01449/11

DATED 21st October **2011**

BARNSLEY METROPOLITAN BOROUGH COUNCIL

and

GUINNESS NORTHERN COUNTIES LIMITED

and

SAUL CONSTRUCTION LIMITED

and

NATIONAL HOUSE BUILDING COUNCIL

AGREEMENT

under Sections 72 and 278 of the Highways Act 1980 and Section 111 of the Local Government Act 1972 relating to highway improvements at Wood View Elsecar, Barnsley, South Yorkshire

A.C. Frosdick, LL.B., DipLG,
Borough Secretary
Town Hall
Barnsley
S70 2TA

THIS AGREEMENT is made the 21st day of October Two thousand and eleven

BETWEEN

1. **BARNSLEY METROPOLITAN BOROUGH COUNCIL** of the Town Hall Barnsley South Yorkshire S70 2TA **("the Council")**
2. **GUINNESS NORTHERN COUNTIES LIMITED** (Industrial and Provident company number IP1820R) whose registered office is at **Bower House , Stable Street , Hollinwood, Oldham , DL9 7LU ("the Company")**
3. **SAUL CONSTRUCTION LIMITED** (**Contractor** Registration Number 1106632) whose registered office is situate at Burntwood Office Park, Brierley Common, Brierley, Barnsley S72 9ET **("the Contractor")**
4. **NATIONAL HOUSE BUILDING COUNCIL** of Buildmark House Chiltern Avenue Amersham Bucks HP6 5AP **("the Surety")**

INTERPRETATION

In this Agreement:-

"the Act" means the Highways Act 1980 as amended by the New Roads and Street Works Act 1991

"the Company and the Contractor" includes their respective successors

"the Site" means the land situate at Wood View, Elsecar, Barnsley and which is shown edged in red on drawing number E11/5351/11A attached hereto

"the Development" means the residential development at the Site for which planning permission has been granted under reference 2010/0794 dated 19th August 2010

"the Highway" means the highways called Wood View and Zetland Road, Elsecar, Barnsley

"the Blue Land" means the lands shown coloured in blue on drawing number E11/5351/11A attached hereto

"the Drawings" means drawing nos. E11/5351/03B; E11/5351/09; E11/5351/11A; E11/5351/13A; and E11/5351/14A attached hereto

"the Works" means the works described generally in the Schedule hereto and indicated in outline on the Drawings and includes any amended or additional works as provided for herein

"the Highways Officer" means the Assistant Director – Highways and Engineering for the time being of the Council and includes any professional officer appointed by him for the purpose of the supervision or inspection of the Works

"the Supervision Fee" means the sum of £5,500.00 (five thousand five hundred pounds) being the fees which are estimated will be incurred by the Council in checking and approving the drawings and the Works

"the Certificate of Completion" means the certificate to be issued by the Highways Officer upon the satisfactory completion of the Works

"the Maintenance Period" means a period of twelve calendar months from the date of the issue of the Certificate of Completion

"the Conditions of Contract" means the Institution of Civil Engineers - Conditions of Contract (etc) with such additions or amendments thereto as may be approved by the Highways Officer

"the Specification" means the Specification for Highway Works published by HMSO with all amendments up to the date hereof

Clause headings are for ease of reference only and shall not form part of this Agreement for the purposes of its construction or interpretation

WHEREAS

(1) The Council is the Highway Authority for the purposes of the Act and the freehold owner of the Site which is comprised in title number SYK 579365

(2) The Company is the long leasehold owner absolute in possession of part of the Site which includes inter alia part of the Blue Land and which is registered under title number SYK 585342 and the Council has agreed with the Company and the Contractor for the Works to be carried out on those parts of the Site that are not contained within the aforesaid leasehold title

(3) The Company has the benefit of planning permission for the development of the Site and the Council the Company and the Contractor are desirous that the Works shall be carried out to facilitate the Development

(4) The Works are wholly required to improve access to the Site to a standard required for traffic safety and thus facilitate the Development and the Company will derive a special benefit if the Works are executed and the Surety has agreed to join in this Agreement to guarantee the respective obligations of the Company and the

Contractor hereinafter contained and to be bound in the manner hereinafter appearing

(5) The Contractor has at the request of the Company agreed to execute or procure the execution of the Works

(6) The Surety has agreed to join in this Agreement to guarantee the obligations of the Company and the Contractor hereinafter contained and to be bound in the manner hereinafter appearing

(7) This Agreement is made pursuant to Sections 72 and 278 of the Act and Section 111 of the Local Government Act 1972 and the Council is satisfied that it will be of benefit to the public

(8) Nothing herein contained shall operate to restrict or prejudice the powers duties and rights of the Council under the Highways Act 1980 and the New Roads and Street Works Act 1991

NOW IT IS HEREBY AGREED by and between the parties as follows:-

1. **EXECUTION OF THE WORKS**

1.1 The Contractor shall at its own expense for the purpose of carrying out the Works:-

(a) carry out surveys as required by the Highways Officer of the Highway and the Site

(b) carry out site investigation works

(c) appoint a designer approved by the Highways Officer to design a scheme for the Works (including all necessary drawings and documents to be approved by the Council) **("the Approved Documents")**

(d) appoint a contractor approved by the Highways Officer for the construction of the Works in accordance with a form of contract which shall be approved by the Highways Officer **("the Contract")**

1.2 The Contractor shall:

(a) procure the provision in writing of a programme and timetable for the Works which shall be submitted to and approved by the Highways Officer prior to the commencement of the Works or any part thereof **("the Approved Programme")**

(b) upon the request of the Highways Officer procure the provision of a written programme and timetable for any temporary traffic arrangements or any other measures which may be necessary or required in connection with the carrying out of the Works which shall be submitted to and approved by the Highways Officer prior to the commencement of the Works or any part thereof and shall comply with any further requests of the Highways Officer at any time during the carrying out of the Works

(c) procure that the Works are carried out at its own expense in a good and workmanlike manner with proper and suitable materials to the

reasonable satisfaction of the Highways Officer in accordance with the Specification and the Approved Documents and once commenced to proceed diligently with the Works and to use reasonable endeavours to complete the Works in accordance with the Approved Programme

(d) before the commencement of the Works take whatever steps are necessary to locate and identify any services apparatus and equipment of any utility company Local Authority or other body which is situated in on under or over the Highway or which may otherwise be affected by the Works and shall supply to the Highways Officer copies of all consultations which have been carried out copies of all consents and approvals obtained and details of any diversion or other works required to any services equipment or apparatus affected by the Works **("Apparatus Works")**

(e) carry out and complete the Apparatus Works at its own expense and in the same manner as the Works

(f) procure compliance with all conditions and requirements imposed by any utility company local authority or other body in respect of any services equipment or apparatus affected by the Works

(g) give the Highways Officer free access to the Site as is reasonably necessary for the proper inspection of the Works

(h) procure that the Works are undertaken pursuant to the Construction (Design and Management) Regulations 2007 **("the CDM Regulations")**

(i) ensure the Works comply in every respect with the latest edition of Chapter 8 of the Traffic Signs Manual published by the Department of Transport

(j) at its own expense arrange for all materials and soils in connection with the Works to be tested by a test laboratory approved by the Council (such approval not to be unreasonably withheld or delayed) and shall submit the test results to the Highways Officer and meet the costs of any further testing required by the Highways Officer

1.3 In the event the Highways Officer determines that any variations to the Works are required the Highways Officer shall notify the Contractor as soon as reasonably practicable of any revised or additional works which may be necessary and the Contractor shall carry out and complete the revised or additional works at its own expense and in the same manner as the Works

2. **FEES AND COSTS**

2.1 The Contractor has paid a sum of £3,000 (three thousand pounds) to the Council (receipt of which the Council hereby acknowledges) as a contribution of the Supervision Fee and shall pay the remaining balance of £2,500.00 (two thousand five hundred pounds) to the Council upon completion of this Agreement

2.2 In the event the reasonable and proper fees and costs incurred by the Council exceed the Supervision Fee the Highways Officer shall provide a certified estimate of the sum of the increased fees and the Contractor shall pay the said

sum of the increased fees to the Council within 28 days of receiving a written request therefor

2.3 The Contractor shall within 28 days of receipt of a written request pay to the Council a sum equal to the reasonable costs and fees incurred by the Council in the preparation and publication of any Traffic Regulation Orders required in connection with the Works

2.4 The Contractor shall upon completion of this Agreement pay to the Council the sum of £1,000.00 being the Council's legal fees for the preparation and completion of this Agreement

3. **CERTIFICATES**

3.1 The Council and the Company respectively shall during such hours of working as may be agreed in advance with the Highways Officer permit the Contractor to enter upon the Highway and/or the Site for the purpose of carrying out the Works and all matters connected with the Works

3.2 The Contractor may at any time when it believes the Works have been substantially completed notify the Highways Officer in writing whereupon the Highways Officer shall make arrangements to inspect the Works and the Highways Officer shall if the Works have been completed to his satisfaction issue the Certificate of Completion to the Contractor and the Company.

The Highways Officer shall be entitled (but for the avoidance of doubt shall not be obliged) to issue the Certificate of Completion notwithstanding any

minor part of the Works remains outstanding provided that the Highways Officer shall notify the Contractor of any such outstanding items and the Contractor shall thereupon provide the Highways Officer with a programme for their completion

3.3 The Contractor shall at its own expense maintain the Works and the Blue Land throughout the Maintenance Period and shall make good any defects or damage arising or occurring in the Works during that period to the satisfaction of the Highways Officer

3.4 After the expiration of the Maintenance Period and provided the Contractor has made good any defects or damage to the satisfaction of the Highways Officer and provided that all monies due to the Council hereunder have been paid the Highways Officer shall issue a further certificate ("the Final Certificate")

3.5 For the avoidance of doubt the covenants on the part of the Contractor contained in clause 6 of this Agreement shall not be affected by the issue of the Final Certificate

4. **DEDICATION OF HIGHWAY**

4. The Council with the consent of the Company shall upon the date of issue of the Certificate of Completion be deemed to have dedicated the Blue Land as highway for use by the public and the Company shall not grant any wayleave licence easement or right in respect of any part of the Blue Land without the

consent in writing of the Council (such consent not to be unreasonably withheld or delayed)

5. **IT IS HEREBY AGREED AND DECLARED** as follows:-

5.1 That for the purpose of carrying out its obligations under this Agreement but for no other purpose whatsoever the Contractor will act as agent for and on behalf of the Council

5.3 Any monies due to be paid under the provisions of this Agreement shall be paid within twenty one days of the due date or if not paid within that period shall bear interest at 3% above the Base Rate of Co-operative Bank Plc for the time being such interest being payable from the due date to the date of payment

6. **COMPENSATION AND INDEMNITY**

6.1 The Company will on demand reimburse the Council with all expenditure it may properly incur in relation to any valid and proper claims made pursuant to the Noise Insulation Regulations 1975 or Part I of the Land Compensation Act 1973 arising from the use of the Highway as altered by the Works and the Roads constructed by the Works together with the reasonable legal costs and surveyor's fees incurred either by the Council or any third party whose costs the Council is legally obliged to pay in connection with the processing and settlement of any such claims provided that no such claim shall be settled

without the Council first liaising with the Contractor (and the Surety) as to the nature and quantum of such claim

6.2 The Contractor will indemnify and keep indemnified the Council against all costs actions proceedings claims demands damages and losses of whatever nature arising out of the non-observance non-performance or other breach of the Contractor's obligations under this Agreement and all claims demands damages and losses of whatever nature which may be suffered by the Council due to any reason connected with the carrying out of the Works

6.3 The Contractor shall insure against any damage loss or injury which may occur to any property or person arising by or out of the execution of the Works otherwise than due to any act or omission of the Council and such insurance shall be effected prior to the commencement of the Works with an insurer on terms approved by the Council (such approval not to be unreasonably withheld or delayed) for at least the sum of £10,000,000 for each and every claim

6.4 The Contractor shall be responsible for

(a) any costs that the Council may incur in entering into any agreements with a sewerage undertaker to allow connections of highway drains to public sewers ("**the Section 115 Agreement**") made pursuant or ancillary to the Works including any costs the sewerage undertaker may charge under the Section 115 Agreement for technical administrative supervisory or legal costs from time to time

(b) notifying the sewerage undertaker of their intention to commence drainage connection works

(c) carrying out any maintenance or remedial works required by the sewerage undertaker pursuant to the Section 115 Agreement

(d) indemnifying the Council against all losses liabilities claims costs damages and expenses arising from any claim by a sewerage undertaker any person or competent authority arising from or ancillary to the connection of the highway drains to the public sewers

7. **DETERMINATION BY THE COUNCIL**

In the event the Contractor fails to perform or observe any of the covenants or obligations herein contained or if a receiving order in bankruptcy is made against the Contractor or if the Contractor is wound up or enters into a composition or arrangement (otherwise than for the purpose of amalgamation or reconstruction) the Council may without prejudice to any of its rights claims or remedies against the Contractor for such non-performance or non-observance determine this Agreement by notice in writing to the Contractor and the Surety to be sent to the addresses stated in this Agreement Subject always to the provisions of clauses 8 and 9 hereof

8. **DEFAULT POWERS**

Without prejudice to clauses 4 and 7 hereof if the Contractor fails to execute or complete the Works in accordance with the Contractor's obligations

hereunder the Council shall be entitled to execute or complete the Works in default by its own employees contractors or otherwise and to recover from the Contractor the reasonable and proper costs incurred by the Council thereby as certified in writing by the Highways Officer Provided that this default power shall only be exercisable by the Council after at least twenty eight days notice of intention has been given in writing to the Contractor and to the Surety and the Contractor has not commenced action to remedy any breach non-observance or non-performance of the contract during that time

9. **SURETY'S OBLIGATIONS**

9.1 The Surety hereby covenants with the Council that if at any time the Contractor fails to observe or perform any of the covenants on the Contractor's part herein contained or if the circumstances shall arise which would entitle the Council to terminate this Agreement then without prejudice to any other rights and remedies of the Council against the Contractor under this Agreement or under statutory powers the Surety shall pay to the Council such sum or sums which become due under this Agreement and which the Contractor would have been liable to pay under the terms hereof Provided that the total liability of the Surety under this clause shall not exceed the sum of £39,000.00 (thirty nine thousand pounds) including interest and expenses

9.2 Any demand made on the Surety for payment of the sums due hereunder shall be served on the Surety in writing at their registered office and such demand shall certify that the Contractor has failed to fulfil its obligations

under this Agreement and that the sum demanded is accordingly due and payable and such demand shall be accepted by the Surety as conclusive evidence that the sum has been validly demanded under this Agreement and the Surety shall not be required to make any further enquiry about the validity of such demand.

9.3 The Surety shall not be discharged or released from its liability under this Agreement by any arrangement made between the Contractor and the Council or by any alteration in the Contractor's obligations or by any forbearance whether as to payment performance or otherwise) made with or without the assent of the Surety

10. COVENANTS BY THE CONTRACTOR AND THE COUNCIL

10.1 If at any time prior to the commencement of the Works the Contractor wishes to terminate this Agreement it may do so by giving notice to the Council accompanied with the written consent of the Surety and the Company and the Council shall give the Contractor an account of all abortive costs reasonably and properly incurred by the Council in respect of this Agreement. Within 28 days from the date of that account if that account shows that the payments made by the Contractor under the foregoing provisions of this Agreement have exceeded those costs the Council shall refund that excess and if that account shows that those costs exceed the payment made by the Contractor under the foregoing provisions of this Agreement the Contractor shall pay to the Council a sum equal to that excess

10.2 The Works shall be completed to the satisfaction of the Highways Officer prior to the occupation of any residential dwellings constructed on the Site.

11. NOTICES

11. Any notice or demand required by this Agreement to be given or made shall be in writing

12. BENEFITS

12.1 The land which is to be benefited by the Works is the land to which the planning application hereinbefore referred to relates

12.2 This Agreement will be of benefit to the public

13. ARBITRATION

13.1 The Company and the Contractor hereby further agree with the Council in the event of any dispute or difference between the parties hereto arising as to the construction of this Agreement or any of the provisions hereof such dispute or difference shall be referred to the President for the time being of the Institution of Civil Engineers whose decision shall be final and binding on the parties hereto Provided that nothing in this clause shall authorise the reference to arbitration of any question as to whether the whole or any part of the Works has been carried out and completed to the satisfaction of the Highways Officer

EXECUTED by the parties hereto as a Deed the day and year first before written

THE SCHEDULE hereinbefore referred to

The Works

(a) Construction of widened carriageway, footways and turning area;
(b) Kerbing;
(c) Surfacing;
(d) Drainage;
(e) Street lighting;
(e) any other works ancillary to the above

THE COMMON SEAL of Barnsley)

Metropolitan Borough Council was)

hereunto affixed in the presence of:-)

Borough Secretary/Authorised Signatory 1873

THE COMMON SEAL of GUINNESS)

NORTHERN COUNTIES LIMITED)

was hereunto affixed in the)

presence of :-)

Authorised Signatory

P Bayley

Secretary

THE COMMON SEAL of SAUL)

CONSTRUCTION LIMITED)

was hereunto affixed in the)

presence of:-)

Director

Director/Secretary

THE COMMON SEAL of)

NATIONA L HOUSEBUILDING

COUNCIL was)

hereunto affixed in the presence of:-)

Authorised Signatory

KIRSTEN L. GIVENS
AUTHORISED SIGNATORY