

**NATIONAL HOUSING CORPORATION
("THE OFFTAKER")**

-and-

**[INSERT PARTY]
("THE DEVELOPER")**

**OFFTAKE AGREEMENT RELATING TO HOUSING UNITS DEVELOPED ON PROPERTY LAND REFERENCE
NUMBER [•]**

IKM Comment: We have assumed that the Project shall be undertaken in one (1) phase. To be discussed.

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THIS AGREEMENT is made on

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 "**the Offtaker**") which expression shall where the context so admits include its successors in title and assigns) of the one part;
and
- (2) **[DEVELOPER]**, a limited liability company incorporated under the [laws of the Republic of Kenya] under Company Registration Number [●] whose address is (hereinafter called "**Developer**") which expression shall where the context so admits include its successors in title and assigns) of the other part.

WHEREAS

- (1) **The** National Housing Corporation has on a non-exclusive basis been tasked by GoK (as hereinafter defined) to facilitate and implement mass housing development of affordable homes across the country as part of 'GoK's Big Four Agenda', by working in partnership with the County Governments, financial institutions, private developers, manufacturers of building materials, cooperative societies and other entities and institutions.
- (2) The National Housing Corporation has been established the Housing Fund under section 6(1) of the Housing Act, Chapter 117 Laws of Kenya and [Legal Notice No. [●] (or equivalent)] which fund has the necessary resources to further the Government of Kenya's objective of providing affordable housing to its citizens.
- (3) The Developer is a real estate developer and investor and has represented to the Offtaker that it:
 - (i) has capacity to develop the Project (as hereinafter defined) and provide the associated infrastructure and common facilities;
 - (ii) has raised or is capable of raising all financing required for the Project; and
 - (iii) qualifies to obtain the Authorisations (as hereinafter defined) for the Project;
- (4) Pursuant to the [Joint Venture Agreement] (as hereinafter defined), [contracting authority] and the Developer have entered into an agreement to develop the Project.
- (5) The Developer has agreed to sell and deliver exclusively to the Offtaker (or at the direction of the Offtaker, to such other person or persons as the Offtaker may direct), and the Offtaker has agreed to purchase the Housing Units (as hereinafter defined) on the terms and conditions provided in this Agreement.
- (6) This Agreement is the Offtake Agreement referred to in the [Joint Venture Agreement].

NOW THEREFORE in consideration of the foregoing and the respective covenants and agreements set forth in this Agreement, the sufficiency and adequacy of which is hereby acknowledged, and intending to be legally bound, the Offtaker and the Developer hereby agree and this Agreement witnesseth as follows:

1. **Definitions and Interpretation**

1.1 **[Joint Venture Agreement] definitions:**

Terms and expressions defined in the [Joint Venture Agreement] have the same meanings when used in this Agreement (unless the same are otherwise defined in this Agreement).

1.2 **Defined terms:**

In this Agreement, unless the context otherwise requires, the following words and expressions shall have the following meanings:

"Agreement": means this Offtake Agreement together with all Schedules hereto as the same may be supplemented, amended, novated or replaced from time to time;

"Authorisation": means any approval, consent, licence, permit, authorisation or exemption, granted or to be granted by a Governmental Authority which is: (i) necessary for the validity or the exercise of rights or performance of obligations by a party under this Agreement, any of the other Development Framework Agreements or the subsequent Project Agreements or any sub-contracts entered into by any of the parties to the Development Framework Agreements or the subsequent Project Agreements; or (ii) required to carry on construction in Kenya;

"Bankruptcy Event": means the occurrence of any of the following events in respect of a Party ("**Affected Party**"), unless such event is capable of being set aside and the requisite proceedings to have it set aside are filed with the appropriate court within sixty (60) days: there is entered against the Affected Party a decree or order by a court adjudging the Affected Party bankrupt or insolvent, or approving, as properly filed by or on behalf of the Affected Party, a petition seeking reorganisation, arrangement, or reconstruction, or appointing an administrator, a receiver, liquidator, trustee, sequestrator (or other similar official) of the Affected Party over a substantial part of its property or assets, or ordering the winding up or liquidation of its affairs; or the institution by the Affected Party of proceedings to be adjudicated bankrupt or insolvent, or the consent by it to the institution of bankruptcy or insolvency proceedings against it, or the filing by it of a petition or consent seeking relief from its creditors generally under any applicable law, or the consent by it to the filing of any such petition or for the appointment of an administrator, a receiver, liquidator, trustee, sequestrator (or other similar official) of the Affected Party or any substantial part of its property, or the admission by it in writing of its inability to pay its debts generally as they become due; or any other event shall have occurred which under any applicable law would have an effect analogous to any of the events referred to above;

"Business Day" means a day (other than Saturday, Sunday or recognized or gazetted public holiday) on which banking institutions in Kenya are generally open for the conduct of banking business;

"Condition Precedent": has the meaning ascribed to it in Clause 5.1 (*Conditions Precedent*);

"Control": means the power to direct the management and policies of an entity, whether through the ownership of voting capital, by contract or otherwise;

"Default": means any one or more of the events listed in Clauses 8.2.1 (*The Developer's Default*) and 8.2.2 (*The Offtaker's Default*);

"Default Rate": means [●];

"Development Framework Agreement" means [●] the agreement dated [●] between [●] and [●] in respect of [●];

"Developer Termination Amount": has the meaning ascribed to it in Clause 8.7.2;

"Effective Date": has the meaning ascribed to it in Clause 5.1 (*Conditions Precedent*);

"Encumbrance": means any mortgage, charge, pledge, hypothecation, lien, assignment by way of security, title retention, option, right to acquire, right of pre-emption, right of set off, counterclaim, trust arrangement or any other security, preferential right, equity or restriction, and any agreement to give or create any of the above;

"Expert": means a person appointed in accordance with the provisions of Clause 10.2 (*Expert*);

"GoK": means the Government of the Republic of Kenya;

"Governmental Authority": means GoK, Parliament or any legislative organ (either national or of any part of the Republic of Kenya), any ministry (department or division thereof), any authority or division thereof (including County Governments and any other regional authorities and any implementing executive or other branches of government), parastatals, any authority or division thereof (including any regional, County and local authorities of Kenya) or any agency or entity or other body owned or controlled by GoK and having statutory competence to regulate or promulgate rules and regulations governing or touching and concerning matters, transactions and issues contained or relating to this Agreement, or any other Development Framework Agreement or the subsequent Project Agreement;

"Housing Units": means the houses, apartments, flats, floors, sections, delineated spaces, gardens, playgrounds, pedestrian ways, forecourts, service roads, entrance halls, landings, staircases, passages, associated common use facilities, parking areas, common areas, relevant infrastructure or other developments constructed at the Site based on the Specifications;

"Joint Venture Agreement": means [●] the agreement dated [●] between [●] and [●] in respect of [●];

"Legal Requirement": means any statute, law, regulation, treaty, policy, guidelines or other legislation, or any decree, order or written directive of any Governmental Authority, court or tribunal, in each case, having jurisdiction in respect of either Party, this Agreement, any Development Framework Agreement or the subsequent Project Agreement, the Project or any party to any of the foregoing;

"Long Stop Effective Date": means [●] or such other date as the Parties may agree in writing;

"Offtaker Termination Amount": has the meaning ascribed to it in Clause 8.7.1;

"Parties": means the Offtaker and the Developer, and **"Party"** means either of them;

"Project": means the construction of the Housing Units;

"Purchase Terms": means the terms set out in Schedule 1, being the terms under which the Offtaker shall acquire the Housing Units from the Developer;

"Purchase Price": means the price set out in the Purchase Terms, being the price at which the Offtaker will purchase each of the Housing Units from the Developer;

"**Sale Notice**" has the meaning ascribed to it in Clause 6.1 (*Sale and Purchase*);

"**Signature Date**": means the date of this Agreement;

"**Site**": means property Land Reference Number [●] situate in [●] County, on which the Project is to be developed;

"**Target Effective Date**": means 20..... or such other date as may be extended by agreement of the Parties;

"**Taxes**": means all forms of taxation, duties, imposts, levies and rates whenever imposed and applicable pursuant to the laws of Kenya;

"**Term**": means the period from the Signature Date until expiry of this Agreement in accordance with Clause 2.2 (*Term of Agreement*) or earlier termination;

"**Transfer Documents**": has the meaning ascribed to it under Clause 6.1.2 (*Sale and Purchase*); and

"**Verification Period**": has the meaning ascribed to it under Clause 6.1.1 (*Sale and Purchase*).

1.3 **Interpretation:**

In this Agreement, unless the context otherwise requires:

- 1.3.1 reference to a day, month or year is a reference to a calendar day, month or year;
- 1.3.2 references to Clauses and Schedules are references to clauses and schedules of, to or contained in this Agreement;
- 1.3.3 words in the singular shall be interpreted as including the plural and vice versa, and words denoting natural persons shall be interpreted as referring to corporations and any other legal entities and vice versa;
- 1.3.4 the terms "including" and "include" shall be construed without limitation;
- 1.3.5 in the event of any conflict between the Clauses and the Schedules, the Clauses shall prevail;
- 1.3.6 headings are for convenience only and shall not affect the construction of this Agreement;
- 1.3.7 save as provided to the contrary in this Agreement, where an obligation is required to be performed by a specified time and is not so performed, such obligation shall continue (until performed) notwithstanding that the time specified for its performance has elapsed;
- 1.3.8 references to any statutes, acts or regulations shall include references to statutes, acts or regulations as amended from time to time or to any statute from time to time replacing, extending or consolidating the same;
- 1.3.9 references to this Agreement or any other Development Framework Agreement or the subsequent Project Agreement (or any of them) shall, in each case, shall be construed as references to this Agreement and any other Development Framework

Agreement or the subsequent Project Agreement, as amended, varied, novated, supplemented or replaced from time to time;

- 1.3.10 the words “include”, “including” and “in particular” shall be construed as being by way of illustration or emphasis only and shall not be construed as, nor shall they take effect as, limiting the generality of any preceding words;
- 1.3.11 the words “other” and “otherwise” shall not be construed *ejusdem generis* with any foregoing words where a wider construction is possible;
- 1.3.12 any covenant by a Party not to do an act or thing shall be deemed to include an obligation not to permit or suffer such act or thing to be done by another person so far as this is within its power or control;
- 1.3.13 the expression "person" shall include any legal or natural person, partnership, trust, company, joint venture, Government (whether national or County) or any agency thereof, local authority or other body (whether corporate or unincorporate);
- 1.3.14 if a definition of a particular term or expression in this Agreement imposes substantive rights and obligations on a Party to this Agreement, such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition;
- 1.3.15 a Party shall be construed so as to include its successors in title, permitted assigns and permitted transferees;
- 1.3.16 a requirement that payment be made on a day which is not a Business Day shall be construed as a requirement that the payment be made on the next Business Day; and
- 1.3.17 unless otherwise provided herein, where a consent or approval is required by one Party from the other Party, such consent or approval shall not be unreasonably withheld or delayed.

2. **Scope and Duration**

2.1 **Scope:**

- 2.1.1 Under the [Joint Venture Agreement], the Developer will finance, procure, construct and sell the Housing Units to the Offtaker.
- 2.1.2 The Offtaker shall purchase the Housing Units from the Developer at Project Completion in accordance with the terms of this Agreement.

2.2 **Term of Agreement**

Unless earlier terminated in accordance with its terms, this Agreement shall, subject to Clause 5.1 (*Conditions Precedent*), come into force on the Signature Date and shall continue in force until completion of the sale of the Housing Units to the Offtaker.

3. **Progress Review**

The Parties shall jointly review the progress towards achieving satisfaction of the Conditions Precedent on a monthly basis and shall notify each other promptly of any anticipated delay in the Effective Date beyond the Target Effective Date.

4. **Assistance with Authorisations**

Upon the written request of the Developer, the Offtaker will use all reasonable endeavours to expedite the obtaining, maintenance and renewal of Authorisations as may be relevant to the Project provided that prior to such request, the Developer has diligently applied for and been pursuing application(s) to obtain such Authorisations (which diligence shall include full and timely compliance with all procedural requirements relating to the issue of such Authorisations, and with all the laws of the Republic of Kenya which relate to the [Project] or [Developer's activities within the Republic of Kenya] in force at the time of such request).

5. **Conditions Precedent and Effective Date**

5.1 **Conditions Precedent:**

Except for the Parties' respective obligations under Clauses 1 (*Definitions and Interpretation*), 2 (*Scope and Duration*), 3 (*Progress Review*), 4 (*Assistance with Authorisations*), 4 (*Conditions Precedent and Effective Date*), 10 (*Dispute Resolution*), 11 (*Miscellaneous*) and 13 (*Governing Law*) which shall be effective from the Signature Date, all other obligations of the Parties hereunder shall commence on the date on which the following conditions (each a "**Condition Precedent**") shall have been fulfilled or waived (the "**Effective Date**"):

5.1.1 the Developer's obligations under the [Joint Venture Agreement] have been discharged in full and the Developer has been issued with a certificate of practical completion by the Project Architect, an occupation certificate in respect of each of the Housing Units and completion certificates from all the relevant Governmental Authorities in respect of the Project; and

5.1.2 the [Independent Engineer] has issued a certificate, certifying, without any material qualification, that the Project has been completed in accordance with the Specifications.

5.2 **Satisfaction of Conditions Precedent**

The Developer shall use all reasonable endeavours to satisfy the Conditions Precedent **Error! Reference source not found.** on or prior to the Target Effective Date or such other date as the Parties may agree in writing.

5.3 **Delay**

If the Effective Date does not occur on or before the Target Effective Date due to:

5.3.1 the failure by any Governmental Authority to issue an Authorisation, the lack of which is the primary reason for the Developer being unable to satisfy the Conditions Precedent, provided that (i) the Developer has first diligently attempted to obtain such Authorisation (which diligence shall include full and timely compliance with all procedural requirements relating to the issue of such Authorisation, and with all Legal Requirements which relate to the activities of the Developer within the Republic of Kenya) and (ii) the Developer has commenced and is pursuing all

reasonably available procedures for appealing against or challenging the grounds upon which such Authorisation is not issued; or

5.3.2 an event of Force Majeure or Political Event;

then, at the Developer's request, the Target Effective Date (and consequently the Long Stop Effective Date) shall be extended on a day-for-day basis or such other period as the Parties may agree in writing, to take account of such event, delay or failure.

5.4 **Non-satisfaction**

If any of the Conditions Precedent has not been satisfied or waived by the Offtaker by the Long Stop Effective Date or such later date as the Parties may agree in writing, then the Offtaker shall have the option, exercisable in its sole discretion, to terminate this Agreement at such date, in which event this Agreement shall be deemed null and void *ab initio* and neither Party shall have any liability whatsoever to the other Party under this Agreement.

6. **Sale and Purchase of the Housing Units**

6.1 **Sale and Purchase**

6.1.1 Upon Project Completion, the Developer shall issue [One Hundred and Twenty (120) days'] written notice to the Offtaker ("**Sale Notice**") requiring the Offtaker to purchase, at the Purchase Price and under the Purchase Terms and free from any Encumbrances, all the Housing Units. The Sale Notice shall contain full particulars of the Housing Units and shall be made substantially in the form set out in Schedule 2. The Developer shall permit the Offtaker for a period of not less than sixty (60) days prior to the expiry of the Offer Notice ("**Verification Period**"), to review and/or verify the Transfer Documents (as hereinafter defined) and for purposes hereof, the Offtaker shall be entitled to notify the Developer of any concerns relating to the Transfer Documents within the Verification Period.

6.1.2 Upon expiry of the Sale Notice, the Developer shall provide the Offtaker with all necessary documents to vest or effect the transfer of legal title to the Housing Units and, if applicable, the Site ("**Transfer Documents**") (which for the avoidance of doubt shall include a comprehensive statement as to how the Developer has addressed any concerns raised by the Offtaker under Clause 6.1.1 above) free and clear of any Encumbrances.

6.2 **Payment Terms**

6.2.1 **Invoices**

6.2.1.1 Simultaneously with the provision of the Transfer Documents pursuant to Clause 6.1.2 above, the Developer shall issue to the Offtaker an invoice in respect of the Housing Units. Each invoice issued by the Developer shall contain the information specified in the Purchase Terms.

6.2.1.2 Where the Offtaker disputes the number of the Housing Units, the completeness or adequacy of the Transfer Documents or the invoiced amount, the matter shall be determined by an Expert pursuant to Clause 10.2 (*Expert*) below.

6.2.2 **Payment Date**

Payments to the Developer shall be due and payable by the Offtaker within [One Hundred and Eighty (180)] days of receipt by the Offtaker of the invoice or determination by the Expert (as the case may be).

6.2.3 Mode of Payment

6.2.3.1 Payment of any sum due to the Developer shall be effected through [electronic funds transfer to the account of the Developer] at such bank as may be notified by the Developer to the Offtaker from time to time.

6.2.3.2 Upon payment of the Purchase Price by the Offtaker in accordance with the provisions of this Clause 6 (*Sale and Purchase of Housing Units*), this Agreement will stand terminated.

6.2.4 Currency of Payments

All amounts falling due under this Agreement shall be payable in [Kenya Shillings].

6.2.5 Taxes

6.2.5.1 All Taxes applicable to the Developer shall be paid by the Developer in accordance with the Legal Requirements and the Purchase Price is deemed to be inclusive of all such Taxes.

6.2.5.2 All Taxes applicable to the Offtaker arising from or in connection with its rights and obligations under this Agreement shall be paid by the Offtaker in accordance with the Legal Requirements.

6.2.5.3 All payments under this Agreement shall be made free and clear from and without set-off, deduction or withholding of any kind provided that, unless the Developer has an exemption from such withholding, the Offtaker shall be entitled to deduct and withhold any sum to the extent that the Offtaker is duly appointed as an agent for the Developer in accordance with any Legal Requirements to pay any moneys which are properly due and payable by the Developer.

7. Undertakings and Warranties of the Parties

7.1 Undertakings, Representations and Warranties of the Developer

The undertakings given under Clause [●] of the [Joint Venture Agreement] and the representations and warranties given under Clause [●] of the [Joint Venture Agreement] shall extend to this Agreement and are hereby incorporated *mutatis mutandis* as if fully set forth herein.

7.2 Undertakings of the Offtaker

The Offtaker undertakes at all times to comply with all Legal Requirements applicable to the Offtaker.

7.3 Representations and Warranties of the Offtaker

The Offtaker represents and warrants that as at the date of this Agreement:

- 7.3.1 The Offtaker is a [state corporation] validly existing under the laws of Kenya and it has all requisite legal power and authority to execute this Agreement and to carry out the terms, conditions and provisions hereof;
- 7.3.2 all necessary governmental action required to authorise the execution, delivery and performance by the Offtaker of this Agreement and the transactions contemplated hereby has been taken;
- 7.3.3 this Agreement constitutes valid, legal and binding obligations of the Offtaker, enforceable in accordance with its terms;
- 7.3.4 to the Offtaker's knowledge, there are no foreseen actions, suits or proceedings pending or threatened, against or affecting the Offtaker before any court or administrative body or arbitral tribunal which might materially adversely affect the ability of the Offtaker to meet and carry out its obligations under this Agreement; and
- 7.3.5 the execution, delivery and performance by the Offtaker of this Agreement has been duly authorised and will not contravene any provision of, or constitute a default under, any other agreement or instrument to which it is a party or by which it or its property may be bound.

8. **Termination and Default**

8.1 **Non-Default Termination**

This Agreement shall terminate automatically on the happening of any of the following events, unless it shall have been terminated earlier in accordance with its provisions:

- 8.1.1 payment by the Offtaker of the Purchase Price in accordance with Clause 6.2.3.2 above; or
- 8.1.2 termination of the [Joint Venture Agreement] in accordance with its terms.

8.2 **Default Termination**

8.2.1 **The Developer's Default**

For the purposes of this Agreement, a Default by the Developer shall be:

- 8.2.1.1 selling or attempting to sell the Housing Units or any part thereof other than in accordance with the terms of this Agreement;
- 8.2.1.2 the breach by the Developer of any of its obligations under this Agreement which breach has been notified by the Offtaker to the Developer and not remedied to the satisfaction of the Offtaker (acting reasonably) (or mitigated to the satisfaction of the Offtaker (acting reasonably) if not capable of remedy) within [thirty (30)] days of notification;
- 8.2.1.3 the occurrence of a Bankruptcy Event affecting the Developer;
- 8.2.1.4 the dissolution of the Developer;

8.2.1.5 a change in Control in the Developer which has not been approved in accordance with the [Joint Venture Agreement]; or

8.2.1.6 any statement, representation or warranty made by the Developer herein proving to have been incorrect, in any material respect, when made or when deemed to have been made.

8.2.2 The Offtaker's Default

For the purposes of this Agreement, a Default by the Offtaker shall be:

8.2.2.1 the breach by the Offtaker of any of its material obligations under this Agreement which breach has been notified by the Developer to the Offtaker and not remedied (or mitigated if not capable of remedy) within [thirty (30)] days of notification; or

8.2.2.2 any failure by the Offtaker to pay any sum of money due and owing for one hundred and twenty (120) days or more from the date when such sum was first due and owing where such sum is not subject to a bona fide dispute pursuant to Clause 6.2.1.2 (*Invoices*) which has been referred to an Expert pursuant to Clause 10.2 (*Expert*) and such dispute has not yet been settled or determined).

8.3 Defaulting Party

For the purposes of this Agreement, the Developer is the defaulting Party in relation to the events of Default specified in Clause 8.2.1 and the Offtaker is the defaulting Party in relation to the events of Default specified in Clause 8.2.2, and (in each case) the other Party is the non-defaulting Party.

8.4 Default Notice

Upon the occurrence of a Default, the non-defaulting Party may give notice to the defaulting Party of the occurrence of such Default. If:

8.4.1 the Default is not capable of remedy; or

8.4.2 the Default is capable of remedy and the defaulting Party does not, where such Default is capable of remedy within a thirty (30) days period, remedy the Default; or

8.4.3 the Default is capable of remedy but not within a thirty (30) days period, the defaulting Party does not furnish to the non-defaulting Party a detailed programme ("**Remedial Programme**") for the remedy as promptly as is practicable upon the occurrence of the Default and/or the defaulting Party fails to remedy the Default in accordance with the Remedial Programme,

then the non-defaulting Party may give notice to the defaulting Party that such Default is an "**Event of Default**". In the event that a Party issues a Default Notice to the other Party without the ability for the other Party to furnish a Remedial Programme in terms of Clause 8.4.3 above, the affected Party may challenge the determination that the Default is not capable of remedy by submitting the issue for determination by an Expert appointed pursuant to Clause 10.2 (*Expert*). Any

Remedial Programme pursuant to Clause 8.4.3 shall be agreed between the Parties (such agreement not to be unreasonably withheld or delayed) and in the event of a dispute (including any dispute in relation to the Remedial Programme), it may be referred to an Expert.

8.5 Survival of Rights

The expiry or termination of this Agreement shall not affect any rights or obligations which may have accrued prior to such expiry or termination and shall not affect obligations of each of the Parties under this Agreement which are expressed to continue after such expiry or termination.

8.6 Termination

Upon the occurrence of an Event of Default, the non-defaulting Party may upon not less than seven (7) days' notice to the defaulting Party, terminate this Agreement.

8.7 Consequences of Termination

The termination of this Agreement shall cause the following rights and obligations to accrue:

8.7.1 in the event that there is a termination of this Agreement due to the Offtaker's Default in terms of Clause 8.2.2 (*The Offtaker's Default*), the Offtaker shall, within [ninety (90)] days of the termination date, pay to the Developer the Purchase Price ("**Offtaker Termination Amount**"). Interest at the Default Rate shall accrue daily on the unpaid balance of the Offtaker Termination Amount and shall be calculated on the basis of a 365-day year and the actual number of days elapsed from the date on which payment became due and payable to the date of actual payment. Upon receipt by the Developer of the Offtaker Termination Amount in full, the Developer shall provide the Offtaker with all necessary documents to vest or transfer legal title to the Housing Units and, if applicable, the Site, in the Offtaker (or at the direction of the Offtaker, to such other person or persons as the Offtaker may direct);

8.7.2 in the event of termination of this Agreement due to the Developer's default in terms of Clause 8.2.1 (*The Developer's Default*), the Developer shall, within [thirty (30)] days of the termination date, pay to the Offtaker an amount in one lump sum in [Kenya Shillings] ("**Developer Termination Amount**") calculated as follows:

- a) [●];
- b) [●];
- c) [●].

8.7.3 Interest at the Default Rate shall accrue daily on the unpaid balance of the Developer Termination Amount and shall be calculated on the basis of a 365-day year and the actual number of days elapsed from the date on which payment became due and payable to the date of actual payment.

8.7.4 If the Parties are unable to agree on an amount payable pursuant to this Clause 8.7 (*Consequences of Termination*), the matter shall be determined by an Expert in accordance with Clause 10.2 (*Expert*).

8.8 Sole Remedies

The Parties agree that their rights and remedies expressly provided in their favour in this Agreement constitute their sole remedies against each other in respect of any breach by a Party of its obligations hereunder.

9. **Indemnification and Liability**

9.1 **Liability**

Each Party shall defend, indemnify and hold the other Party, its officers, directors, agents and employees harmless from and against any and all claims, liabilities, actions, demands, judgments, losses, costs, expenses (including reasonable attorney's fees), suits, actions, or damages arising by reason of bodily injury, death or damage to property sustained by any person or entity (whether or not a party to this Agreement):

9.1.1 caused by the Party or sustained on property or at facilities owned or controlled by the Party, except to the extent caused by an act of negligence or wilful misconduct by an officer, director, contractor, subcontractor, agent or employee, parent entity, subsidiary or affiliate of the other Party; or

9.1.2 caused by an act or omission of negligence or wilful misconduct of the Party, or by an officer, director, contractor, subcontractor, agent, employee, parent entity, subsidiary or affiliate of the Party.

10. **Dispute Resolution**

10.1 **Arbitration**

10.1.1 Where, in the event of any dispute or difference of any kind between the Parties in connection with or arising out of this Agreement including the interpretation of this Agreement, its validity and any purported breach or termination, which dispute MUST be declared in writing ("**Dispute**"), the Parties shall within seven (7) days of a written request from one Party, meet in good faith in an effort to resolve the dispute.

10.1.2 If the dispute is not resolved at that meeting, the parties will refer the matter to mediation to a mutually acceptable Mediator within seven (7) days.

10.1.3 Failure to agree on such a nomination, the mediator will be nominated by the Chairperson of the Kenya Branch of the Chartered Institute of Arbitrators on the application of either party. The mediation shall take place in accordance with the Nairobi Centre for International Arbitration – Mediation Rules as in force. The place of mediation shall be Nairobi, Kenya. All negotiations and proceedings shall be confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality protections.

10.1.4 If the dispute has not been settled pursuant to the mediation within (21) days from when the mediation was instituted, upon filing of a Request for Arbitration by any one party, it shall be referred to and finally determined by arbitration in accordance with the Kenya Arbitration Act, 1995 (as amended or varied from time to time) and the Rules of the Kenyan chapter of the Chartered Institute of Arbitrators; which Rules are deemed to be incorporated by reference to this clause.

10.1.5 The matter shall be referred to a single Arbitrator to be agreed by the Parties. If the Parties fail to agree on the appointment of the Arbitrator within thirty (30) days, the Chairperson of the Kenyan chapter of the Chartered Institute of Arbitrators shall appoint an Arbitrator on the application of any Party to determine the dispute.

- 10.1.6 The seat of arbitration shall be Nairobi, Kenya and only the Parties and their legal and other representatives involved with the dispute shall be in attendance.
- 10.1.7 The location of the arbitration shall be Kenya.
- 10.1.8 The language to be used in the arbitral proceedings shall be English.
- 10.1.9 The award rendered shall apportion the costs of the arbitration.
- 10.1.10 The award shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the tribunal's decision.
- 10.1.11 The award in such arbitration shall be final and binding upon the parties to this Agreement and judgment thereon may be entered in any Court having jurisdiction for its enforcement; and the parties to this Agreement renounce any right of appeal from the decision of the tribunal insofar as such renunciation can validly be made.
- 10.1.12 Nothing in this clause shall prevent any Party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the resolution of the dispute.

10.2 **Expert**

Where this Agreement provides that any matter shall be referred to an Expert or the Parties otherwise so agree, the following provisions shall apply:

- 10.2.1 the Expert shall be an independent person with relevant experience and willing to act, agreed between the Parties, or if not agreed within fourteen (14) days of a request in writing by either Party, appointed by the [President for the time being of the Institute of Chartered Public Accountants of Kenya];
- 10.2.2 the same Expert may be appointed to resolve more than one matter;
- 10.2.3 for a period of forty-two (42) days after the appointment of the Expert or, such other period as the Parties may agree, each Party may make such written submissions as it wishes to the Expert and shall simultaneously provide a copy to the other Party, and at the end of such forty-two (42) day period, each Party shall have a period of twenty-one (21) days to make counter-submissions to the Expert (with a copy to the other Party) in reply to the other Party's written submissions made during the aforementioned forty-two (42) day period provided that neither Party shall during such twenty-one (21) day period make any written counter-submission which purports to reply to, raise or refer to, any new matters not raised or referred to in any submission made during the aforementioned forty-two (42) day period;
- 10.2.4 at the end of the twenty-one (21) day period referred to in sub-paragraph 10.2.2 above, and no later than a further twenty-one (21) days thereafter, either Party may, with the consent of the Expert and at a time and place decided by the Expert, make an oral presentation to the Expert in the presence of the other Party commenting on or explaining matters previously submitted to the Expert in writing;
- 10.2.5 the Expert shall render his determination in writing within fourteen (14) days of the completion of the oral presentation given in accordance with sub-paragraph 10.2.4 above or at the end of the twenty-one (21) day period referred to in sub-paragraph

10.2.2 above where no oral presentations are made and give reasonable details of the reasons for his determination;

10.2.6 the decision of the Expert shall have retrospective effect from the date any matter was referred to the Expert and shall be final and binding on the Parties save in the event of fraud or manifest error or mistake;

10.2.7 the Expert shall act as an expert and not as an arbitrator;

10.2.8 the costs of the Expert shall be borne as determined by the Expert or, in default of such determination, equally by the Parties; and

10.2.9 any of the aforementioned periods set out in Clauses 10.2.3, 10.2.4, and 10.2.5 may be revised by agreement of the Parties in writing.

10.3 **Exclusivity**

Neither Party shall have any right to commence or maintain any legal proceeding concerning a Dispute until it has been resolved in accordance with Clauses 10.1 (*Arbitration*) or 10.2 (*Expert*), and then only to enforce or execute the award under such procedure.

10.4 **Confidentiality**

10.4.1 The Parties shall each secure that all Experts and arbitrators shall issue appropriate confidentiality undertakings, which for the avoidance shall include an undertaking to be bound by Clause 10.4.2 below, as a condition of appointment.

10.4.2 All information, data or documentation disclosed or delivered by a Party to an Expert or arbitrator appointed under this Agreement and all determinations by such Expert or arbitrator shall be treated as confidential. Each Party and/or an Expert or arbitrator appointed under this Agreement shall not, save as required under any Legal Requirement, disclose to any other person any such information, data, documentation or determination.

10.5 **Continuance of Obligations**

The Parties shall continue to perform their respective obligations under this Agreement during any Expert or arbitration proceeding, provided that the right to terminate pursuant to Clause 8 (*Termination and Default*) on grounds different to those referred to the Expert or arbitrator shall not be restricted by this Clause 10.5 (*Continuance of Obligations*).

10.6 **Survival**

The provisions of this Clause 10 (*Dispute Resolution*) shall survive the termination or expiry of this Agreement.

11. **Change in Law**

11.1 **Change in Law** shall mean any one or more of the events referred to in sub-paragraphs (a) or (b) below of this definition occurring after the Effective Date, and which despite the exercise of Good Industry Practice by the Developer: (i) results in an increase in the Project Cost incurred by the Developer in performing its obligations under the Development Framework Agreement or the subsequent Project Agreement or (ii) imposes requirements

for the Works and/or Services that are materially more onerous than the requirements in effect as at the Effective Date, and that materially affect the Developer's performance under the Development Framework Agreement or the subsequent Project Agreement:

- a..... a change in, or in the interpretation (by a Governmental Authority), application or enforcement of, or the enactment or adoption of or promulgation, bringing into effect of, repeal, amendment of, any Applicable Laws; or
- b..... any change in any Authorisation required in connection with the Development Framework Agreement or the subsequent Project Agreement or any additional requirements or conditions imposed by any Governmental Authority in connection with the issuance, extension, replacement, variation or renewal of any Authorisation required in connection with the Development Framework Agreement or the subsequent Project Agreement provided that in respect of the issuance, extension, replacement, variation or renewal of any Authorisation required in connection with the Development Framework Agreement or the subsequent Project Agreement, the Party requiring the relevant Authorisation has first diligently attempted to obtain such Authorisation and if the processes required by such duty of diligence have not been exhausted, such processes have been and are still being diligently pursued by that Party.

11.2 The Developer shall be required to give notice to the Offtaker and the Independent Engineer of the occurrence of a Change in Law specifying whether relief from compliance with obligations is required.

11.3 If as a result of a Change in Law, the Developer is unable to carry out the Works or unable to comply with any of its other obligations arising from the Development Framework Agreement or the subsequent Project Agreement, the Developer shall be entitled to apply for relief in the form of:

- (a) a postponement of the scheduled COD;
- (b) amendment to the Development Framework Agreement or the subsequent Project Agreement to take account of the Change in Law; and/or
- (c) relief from termination for Contractor/Developer Event of Default.

11.4 The Developer shall only be entitled to relief where it has notified the Offtaker and the Independent Engineer of its request to be provided with any such relief, and provided such other information as will be specified in the Development Framework Agreement or the subsequent Project Agreement and the Independent Engineer has provided a written decision stating that Change in Law has occurred.

12. **Miscellaneous**

12.1 **Assignment or Transfer:**

12.1.1 Any assignment or transfer by a Party of all (but not part only) of its rights and obligations under this Agreement is permitted but only with the prior written consent of the other Party, provided that:

12.1.1.1 such consent shall not be unreasonably withheld or delayed if the Party wishing to assign can satisfy the other Party of such proposed assignee's financial, technical and legal status and ability to observe and perform this Agreement; and

12.1.1.2 the Party wishing to assign shall have given notice to that effect to the other Party and such notice shall have given sufficient information to show the status and ability of the proposed assignee to carry out the terms of this Agreement.

12.1.2 No assignment pursuant to Clause 12.1 (*Assignment or Transfer*) shall be effective unless and until the assigning Party has:

12.1.2.1 procured the proposed assignee to covenant directly with the other Party (in a form reasonably satisfactory to such Party) to observe and perform all the terms and conditions of this Agreement and if reasonably required by the other Party arrange for a guarantee or other equivalent security in favour of such other Party in respect of all obligations or liabilities to be assigned; and

12.1.2.2 provided to the other Party a certified copy of the assignment (excluding the consideration paid or payable for such assignment).

12.2 **Variation**

This Agreement may not be varied nor any of its provisions waived except by an agreement in writing signed by the Parties. The Parties record that any such variation or waiver shall be treated as confidential and shall not be disclosed to any other person, save as required under any Legal Requirement.

12.3 **Waivers of Rights**

No provision of this Agreement shall be waived except by agreement in writing signed by the Parties. No delay or forbearance by either Party in exercising any right, power, privilege or remedy under this Agreement shall operate to impair or be construed as a waiver of such right, power, privilege or remedy.

12.4 **Notices**

Any notice or other communication given or made under or in connection with the matters contemplated by this Agreement shall be in writing as follows:

12.4.1 Any such notice or other communication shall be addressed as provided in Clause 12.4.2 below and, if so addressed, shall be deemed to have been duly given or made as follows:

12.4.1.1 if sent by personal delivery, upon delivery at the address of the relevant Party;

12.4.1.2 if sent by post, five (5) Business Days after the date of posting provided that proof is given that the notice was properly addressed and duly dispatched by post; and

12.4.1.3 If sent by electronic mail, upon confirmation of receipt by the intended recipient.

provided that if, in accordance with the above provisions, any such notice or other communication would otherwise be deemed to be given or made outside normal working hours in the place of service of the notice or other

communication, it shall be deemed to be given or made at the start of normal working hours on the next Business Day.

12.4.2 The relevant address of each Party for the purposes of this Agreement, subject to Clause 12.4.3 below, is:

(a) **In the case of Offtaker:**

Name:

Address: [insert physical and postal address]

Email Address:

Marked for the attention of:

(b) **In the case of the Developer:**

Name:

Address: [insert physical and postal address]

Email Address:

Marked for the attention of:

12.4.3 A Party may notify the other of a change to its name or address for the purposes of Clause 12.4.2 above provided that such notification shall only be effective on:

12.4.3.1 the date specified in the notification as the date on which the change is to take place; or

12.4.3.2 if no date is specified or the date specified is less than five (5) Business Days after the date on which notice is given, the date falling five (5) Business Days after notice of any such change has been given.

12.4.4 Notwithstanding the above, any notice given in writing in English, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this Clause.

12.4.5 The Parties record that whilst they may correspond via email during the currency of this Agreement for operational reasons, no formal notice required in terms of this Agreement, nor any amendment of or variation to this Agreement may be given or concluded via email.

12.5 Effect of Illegality

If for any reason whatsoever, any provision of this Agreement is or becomes or is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, then in any such case the Parties will negotiate in good faith with a view to agreeing one or more provisions to be substituted therefore which are not invalid, illegal or unenforceable and produce as nearly as is practicable in all the circumstances the appropriate balance of the commercial interests of the Parties.

12.6 Entire Agreement

This Agreement contains and expressly refers to the entire agreement between the Parties with respect to its subject matter and expressly excludes any warranty, condition or other undertaking implied at law or by custom and supersedes all previous agreements and understandings between the Parties with respect to its subject matter and each of the Parties acknowledges and confirms that it does not enter into this Agreement in reliance on any

representation, warranty or other undertaking by the other Party not fully reflected in the terms of this Agreement.

12.7 **Counterparts**

This Agreement may be executed in counterparts and by each Party on a separate counterpart, each of which when executed and delivered shall constitute an original, but both counterparts shall together constitute one and the same instrument.

12.8 **Further Assurances**

The Developer shall take all such action and do, perform, execute and deliver all acts, deeds, documents as shall be necessary from time to time to cause the effective performance of its obligations, under this Agreement. In this regard, the Developer agrees that it shall be competent for the Offtaker to bring an action for specific performance of the provisions of this Agreement.

13. **Governing Law**

This Agreement shall be governed by and construed in all respects in accordance with the laws of Kenya.

DRAFT

AS WITNESS the hands of the duly authorised representatives of the Parties the day and year first above written.

**Signed and sealed
for and on behalf of
[The Offtaker]**))
))
))

In the presence of:))
_____))
_____))
_____))
_____))
_____))
_____))

**Signed and sealed
for and on behalf of
[the Developer]**))
))
))

In the presence of:))
_____))
Director))
_____))
Director/ Secretary))
_____))

DRAFT

SCHEDULE 1: PURCHASE TERMS
(Clause 1.2)

DRAFT

SCHEDULE 2: SALE NOTICE
(Clause 6.1.1)

TO: [Address of the Offtaker]

Re: Offer Notice

Dear Sir/Madam

We refer to the Offtake Agreement between [●] and [●] dated [●].

In accordance with Clause 6.1.1 of the Offtake Agreement, we hereby give you notice of the Project Completion and intention to sell and transfer the Housing Units to [insert name of Offtaker] in accordance with the attached Purchase Terms.

Yours faithfully

[Authorized signature for the Developer]

[Insert name of Developer]

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