

DATED THIS

DAY OF

20

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ESCROW ACCOUNT AGREEMENT

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between

NATIONAL HOUSING CORPORATION

and

[ DEVELOPER ]

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DRAWN BY:-

THIS ESCROW ACCOUNT AGREEMENT (this "Agreement") is made this ..... day of ..... 20.....

**BETWEEN**

1. **NATIONAL HOUSING CORPORATION** a statutory body established under the Housing Act (Chapter 117, Laws of Kenya), whose address is Post Office Box Number 30257-00100, Nairobi, Kenya (hereinafter called "**NHC**" which expression shall where the context so admits include its successors in title and assigns) of the first part;
2. [ **DEVELOPER** ] whose address is [ ... ] (hereinafter called the "**Developer**" which expression shall where the context so admits include its successors in title and assigns) of the second part; and
3. [ **BANK** ] a limited liability company of Post Office Box Number [ ... ], Nairobi (hereinafter called the "**Escrow Agent**") of the third part.

NHC, the Developer and the Escrow Agent shall hereinafter be referred to as "**Parties**" and "**Party**" shall refer to either of them as the context may require.

**WHEREAS**

- A. The Developer is undertaking the development of property [ title and description of property, together with details of the development ] (hereinafter referred to as "**the Project**").
- B. It is a term of the Commitment Agreement dated [ ... ] that the Parties shall create and establish an Escrow Account (hereinafter defined) and at all times until this Agreement is terminated shall maintain the Escrow Account with the Escrow Agent.
- C. The Parties now wish to regulate their mutual rights and obligations in the manner set out below.

**1. ESTABLISHMENT OF ESCROW ACCOUNT**

- 1.1. NHC and the Developer shall jointly open a Joint Escrow Account Bearing Account No. [ ... ] in the names of the Developer and NHC designated as [ ... ] ESCROW A/C with the Escrow Agent at its Branch at [ ... ] ("**Escrow Account**"), and it shall be maintained at all times until termination of this Escrow Agreement.
- 1.2. The Escrow Account shall be operated under joint signatures of the authorized signatories of both NHC and the Developer.

**2. RIGHTS AND OBLIGATIONS OF THE PARTIES**

- 2.1. The Parties hereby agree and undertake:

- 2.1.1. In accordance with the provisions of the Commitment Agreement, the Developer shall deposit the Commitment Fee into the Escrow Account.
  - 2.1.2. That NHC and the Developer shall not create any charge, lien or any encumbrance whatsoever, in favour of any person on the amount lying to the credit of the Escrow Account, except with joint written consent of both the Parties and prior written joint instruction/information to the Escrow Agent.
  - 2.1.3. That the Parties shall not do or cause to be done any acts, deed or things which may prejudicially affect the operation of the Escrow Account.
  - 2.1.4. That both NHC and the Developer shall have full authority to monitor all transactions of the Escrow Account including conducting of audits.
  - 2.1.5. That the Escrow Agent shall not act upon any instruction given by NHC or the Developer, unilaterally or any contradictory instructions given by either party.
- 2.2. The Escrow Agent hereby agrees and undertakes:
- 2.2.1. That the Escrow Agent shall furnish statements in respect of the Escrow Account to the Parties at such intervals as may be required by them.
  - 2.2.2. That the Escrow Agent shall act only on the instructions which are given in writing jointly by both NHC and the Developer and executed by the respective signatories to the Escrow Account.
  - 2.2.3. That the Escrow Agent shall not make or permit any disbursement or any debit or deduction of any kind from the Escrow Account other than in accordance with terms of this Agreement.

### 3. DEPOSITS INTO THE ESCROW ACCOUNT

All parties have been provided with a copy of the Commitment Agreement and are aware that pursuant to the terms of the Commitment Agreement:

- 3.1. The Developer shall, within seven (7) days of the signing of the Project Agreement (as defined in the Commitment Agreement), deposit the Commitment Fee into the Escrow Account.
- 3.2. The Commitment Fee shall be ten per cent (10%) of the total Project cost.
- 3.3. The funds in the Escrow Account shall be used exclusively for the following:
  - 3.3.1. payment of all expenses in relation to the Early Works;
  - 3.3.2. engaging professional services; and
  - 3.3.3. in accordance to the payment plan provided in the Commitment Agreement.

### 4. REPRESENTATIONS AND WARRANTIES

- 4.1. The Parties hereby represent and warrant that:
  - 4.1.1. The Parties have all requisite legal power and authority to execute this Escrow Agreement and to carry out the terms, conditions and provision set out herein.

- 4.1.2. This Escrow Agreement constitutes valid, legal and binding obligations on the Parties enforceable in accordance with the terms hereof.
- 4.2. The Escrow Agent warrants with the Parties that they are licensed under the Banking Act and the Escrow Agent has all requisite legal powers, authority and resources to enter into this Escrow Agreement and to perform its duties and obligations there under.
- 4.3. This Escrow Agreement constitutes the valid, legal and binding obligations of the Parties enforceable in accordance with terms of this agreement;

## 5. **TERMINATION**

This Escrow Agreement cannot be terminated unilaterally by NHC or the Developer under any circumstances. It can only be terminated by joint written instructions of NHC and the Developer.

## 6. **MISCELLANEOUS PROVISIONS**

### 6.1. **Notices**

Any notice to be given under this Agreement may be given by sending the same by registered mail or electronic mail addressed to the Party concerned at its address as given above or at such other address for the purpose as such Party may have notified in writing to the Party giving the notice or by delivering the same by hand to the addressee at such address and any notice so given shall be deemed to have been served seven (7) days after it was posted or on the day on which it was delivered by hand or sent by electronic mail. A notice or other communication received on a day other than a business day in the place of receipt shall be deemed to be given on the next following business day in such place.

### 6.2. **Assignment**

This Agreement shall be binding upon and inure to the benefit of the Parties' respective successors and assigns.

### 6.3. **Waiver**

No waiver alteration variation or addition to this Agreement shall be effective unless made in writing and executed by all Parties in the same manner as this Agreement.

### 6.4. **Severability**

If any provision of this Agreement is held to be void or unenforceable by any Court or other authority which decision is binding upon the Parties, the Parties hereby agree that such determination shall not result in the nullity or un-enforceability of the remaining provisions of this Agreement. The Parties agree to use their best endeavours to replace such unenforceable provision in a manner, which will achieve, to the extent possible, the economic, business and other purposes of the void or unenforceable provision.

## 7. **DISPUTE RESOLUTION**

- 7.1. The Parties agree that should a dispute arise with respect to this Agreement, they shall make good faith efforts to resolve the dispute through negotiations between the Parties

and should this fail to resolve the dispute, the Parties agree to submit the matter to a single Arbitrator to be appointed by the Parties jointly and failing agreement, by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya branch.

- 7.2. Such arbitration shall be conducted in Nairobi, Kenya and resolved in accordance with the Arbitration Act 1995 as amended from time to time.
- 7.3. The decision of the arbitrator shall be final and binding upon the Parties to the extent permissible by law.

8. **GOVERNING LAW**

This Agreement shall be governed by and construed in accordance with the laws of the Republic of Kenya and the Parties hereby submit to the exclusive jurisdiction of the Kenyan courts.

9. **CONFIDENTIALITY**

Each Party agrees that it shall keep the existence of this Agreement and all information relating thereto confidential and shall not disclose the same to any third party except the Parties' respective clients or use such information without the prior written consent of the other Party.

10. **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between the Parties relating to the subject matter hereof and supersedes all other agreements statements representations or warranties made by or between the Parties concerning the same.

**IN WITNESS WHEREOF** the Parties have duly executed this Agreement on the day and year first before written.

SEALED with the Common Seal of )  
NATIONAL HOUSING CORPORATION )  
in the presence of: )  
)  
)  
)  
[Accounting Officer] )  
)  
)  
)  
)

SEALED with the Common Seal of )

THE DEVELOPER )

in the presence of: )

Director )

Director/Secretary )

SEALED with the Common Seal of )

THE ESCROW AGENT )

in the presence of: )

Director )

Director/Secretary )

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