Act 1991 until the issue of the Final Certificate

14.3 **THE** Owner / Developer shall, without cost to the Council, execute and complete or procure the execution and completion by all necessary parties of a Transfer of the Pink Land to the Council [unless the Council decides in its absolute discretion to waive this requirement]. Such Transfer is to be free from encumbrances other than such as shall already have been created prior to the date of this Agreement (with the exception of any purely financial charge) and which are not inconsistent with the use of the Pink Land for highway purposes or the proper management and maintenance of the Pink Land. Such Transfer shall be in the form set out in the Third Schedule hereto and the Owner / Developer shall pay the Council's legal costs and disbursements in connection with such Transfer



14.4 If the Owner / Developer has not transferred the Pink Land within 12 months of the issue of Certificate Number 1 then the County Council may choose to waive that requirement

## **15. OBLIGATIONS DURING THE MAINTENANCE PERIOD**

15.1 **DURING** the Maintenance Period:

15.1.1 the Developer at the Developer's own expense shall maintain the Works including all grassed and planted areas and shall carry out routine maintenance including sweeping gully emptying and snow clearance

15.1.2 the Developer at the Developer's own expense shall clear all abandoned vehicles rubbish or other unauthorised materials as may be necessary to facilitate use by vehicles pedestrians and other users and for inspection of the Works for the purposes of the issue of any certificate under this Agreement

15.1.3 the Developer at the Developer's own expense shall maintain all sustainable drainage systems and materials and carry out all routine maintenance as required by the Proper Officer

15.1.4 the Council at the Council's own expense shall undertake routine maintenance of and be responsible for payment for energy for all street lights and illuminated traffic signs forming part of the Part 2 Works

## **16. FINAL CERTIFICATE**

**BEFORE** the expiration of the Maintenance Period the Developer shall at the Developer's own cost and expense reinstate and make good any defect or damage to the Works which may have arisen from any cause whatsoever or be discovered during the Maintenance Period (including any defect in or damage to the road surface water drainage system or sustainable drainage system) of which the Developer has been notified in writing by the Proper Officer so that the Works comply with the Specification

**AND THEN PROVIDED THAT:**

- (i) the Owner or (as the case may be) the / Developer has paid to the Council all amounts due to the Council under this Agreement including all commuted sums referred to in Part 4
  - (ii) the Owner or (as the case may be) the / Developer has completed any necessary reinstatement or other works to the satisfaction in all respects of the Proper Officer;
  - (iii) [the Council has issued Certificate No 2 under the Agreement referred to in Recital 5/6]
  - (iv) the Developer has undertaken all stages of the Safety Audit in accordance with H.D. 19/03 (Road Safety Audit) and addressed all issues raised therein to the satisfaction of the Proper Officer [and]
  - (v) the Road or Roads as referred in Clause 25 adjoin an adopted highway
- the Proper Officer shall issue the Final Certificate to the Developer within 28 days [and the Council shall release the Surety from all liability under this Agreement] –  
Delete if Performance Security

**17. PROCEDURE FOR INSPECTION AND ISSUE OF CERTIFICATES**

**WITHIN** twenty eight days of receipt of written application from the Owner and/or / the Developer for the issue of any Certificate or part Certificate under this Agreement the Proper Officer shall inspect the Works and where necessary provide the Owner and/or the / Developer with a definitive list in writing of any remedial works required to be carried out before the issue of the relevant certificate Any such remedial works shall be subject to the same inspection procedure detailed in this Clause 17 until such remedial works have been completed to the satisfaction of the Proper Officer who shall within twenty eight days thereafter issue the relevant Certificate

**18. ADOPTION**

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

**19. LEGAL AND OTHER COSTS**

19.1 **ON** the execution of this Agreement (or within 14 days of a written demand if agreed by the Proper Officer)-the Developer shall pay to the Council:

19.1.1 in respect of the costs and expenses incurred or to be incurred by the Council in connection with the technical assessment and inspection of the Works (excluding Structures sustainable drainage systems non-standard drainage systems geo-technical approval or inspection) the sum of [

] Pounds (£[ ]) being eight per centum (8%) of the Estimated Cost subject to a minimum fee of £1000 less any sum paid to the Council prior to the date of this Agreement in respect of such costs and expenses; and

19.1.2 the Council's legal costs and disbursements in connection with the preparation completion and registration of this Agreement and any costs associated with any Supplemental Agreement

19.1.3 the costs and expenses incurred or to be incurred by the Council in connection with the technical approval of design and of construction in relation to Structures and other items mentioned in the Specification (excluding non-Structures soakaways) whether or not to be adopted; [and]

19.1.4 any costs incurred by the Council in making and implementing any traffic regulation order(s) (as defined in the Road Traffic Regulation Act 1984 and any other statute) which the Proper Officer deems necessary because of the Works and whether made or implemented before during or after completion of the Works; [and]

*[19.1.5 the commuted sum specified in the second column of Part 4 of the First Schedule in respect of the future maintenance and/or replacement of the corresponding item described in the first column of the same Schedule*

19.2 **BEFORE** the issue of certificate No. 2

19.2.1 the cost of highway inventory surveys

19.2.2 any additional fees required according to the Specification and any additional fees required where an extension of the time limit set out in Clause 2.1(iv) has been granted (being not less than a further 3% (minimum £500) for inspection fees and additional administration work based on the Council's estimate of the cost of the outstanding Works

19.2.3 any additional fees required in line with the Specification

19.2.4 the costs and expenses incurred or to be incurred in connection with drafting completing and registering such transfers deeds of grant or deeds of variation as are required by the Council

19.3 **RECEIPT** by the Council of the payment of such sums shall not create any contractual relationship between the Council and the Owner or the Developer nor absolve the Owner or the Developer from any liability or obligation imposed upon them / the Developer by the terms of this Agreement or by statute or at common law and the Council shall not be liable for any loss damage or injury which the Owner or the Developer may sustain by reason of no or insufficient or faulty inspection of the Works by the Council

## **20. DETERMINATION BY THE COUNCIL**

**WITHOUT** prejudice to any other right or remedy it may have the Council may determine this Agreement (except for Clauses 21 and 22) by notice to the Owner and the Developer such notice to take effect as specified in the notice if the Owner or the Developer:-

- (i) fails to perform or observe any of the conditions stipulations or obligations and liabilities on their respective parts / on the Developer's part contained in this Agreement and the Specification;  
or
- (ii) has an administrative receiver or receiver appointed over the whole or part of their respective / the Developer's assets or suffers the appointment of an administrator; or

- (iii) has a winding up order made or (except for the purpose of amalgamation or reconstruction of a solvent company) passes a resolution for voluntary winding up; or
- (iv) enters into any arrangement agreement or composition with and for the benefit of its creditors; or
- (v) being an individual is the subject of a bankruptcy petition or order

**21. POWER TO EXECUTE WORKS IN DEFAULT**

**WITHOUT** prejudice to Clauses 2 and 20 if the Owner or the Developer fails to execute or complete the Works in accordance with their / the Developer's obligations and liabilities under this Agreement and the Specification the Council shall be entitled to execute or complete the Works in default by its own employees or by contractors or otherwise and to recover the cost as certified by the Proper Officer [from [the Surety] [out of the Performance Security]

**22. [SURETY'S] DEVELOPER'S OBLIGATIONS**

22.1 **IF** any of the events set out in Clause 20 occurs the Proper Officer may without prejudice to any statutory rights or powers or any other right claim or remedy under this Agreement give to the [Surety] Developer notice ("the Default Notice")

22.1.1 specifying the work ("the Default Work") to be carried out in order that the Works may be executed or completed as the case may be in accordance with this Agreement and

22.1.2 containing an estimate ("the Default Estimate") by the Proper Officer of the cost of carrying out the Default Work and of the cost of maintaining the Works for a period of twelve months prior to the Road or Roads becoming maintainable at the public expense and also a statement of the amount of the usual establishment charges and other costs (including commuted sums where appropriate) of the Council ("the Default Costs")

(i) and not exceeding the Estimated Cost plus any commuted sums required in connection with this Agreement;

- (ii) and not exceeding 50% of the Estimated Cost plus any commuted sums required in connection with this Agreement after the issue of Certificate No 1;
- (iii) and not exceeding 25% of the Estimated Cost and any commuted sums required in connection with this Agreement after the issue of Certificate No 2; and
- (iv) and not exceeding an amount to be determined by the Proper Officer plus any commuted sums required after the issue of either a part Certificate No 1 or a part Certificate No 2 or a part Final Certificate

22.2 **WITHIN** twenty eight days after the [Surety] the Developer has received the Default Notice the [Surety] Developer shall either

22.2.1 pay the Default Estimate and the Default Costs to the Council or

22.2.2 send to the Council notice in writing (“the [Surety’s] Developer’s Counter Notice”) of the intention of the [Surety] Developer to carry out the Default Work to the satisfaction of the Proper Officer and to perform the obligations of the Owner and/or the Developer including payment of any commuted sums required in connection with this Agreement and as contained in Clauses 2 10 14.2 and 14.3

22.3 **IF** the [Surety] Developer having sent the [Surety’s] Developer’s Counter Notice to the Council fails to start the Default Work or pay the commuted sums within [fifty-six] days after the Council has sent to the [Surety] Developer the Default Notice the [Surety] Developer shall forthwith pay the Default Estimate and the Default Costs including commuted sums where appropriate to the Council with simple interest thereon at the rate of four per cent above the base lending rate of the National Westminster Bank PLC for the time being in force calculated from the date on which the Default Notice was sent to the Surety

22.4 **IF** the [Surety] Developer having sent the [Surety’s] Developer’s Counter Notice to the Council starts the Default Work and the Default Work is not completed within

[four] months after the [Surety's] Developer's counter notice is received by the Council or within such further period or periods as may be agreed by the Proper Officer or if the [Surety] Developer fails to perform the obligations and liabilities of the Owner or the Developer as contained in Clauses 2 10 14.2 and 14.3 the [Surety] Developer shall forthwith on demand by the Proper Officer pay to the Council

223.4.1 such sum as the Proper Officer may determine as being the outstanding Default Costs and

223.4.2 the amount determined by the Proper Officer as representing the usual establishment charges and other costs of the Council

223.4.3 the commuted sums (where appropriate) in accordance with Part 4

### **23. RELEASE OF THE PERFORMANCE SECURITY**

23.1 **WITHIN** 28 days of the date of issue of the Part 1 Certificate the Council shall release to the Developer fifty per centum (50%) of the Performance Security

23.2 **WITHIN** 28 days of the date of issue of the Part 2 Certificate the Council shall release to the Developer a further twenty five per centum (25%) of the Performance Security

23.3 **WITHIN** 28 days of the date of issue of the Final Certificate the Council shall release to the Developer the balance of the Performance Security and all accrued interest on the Performance Security

### **24. COUNCIL'S COVENANTS**

24.1 **THE** Council HEREBY COVENANTS with the Owner and (as a separate covenant) with the Developer [and (as a separate covenant) with the Surety] [Delete if Performance Security] for the benefit of each and every building plot fronting adjoining or abutting the Road or Roads:

24.1.1 to use all reasonable endeavours [in consultation with the Surety] [Delete if Performance Security] to mitigate any loss or damage sustained by reason of any default by the Owner or by the Developer / Developer by taking such reasonable steps as the Council shall think fit;

- 24.1.2 to apply [all monies received from the Surety pursuant to Clause 21] the Performance Security towards the expenditure involved in executing or completing the Works and maintaining and making good all defects for a period of twelve months after completion of the Works and (so far as the Council is able) in performing the obligations and liabilities of the Owner or the Developer / Developer as contained in Clauses 2 10 14.2 and 14.3 and the amount so received shall be deducted from any sum which would otherwise be recoverable from the owners of premises fronting the Road or Roads under the provisions of the Highways Act 1980;
- 24.1.3 that if the [sum paid by the Surety to the Council] Performance Security exceeds the cost of executing or completing the Works and maintaining and making good all defects as aforesaid and of performing the obligations and liabilities of the Owner and/or the Developer / Developer as contained in Clauses 2 10 14.2 and 14.3 together with the amount of the Council's usual establishment charges and other costs to repay to the [Surety] Developer within twenty-eight days after the Road or Roads become maintainable at the public expense the amount of such excess [with simple interest thereon calculated at the base lending rate of the National Westminster Bank PLC for the time being in force] and all accrued interest on the Performance Security;
- 24.1.4 to release the [Surety] Developer from all liability under this Agreement when the Final Certificate is issued in accordance with this Agreement; and
- [24.1.5 to give notice to the Surety forthwith if the Developer becomes subject to any of the circumstances set out in clause 20] – Delete if Performance Security

## **25. PART OR PARTS CERTIFICATE ISSUE**

- 25.1 **NOTWITHSTANDING** anything contained in this Agreement the Owner or the Developer / Developer may from time to time during the currency of this Agreement



apply to the Proper Officer for a part Certificate No 1 or a part Certificate No 2 or a part Final Certificate in respect of any part of the Road or Roads (being the whole width of the Road or Roads between points to be defined in the application and as agreed by the Proper Officer)

25.2 **IF** the Proper Officer is satisfied that the part of the Road or Roads so defined is in all respects suitable to be treated as a separate road for the purposes of construction and adoption in accordance with the several provisions contained in this Agreement and will connect to a road or roads already maintained at public expense then the Proper Officer shall at his discretion issue a separate Certificate No 1 or Certificate No 2 or Final Certificate as the case may be in respect of the said part of the Road or Roads as if the said part were the subject of a separate Agreement under which the terms of this Agreement applied to the said part separately from the remainder of the Road or Roads but without prejudice to the application of this Agreement to the remainder of the Road or Roads and the [liability of the Surety] Performance Security may be reduced as may be directed by the Proper Officer

## **26. ASSIGNMENT**

**THIS** Agreement may not be assigned by the Owner or by the Developer

## **27. NOTICES**

**ALL** notices to be given under this Agreement shall:

- (a) be in writing;
- (b) be signed by or on behalf of the party concerned be delivered personally or sent by pre-paid recorded delivery post addressed to the party to be served at the address set out in this Agreement or such other address as may from time to time be notified for the purpose by notice in writing; and
- (c) be deemed to have been served in the case of a notice delivered personally at the time of delivery or in the case of a notice sent by pre-paid recorded delivery post at the expiration of 48 hours after the notice was delivered into the custody of the postal authorities

**28. THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

A person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any terms of this Agreement but this does not affect any right or remedy of a third party which exists or is available apart from such Act

**29. REGISTRATION**

**IMMEDIATELY** after completion of this Agreement the Council will arrange for an entry relating to the covenants contained in Clauses 10 and 14.3 to be made in the appropriate register[s] of Title No(s)

**30. MORTGAGEE CONSENT**

*THE Mortgagee joins herein to consent to the terms of this Agreement but without liability save in the event that the Mortgagee becomes successor in title to the Owner / Developer at any time before the obligations on the part of the Owner / Developer contained in this Agreement have been performed in full]*

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

## **THE FIRST SCHEDULE**

### **PART 1**

1. All highway drainage (including drainage situated outside the Road or Roads and all sustainable drainage systems (where appropriate))
2. All other drainage contained within the highway
3. All kerb foundations and where appropriate kerbs including lowering or raising at vehicle crossings and pram-ramps and sub-base and binder course surfacing to pedestrian ways and cycle ways
4. Carriageway sub-base binder course and vehicle crossings (where appropriate)
5. Demarcation of sight lines and service strips and clearance of vision splays
6. Street lighting illuminated traffic signs and bollards (where appropriate)
7. Structures (where appropriate)
8. Non-Structure soakaways (where appropriate)
9. Street Name Plates (temporary where appropriate and agreed with the Proper Officer)

### **PART 2**

10. All outstanding kerbing not completed in Part 1
11. Surfacing of pedestrian ways
12. Surfacing of cycleways
13. Carriageway surface course (including non-standard or enhanced surfacing) and outstanding carriageway binder course including (where appropriate) speed restraint measures
14. All outstanding vision splays and (where appropriate) verges and service strips
15. All remaining and permanent street name plates and (where appropriate) street furniture

- 16 Road markings where appropriate
- 17 All outstanding illuminated traffic signs and bollards where appropriate
18. All other works described in the Specification and shown on the Drawings
19. Any other works required by the Proper Officer (e.g. sustainable drainage systems)

### **PART 3**

*(Structures to be adopted)*

[(Non-Structures Soakaways to be adopted)]

## PART 4

### Commuted Sums

<u>Item</u>	<u>Amount</u>
Structure(s)	*The costs of inspection maintenance and commuted sum for eventual replacement of the Structure(s) for a period of 120 years from the date of the Part 2 Certificate <i>[amount determined on a site specific basis]</i>
Non Structure(s) Soakaways	*[The costs of inspection and maintenance for a period of 30 years from the date of the Final Certificate – a minimum basic sum of £5,000 per chamber]
Special Surfacing and street furniture	Cost of inspection and maintenance for 30 years for non-standard higher cost materials: amount determined on a site specific basis.
Soft-Landscaping Works	*[Commuted sum for inspection and maintenance for 30 years – a period from the date of the Final[Third] Certificate <i>[amount determined on a site specific basis]</i>
Non-standard street lighting	<i>*Cost of inspection and maintenance for 30 years;</i> <i>[amount determined on a site specific basis]</i>
Traffic Signal Equipment	Cost of inspection and maintenance for 30 years: amount determined on a site specific basis.

**THE SECOND SCHEDULE**

DATED \_\_\_\_\_

200

**(1)\*[The Developer/Plot Owner]**

**- and -**

**\*[(2) [The Mortgagee]]**

**- and -**

**THE KENT COUNTY COUNCIL \*[(2)/(3)]**

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**DEED OF GRANT**

of easements and rights as to surface water  
drainage apparatus situate on land at

Kent

---

County and District: : KENT :  
Title Number : K  
Property : \*[as in Developer's Title/  
Address of property (formerly known as  
Plot )]

THIS DEED is made the day of [year]

BETWEEN

of

("the Grantor") of the \*[one/first] part

\*[ of

("the Mortgagee") of the second part] and THE KENT COUNTY COUNCIL of Sessions  
House County Hall Maidstone Kent ME14 1XQ ("the Grantee") of the \*[other/third] part

WHEREAS:-

- (1) [The Grantor/name of Developer] has recently developed a housing estate ("the estate") on the land comprised in \*[the above numbered Title/Title Number ] and has constructed on the Estate [a] housing estate road[s] ("the Road[s]") together with [a] surface water drain[s] and soakaway[s] ("the Drainage Works") for the purpose of draining surface water from the Road[s]
- (2) Part of the Drainage Works have been constructed in on or under that part of the land comprised in the above-numbered Title shown coloured blue on the plan annexed hereto which land ("the Land") is (with other land) vested in the Grantor
- (3) The Grantee is the registered proprietor of the land comprised in Title Number [ ] which includes the Road[s] and has requested the Grantor to grant to the Grantee the easements hereinafter mentioned in respect of the Drainage Works

(4) The Grantor has agreed to make the grant to the Grantee \*[and the Mortgagee has agreed to confirm the grant] hereinafter contained

**NOW THIS DEED WITNESSETH** as follows:-

1. IN pursuance of the said agreement and in consideration of ONE POUND (£1.00) now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor HEREBY GRANTS with full title guarantee \*[and the Mortgagee as Mortgagee hereby confirms] unto the Grantee from time to time and at all times hereafter:

(i) full right and liberty unto the Grantee its successors in title and its or their servants and agents to enter upon cross and recross with or without all necessary apparatus and vehicles so much of the Land as may be necessary to enable the Grantee to maintain inspect renew and repair therein the Drainage Works

(ii) full right and liberty for the Grantee and its successors in title to use the Drainage Works for the purpose of passing surface water from the Road[s] into the said soakaway[s]

**TO HOLD** the said rights and liberties unto the Grantee in fee simple

2. THE Grantee hereby covenants with the Grantor to exercise the rights hereby granted in such manner as to do as little damage as possible to the Land and to make good all disturbance to the surface of the Land which may arise in connection with the maintenance inspection renewal and repair of the Drainage Works

3. THE Grantor and the Grantee hereby apply to the Chief Land Registrar to enter Notice of the rights hereby granted in the Charges Register of Title Number [K ] and in the Property Register of Title Number [K ]



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

THE COMMON SEAL of the Grantor )  
was hereunto affixed in the presence )  
of:- )

Director

Secretary]

SIGNED AND DELIVERED by the )  
Grantor in the presence of:- )

THE COMMON SEAL of the Mortgagee )  
was hereunto affixed in the presence of:-)

THE COMMON SEAL of the Grantee )  
was hereunto affixed in the presence )  
of:- )

Authorised Signatory

Member of the Kent County Council

THE COMMON SEAL of the COUNCIL     )  
was hereunto affixed in the presence of:-     )

Authorised Signatory

Member of the Kent County Council

**For Companies having a Common Seal**

THE COMMON SEAL of the OWNER     )  
was hereunto affixed in the presence of: -     )

Director

Secretary

THE COMMON SEAL of the DEVELOPER     )  
was hereunto affixed in the presence of:-     )

Director

Secretary

**For Companies not having a Common Seal**

SIGNED as a Deed by the OWNER acting by)  
[a Director and its Secretary or two Directors )

Director

Secretary

SIGNED as a Deed by the DEVELOPER     )  
acting by [a Director and its Secretary     )  
or two Directors]     )

Director

Director/Secretary

[THE COMMON SEAL of the SURETY )  
was hereunto affixed in the presence of:- )] – Delete if Performance Security

*THE COMMON SEAL of the Mortgagee )*  
*was hereunto affixed in the presence of:- )*

THE THIRD SCHEDULE

Land Registry  
Transfer of part of registered title(s)

TP1

If you need more room than is provided for in a panel, and your software allows, you can expand any panel in the form. Alternatively use continuation sheet CS and attach it to this form.

Leave blank if not yet registered.

When application for registration is made these title number(s) should be entered in panel 2 of Form AP1.

Insert address, including postcode (if any), or other description of the property transferred. Any physical exclusions, such as mines and minerals, should be defined.

Place 'X' in the appropriate box and complete the statement.

For example 'edged red'.

For example 'edged and numbered 1 in blue'.

Any plan lodged must be signed by the transferor.

Give full name(s).

Complete as appropriate where the transferor is a company.

Give full name(s).

Complete as appropriate where the transferee is a company. Also, for an overseas company, unless an arrangement with Land Registry exists, lodge either a certificate in

1	Title number(s) out of which the property is transferred: K
2	Other title number(s) against which matters contained in this transfer are to be registered or noted, if any:
3	Property:  The property is identified <input checked="" type="checkbox"/> on the attached plan and shown: coloured pink  <input type="checkbox"/> on the title plan(s) of the above titles and shown:
4	Date: 2009
5	Transferor:  For UK incorporated companies/LLPs Registered number of company or limited liability partnership including any prefix:  For overseas companies (a) Territory of incorporation:  (b) Registered number in the United Kingdom including any prefix:
6	Transferee for entry in the register: <b>THE KENT COUNTY COUNCIL</b>  For UK incorporated companies/LLPs Registered number of company or limited liability partnership including any prefix:

Form 7 in Schedule 3 to the Land Registration Rules 2003 or a certified copy of the constitution in English or Welsh, or other evidence permitted by rule 183 of the Land Registration Rules 2003.

Each transferee may give up to three addresses for service, one of which must be a postal address whether or not in the UK (including the postcode, if any). The others can be any combination of a postal address, a UK DX box number or an electronic address.

Place 'X' in the appropriate box. State the currency unit if other than sterling. If none of the boxes apply, insert an appropriate memorandum in panel 12.

Place 'X' in any box that applies.

Add any modifications.

Where the transferee is more than one person, place 'X' in the appropriate box.

Complete as necessary.

Use this panel for:  
 – definitions of terms not defined above  
 – rights granted or reserved  
 – restrictive covenants  
 – other covenants  
 – agreements and declarations  
 – any required or permitted statements  
 – other agreed provisions.

The prescribed subheadings may

	<p>For overseas companies</p> <p>(a) Territory of incorporation:</p> <p>(b) Registered number in the United Kingdom including any prefix:</p>
7	<p>Transferee's intended address(es) for service for entry in the register:</p> <p>SESSIONS HOUSE COUNTY HALL MAIDSTONE ME14 1XQ</p>
8	The transferor transfers the property to the transferee
9	<p>Consideration</p> <p><input checked="" type="checkbox"/> The transferor has received from the transferee for the property the following sum (in words and figures): ONE POUND (£1.00)</p> <p><input type="checkbox"/> The transfer is not for money or anything that has a monetary value</p> <p><input type="checkbox"/> Insert other receipt as appropriate:</p>
10	<p>The transferor transfers with</p> <p><input checked="" type="checkbox"/> full title guarantee</p> <p><input type="checkbox"/> limited title guarantee</p>
11	<p>Declaration of trust. The transferee is more than one person and</p> <p><input type="checkbox"/> they are to hold the property on trust for themselves as joint tenants</p> <p><input type="checkbox"/> they are to hold the property on trust for themselves as tenants in common in equal shares</p> <p><input type="checkbox"/> they are to hold the property on trust:</p>
12	<p>Additional provisions</p> <p><del>Definitions</del></p> <p>THE LAND IS TRANSFERRED PURSUANT TO THE HIGHWAYS ACT 1980</p>

be added to, amended, repositioned or omitted.

Any other land affected by rights granted or reserved or by restrictive covenants should be defined by reference to a plan.

Any other land affected should be defined by reference to a plan and the title numbers referred to in panel 2.

~~Rights granted for the benefit of the property~~

Any other land affected should be defined by reference to a plan and the title numbers referred to in panel 2.

~~Rights reserved for the benefit of other land~~

Include words of covenant.

~~Restrictive covenants by the transferee~~

Include words of covenant.

~~Restrictive covenants by the transferor~~

Insert here any required or permitted statements, certificates or applications and any agreed declarations and so on.

~~Other~~

The transferor must execute this transfer as a deed using the space opposite. If there is more than one transferor, all must execute. Forms of execution are given in Schedule 9 to the Land Registration Rules 2003. If the transfer contains transferee's covenants or declarations or contains an application by the transferee (such as for a restriction), it must also be executed by the transferee.

13	<p><b>Execution</b></p>   <p>THE COMMON SEAL of [BELLWAY )          HOMES LIMITED] was hereunto affixed )          in the presence of:- )</p>   <p>.....          Director</p>   <p>.....          Director/Secretary</p>   <p>THE COMMON SEAL of THE KENT )          COUNTY COUNCIL was hereunto )          affixed in the presence of:- )</p>   <p>.....          Authorised Signatory</p>   <p>.....          Member of The Kent County Council</p>
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**WARNING**  
 If you dishonestly enter information or make a statement that you know is, or might be, untrue or misleading, and intend by doing so to make a gain for yourself or another person, or to cause loss or the risk of loss to another person, you may commit the offence of fraud under section 1 of the Fraud Act 2006, the maximum penalty for which is 10 years' imprisonment or an unlimited fine, or both.

Failure to complete this form with proper care may result in a loss of protection under the Land Registration Act 2002 if, as a result, a mistake is made in the register.

Under section 66 of the Land Registration Act 2002 most documents (including this form) kept by the registrar relating to an application to the registrar or referred to in the register are open to public inspection and copying. If you believe a document contains prejudicial information, you may apply for that part of the document to be made exempt using Form EX1, under rule 136 of the Land Registration Rules 2003.

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