

DATED 4<sup>th</sup> MAY 2010

Clause

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**Ashfords**  
Solicitors

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THIS AGREEMENT is made on the 4<sup>th</sup> day of MAY 2010

**BETWEEN:-**

- (1) **SOUTH EAST ENGLAND DEVELOPMENT AGENCY** (a body corporate under the Regional Development Agencies Act 1998) of Cross Lanes, Guildford GU1 1YN (the "**Agency**");
  - (2) **ASHFORD BOROUGH COUNCIL** of Civic Centre, Tannery Lane, Ashford TN23 1PL ("**ABC**");
  - (3) **THE KENT COUNTY COUNCIL** of County Hall, Maidstone, Kent ME14 1XQ ("**KCC**")
- (together the "**Parties**")

**BACKGROUND:-**

- (A) The Agency has established (and is the Accountable Body for) a fund to be used to forward-fund significant regional or sub-regional infrastructure in the South East of England which supports the delivery of planned growth as set out in the RSS and/or RES (the "**Regional Infrastructure Fund**" or "**RIF**"). The RIF provides a mechanism for providing capital funding subject to repayment to improve the timing of infrastructure delivery.
- (B) The RSS at the date of this Agreement is The South East Plan 2009 and under its spatial planning principles new development is to be focussed on regional hubs according to their role and function. Ashford is a regional hub and a designated growth area. Ashford delivery partners are urged therein to investigate private and public sources of funding and work together to find a mechanism to forward fund strategic infrastructure. New public transport and highway networks to support the growth area are highlighted as a key issue to be addressed.
- (C) ABC's Local Development Framework Core Strategy Development Plan Document adopted in July 2008 (the "**Core Strategy**") states that a strategic tariff will be used to secure contributions to help fund the strategic physical infrastructure and other facilities needed to support the sustainable growth of the growth area. The Core Strategy expects that uses of the strategic tariff will include strategic road improvements such as improved access to the M20, and details of the tariff will be set in a supplementary planning document which ABC is currently preparing.
- (D) ABC and KCC are LPAs for the growth area and consider that the Works are strategic road improvements needed to support the sustainable growth of the growth area. ABC and KCC consider that it is desirable and necessary to commit to use an element of the tariff proceeds as contributions towards repayment of the RIF forward-funding of the Works, alongside contributions towards such repayment which are to be made by certain known developers and further such contributions from future developers which they will seek where appropriate.
- (E) KCC is the Highway Authority and intends to procure and project manage the delivery of the Works in accordance with this Agreement.
- (F) The Company (defined below) on behalf of the Partnership Board (defined below) has applied for the Funding and the Agency in the exercise of its powers pursuant to the Regional Development Agencies Act 1998 agrees to award and make the Funding available in accordance with this Agreement (up to the Maximum Sum) for the purpose of financially assisting the carrying out of the Works in order to improve the infrastructure in the Ashford Growth Area in which the Works are to be carried out. The Agency shall pay the Funding to ABC with the intent that ABC shall pay the same to KCC and it shall be used to reimburse KCC for costs properly incurred in connection with the Works. ABC and KCC hereby accept the Funding on the terms and conditions set out in this Agreement.
- (G) The Agency, ABC and KCC are members of an unincorporated body known as the Ashford's Future Partnership Board (the "**Partnership Board**"). In addition, the Agency, ABC and KCC are founding members of the Ashford's Future Company Limited ("**the Company**"). The Partnership Board and the Company are responsible for delivering and monitoring respectively the growth

programme in the Ashford Growth Area, including key infrastructure projects such as those supported through the Regional Infrastructure Fund. The Agency, KCC and ABC agree that the Partnership Board and the Company will be kept informed of progress with the Project to ensure co-ordination of regeneration activities. The parties intend that any potential delays and/or risks to delivery of the Project and suggested mitigating measures will be discussed through the Partnership Board with a view to identifying optimum solutions.

- (H) The Parties acknowledge that the Funding is to be repaid/reimbursed to the Agency in accordance with the terms of this Agreement.
- (I) In a letter to the Agency dated 31 March 2010 the Department for Transport confirmed that it is prepared to commit £8.1 million to enable the Agency to provide the Funding to be paid by the Agency under this Agreement provided that the spend occurs no later than 31 March 2011. The Parties agree that the Agency is administering the Funding which is being provided by the Department for Transport and notwithstanding any other provisions of this Agreement the Agency shall not be required to use funds other than those provided by the Department for Transport in relation to the funding of the Qualifying Expenditure.

**IT IS HEREBY AGREED** as follows:-

**1. DEFINITIONS**

The expressions in this Agreement shall have the meanings more particularly identified in Schedule 1.

**2. PROVISION OF FUNDING**

The Agency (in exercise of its powers under the Regional Development Agencies Act 1998) hereby agrees to provide the Funding to ABC upon and subject to the terms of this Agreement and without prejudice to the generality of the foregoing in accordance with Clause 4 of this Agreement. Upon receipt of each instalment of the Funding, ABC shall promptly pay the same to KCC.

**3. REPRESENTATIONS AND WARRANTIES AND INCEPTION REPORT**

- 3.1 ABC (in respect of ABC) and KCC (in respect of KCC) respectively represent and warrant to the Agency that ABC and KCC have full power to enter into and perform this Agreement, the execution on behalf of ABC and KCC of this Agreement has been validly authorised, and the obligations assumed by ABC and KCC under this Agreement constitute valid legal and binding obligations of ABC and KCC (respectively) enforceable against ABC and KCC (respectively) in accordance with their terms.
- 3.2 Not used.
- 3.3 KCC represents and warrants to the Agency as at the date of the Inception Report and each updated Inception Report that the information in the initial and each updated Inception Report respectively is true and accurate as to the current status of the Project and of any material risks known to KCC in connection with the Project.
- 3.4 KCC will promptly provide to the Agency any information which the Agency may request in connection with an Inception Report.

**4. PAYMENT OF FUNDING**

**4.1 Claim for funding**

- 4.1.1 The Agency shall pay the Funding to ABC in accordance with this clause 4. Upon receipt of each instalment ABC shall promptly pay the same to KCC.
- 4.1.2 The Agency acknowledges that KCC has incurred Qualifying Expenditure in undertaking preparatory work with a view to realising the Project prior to the execution of this

Agreement and the Agency agrees to pay Funding to ABC to be used to reimburse KCC for such Qualifying Expenditure subject to receipt of a Claim in accordance with clause 4.4.

- 4.1.3 ABC, KCC and the Agency agree that Funding will only be provided pursuant to this Agreement to contribute towards Qualifying Expenditure and not further or otherwise.

#### 4.2 Accruals Basis

- 4.2.1 The Agency agrees that, subject to the requirements of this clause 4 and any other relevant provisions of this Agreement which would prevent payment (eg clauses 5.2 and 8.6), ABC shall be entitled (notwithstanding that the Works may not have commenced) to payment of the Funding on an accruals basis once the expenditure to which the Funding relates has been incurred by KCC, and notwithstanding that KCC has not yet paid the expenditure, subject to KCC undertaking to forthwith pay any third party the relevant expenditure to which the Claim relates, or in the case of the provisional sums referred to in the definition of "Qualifying Expenditure" pay any third party if and when payment is due.

#### 4.3 Payment of Funding

Subject to the provisions of this Agreement the Agency shall pay Funding (in instalments) in respect of Qualifying Expenditure into ABC's account details of which shall have been notified to the Agency by ABC not exceeding in total the Maximum Sum as follows:-

- 4.3.1 each instalment is to be paid Quarterly in arrears of the relevant Instalment Period within 28 days of the later of, the receipt of a Claim for that relevant Instalment Period submitted in accordance with this Clause 4, or, the last day of the relevant Quarter; and
- 4.3.2 at the rate of the Relevant Percentage of the items of Qualifying Expenditure to which the Claim relates; and
- 4.3.3 any other sums claimed in accordance with the procedure for Claims under this Clause.
- 4.4 Unless the Agency otherwise agrees, the Agency shall not be liable to provide (or as the case may be to continue to provide) Funding (or any instalment thereof):-
- 4.4.1 unless a Claim by ABC for Funding (or any instalment thereof) shall:-
- (a) be submitted as soon as reasonably practicable and in a Claim Form signed by an officer of KCC;
  - (b) be accompanied by a report complying with the provisions of Clause 7.1.1
  - (c) be accompanied by the initial Inception Report in the case of the first Claim and thereafter by an updated Inception Report;
  - (d) relate to Qualifying Expenditure in relation to which KCC has not submitted any other Claim or received any Public Sector Financial Assistance;
  - (e) include to the reasonable satisfaction of the Agency evidence that the obligation to make the payment to which the Claim relates has been incurred by KCC;
- 4.4.2 in relation to expenditure to make good damage to the Works or to make good any defects in the Works.
- 4.5 If the Agency shall determine that any expenditure previously defrayed and the subject of a prior instalment of Funding paid by it is not Qualifying Expenditure or if at any time the Agency has paid more than it is liable to pay under any provision of this Agreement, KCC shall forthwith on

demand in writing reimburse to the Agency the amount stipulated by the Agency as having been overpaid.

4.6 ABC, KCC and the Agency have satisfied themselves that the Funding does not involve unlawful state aid.

4.7 The Agency reserves the right to decrease the Maximum Sum and/or the Relevant Percentage in the event of the receipt of any Public Sector Financial Assistance or the acceptance of an offer thereof by KCC or ABC and any such reduction in the Maximum Sum and/or the Relevant Percentage may reflect the amount of such Public Sector Financial Assistance but the Agency shall also take into consideration any increased costs or risks associated with the Project which such Public Sector Financial Assistance is intended to mitigate in whole or part.

## 5. **FORCE MAJEURE**

5.1 Each of the Parties shall forthwith notify the others where it considers that an event of Force Majeure has occurred. Thereafter, ABC, KCC and the Agency shall meet and shall endeavour to negotiate such changes to this Agreement as may be required to enable the Project to proceed PROVIDED that if each of the Parties reasonably believes that the Project cannot proceed they may unanimously agree that it should be abandoned.

5.2 Where the Parties unanimously decide to abandon the Project, following the occurrence of an event of Force Majeure, or for any other reason, then unless otherwise agreed:

5.2.1 the Agency shall remain liable to continue to deal with and pay any Claim for Funding in accordance with clause 4 in relation to any Qualifying Expenditure incurred by KCC (acting properly and in good faith) prior to such decision or the earlier receipt by KCC of a notice of suspension of Funding under clause 8.6; and

5.2.2 (without limiting any other provisions of this Agreement) such abandonment shall not oblige ABC or KCC to reimburse to the Agency any Funding paid to ABC or KCC in respect of expenditure incurred by KCC (acting properly and in good faith) prior to such decision; and

5.2.3 ABC and KCC shall continue to observe and perform their obligations in this Agreement in relation to the repayment of the Funding paid by the Agency to ABC.

## 6. **OBLIGATIONS OF KCC AND ABC TO THE AGENCY**

KCC agrees with the Agency that:-

### 6.1 **Works**

it shall procure:

6.1.1 that the Works (once commenced) are carried out and completed substantially by the Works Longstop Date subject to Force Majeure in accordance with:

(a) the Works Specification;

(b) this Agreement; and

(c) the standard required by the Highway Authority for the Works to be adopted and maintainable at public expense;

6.1.2 that the Works shall form part of the highway which has been, or will be, adopted and maintained at public expense;

6.1.3 that the Works shall not be commenced prior to the approval of the Agency of the Works Specification provided always that anything approved or constructed by the Highway Authority shall be deemed to have been approved by the Agency.

## 6.2 Project Governance and Management

the Works Contract will be prudently administered by KCC in accordance with its terms;

## 6.3 Milestones

6.3.1 it shall use reasonable endeavours to meet the Milestones; and

6.3.2 it shall provide reasonable evidence to the Agency of its endeavours in relation to this Clause 6.3.

## 6.4 Long Term Management and Maintenance and Use of Works

Upon practical completion of the Works it shall ensure that the Works are properly maintained and managed to an adoptable standard and to the requirements of the Highway Authority during any maintenance period until the Works are adopted and maintained at public expense.

## 6.5 Repayment of Funding Advanced - ABC's Obligations

ABC agrees with the Agency that ABC shall:

6.5.1 Pay contributions to the Agency by way of repayment of the Funding Advanced in accordance with the following provisions until the total contributions which have been repaid to the Agency under clause 6.5 (or from other sources or by additional voluntary payments from Strategic Tariff or CIL and taking into account clause 6.7.8) equal the Funding Advanced.

6.5.2 Within 28 days of the end of the Quarter in which ABC receives a financial contribution specifically in respect of the Project and/or the Works and/or the repayment of Funding under:

(a) the Section 278 Agreements; and/or

(b) the Notified Section 106 Obligations;

pay on to the Agency (unless the Agency agrees otherwise in its absolute discretion) such contribution (together with any interest received from KCC for late payment by KCC to ABC)

Save that no payment to the Agency will be required under this clause 6.5.2 if or to the extent that the whole of the Funding Advanced has been repaid to the Agency (taking into account clause 6.7.8).

6.5.3 Subject to clauses 6.7.1, 6.7.6, and 6.7.7(b), operate a Transport Fund (with which KCC hereby concurs) into which ABC shall forthwith following receipt pay the following percentages of any Strategic Tariff or CIL received by ABC on or after 1 July 2010:-

(i) 36% if the receipt per dwelling is £14,000 or more

(ii) 50% if the receipt per dwelling is £10,000 or more but less than £14,000

(iii) 67% if the receipt per dwelling is £7,500 or more but less than £10,000

(iv) 80% if the receipt per dwelling is less than £7,500

PROVIDED THAT the percentages and amounts of receipt per dwelling may be reviewed at any time upon written request by any of the Parties and may be revised at any time by agreement in writing between ABC and the Agency (in each party's absolute discretion) after consultation with KCC and (if they continue to exist at that time) the Partnership Board and the Agency's "RIF Investment Panel", and following any such revision the revised



percentages and/or amounts of receipt per dwelling shall apply until any further such revision.

6.5.4 Within 28 days of the end of each Quarter in which there is a payment into the Transport Fund ABC shall treat each payment into the Transport Fund as follows:-

- (a) calculate and deduct from the amount of such payment such amount (if any) which falls to be paid out by ABC under the Park Farm Agreement;
- (b) calculate and deduct such other amount or such percentage (if any) as ABC may have reasonably determined (after consultation with the Agency and KCC and if it continues to exist at that time the Partnership Board) to be necessary at that time to expend and/or reserve for or towards the provision of funding and/or repayment of forward-funding of Other Transport Infrastructure PROVIDED THAT unless the Agency agrees otherwise:
  - (i) no deduction may be made under this sub-clause (b) unless ABC has then entered into an agreement or agreements (each in a form approved by the Agency acting reasonably) (whether with the Homes and Communities Agency and/or any other public or private-sector funder) whereby more than twenty per cent (20%) of the amount of the payment into the Transport Fund is required to be reserved for and/or paid to the Homes and Communities Agency and/or such other funders in respect of funding and/or repayment of forward-funding which it and/or they have agreed to provide for or towards the Junction 10A Works; and
  - (ii) any deduction made under this sub-clause (b) shall not exceed thirty per cent (30%) of the amount of the payment into the Transport Fund;
- (c) provide to the Agency and KCC a statement of its calculations under this clause 6.5.4 (including, if any deductions are made under sub-clauses (a) and/or (b) a calculation of the balance remaining of such payment into the Transport Fund); and
- (d) unless the Agency agrees otherwise (in its absolute discretion), pay to the Agency twenty-five per cent (25%) of either:-
  - (i) (if no deductions were made under sub-clauses (a) and/or (b)) the whole of the payment into the Transport Fund;
  - (ii) or (if any deductions were made under sub-clauses (a) and/or (b)) the balance of such payment after the deductions under sub-clauses (a) and/or (b);

Save that no payment to the Agency will be required under this sub-clause (d) if or to the extent that either of the following apply or would then apply:

- (A) the whole of the Funding Advanced has been repaid to the Agency (taking into account clause 6.7.8)
- or
- (B) the Parties have reached agreement that sub-clause 6.7.1(b) is satisfied.

6.5.5 Subject to clause 6.7.5 and unless the Agency agrees otherwise:-

- (a) Use reasonable endeavours to maximise (as far as reasonably practicable) the payments into the Transport Fund but for the avoidance of doubt this does not impose any duty on ABC to pay into the Transport Fund any greater percentages or amounts of receipt per dwelling than those set out in or revised as provided in sub-clause 6.5.3.



- (b) Use reasonable endeavours, and take reasonable steps, to duly perform its obligations under any Section 278 Agreements and under any Notified Section 106 Obligations in so far as they relate to or effect the repayment of Funding.
- (c) Use reasonable endeavours, and take reasonable steps, to recover any Strategic Tariff or CIL which may be due and unpaid.
- (d) Not release or vary any financial contributions which remain payable specifically in respect of the Project and/or the Works and/or the repayment of Funding under Section 278 Agreements and Notified Section 106 Obligations.

#### **6.6 Repayment of Funding Advanced - KCC's obligations**

KCC agrees severally with the Agency and with ABC that KCC shall (subject to clause 6.7.3 and unless the Agency and ABC agree otherwise):-

- 6.6.1 Use reasonable endeavours and take reasonable steps to duly perform its obligations under Section 278 Agreements and under any Notified Section 106 Obligations in so far as they relate to the Project and/or the Works and/or the repayment of Funding;
- 6.6.2 use reasonable endeavours and take reasonable steps to recover any sums due and owing to it (or ABC) from any persons liable under the Section 278 Agreements and under any Notified Section 106 Agreements specifically in respect of the Project and/or the Works and/or the repayment of Funding;
- 6.6.3 not release or vary any financial contributions which remain payable specifically in respect of the Project and/or the Works and/or the repayment of Funding under Section 278 Agreements and Notified Section 106 Obligations;
- 6.6.4 upon receipt of all or part of an Unconditional 278/106 Contribution to pay such sum to ABC within 10 Working Days of receipt or within 10 Working Days of the Date of Practical Completion of the Works (whichever is the later);
- 6.6.5 upon it being ascertained that a contribution previously received by KCC specifically in respect of the Project and/or the Works and/or the repayment of Funding under a Section 278 Agreement or a Notified Section 106 Obligation will not have to be, or once paid by KCC to ABC will not have to be, repaid to the payer as provided in paragraph (iii) (a) of the definition of "Unconditional 278/106 Contributions" to pay such sum to ABC within 10 Working Days of such ascertainment or within 10 Working Days of the Date of Practical Completion of the Works (whichever is the later).

#### **6.7 Repayment of Funding Advanced - the Parties' Agreements**

- 6.7.1 The Parties agree that ABC will be released from its obligation in this Agreement (without prejudice to any other obligation) to operate a Transport Fund and/or to make payments into it in accordance with clause 6.5.3 as from the date when the Parties unanimously agree that both the following sub-clauses are satisfied:-
  - (a) the Agency is no longer under any obligation in this Agreement to pay any further Funding to ABC; and
  - (b) the amount of the Funding Advanced which has not been repaid to the Agency under clause 6.5 (or from other sources or by additional voluntary payments from ABC's receipts of Strategic Tariff or CIL and taking into account clause 6.7.8) is no greater than the total amount of all Unconditional 278/106 Contributions which have not been received by the Agency.
- 6.7.2 The Parties agree to jointly monitor the amount of the Funding Advanced which has not been repaid to the Agency under clause 6.5 (or from other sources or by additional voluntary

payments from ABC's receipts of Strategic Tariff or CIL and taking into account clause 6.7.8) and;

- (a) the Agency agrees (not later than 15 Working Days before the end of each Quarter) to send to ABC and KCC a statement showing:-
  - its payments of Funding,
  - any amounts reimbursed or due to be reimbursed to it as referred to in paragraphs (i) and (ii) of the definition of "Funding Advanced"
  - its receipts of repayments of Funding Advanced (taking into account clause 6.7.8), and
  - the running balance of Funding Advanced which has not been repaid; and
- (b) the Parties shall promptly discuss any discrepancies or disagreements regarding such statements; and
- (c) the Parties shall meet as soon as practicable following a request by any Party to meet with a view to agreeing the first date when it can safely be determined that the requirements of sub-clauses 6.7.1(a) and/or (b) are satisfied.

6.7.3 The Parties agree that where KCC is unable to recover the whole or part of any sums due and owing to it (or ABC) from any persons liable under the Section 278 Agreements and under any Notified Section 106 Obligations specifically in respect of the Project and/or the Works and/or the repayment of Funding, it shall have no liability to make payment or compensation to the Agency or ABC from KCC's other resources save where KCC has intentionally not performed its obligations under clause 6.6, which will be deemed to be the case if KCC decides not to act in accordance with that clause after being reasonably requested to do so in a written notice from the Agency or ABC.

6.7.4 Not used.

6.7.5 The Parties agree that where ABC is unable to recover the whole or part of any financial contribution specifically in respect of the Project and/or the Works and/or the repayment of Funding under any Section 278 Agreements or Notified Section 106 Obligations or any Strategic Tariff or CIL which may be due and unpaid, it shall have no liability to make payment or compensation to the Agency from ABC's other resources, save where ABC has intentionally not performed its obligations under sub-clauses 6.5.5(b), 6.5.5(c) and/or 6.5.5(d) as the case may be, which will be deemed to be the case if ABC decides not to act in accordance with the relevant clause after being reasonably requested to do so in a written notice from the Agency.

6.7.6 The Parties agree that if for any reason ABC is prevented from operating the Transport Fund (including by reason of any contrary legislation judgment or order of any competent court or tribunal or decision or ruling of any planning inspector Infrastructure Planning Commission or Secretary of State) then the provisions of clauses 6.5.3 and 6.5.4 shall operate without reference to such Transport Fund and ABC shall deal with any Strategic Tariff or CIL receipts as if the references to the date of payment into the Transport Fund were references to the date of receipt by ABC and such that notwithstanding the non-operation of the Transport Fund the same amount is paid to the Agency as if the Transport Fund were operating.

6.7.7 The Parties agree that if:-

- (a) any financial contribution specifically in respect of the Project and/or the Works and/or the repayment of Funding which has been paid is payable or will become payable at a future time and/or upon a future contingency under a Section 278 Agreement and/or a Notified Section 106 Obligation:-

- is repaid to the payer by KCC or ABC, or
- ceases to be so payable to KCC or ABC, or
- is not paid to KCC or ABC within 6 months of the due date for payment set out in the Section 278 Agreement or in the Notified Section 106 Obligation, or
- is not received by KCC or ABC by 31 March 2020;

or

- (b) any legislation judgement or order of any competent court or tribunal or decision or ruling of a planning inspector the Infrastructure Planning Commission or the Secretary of State determines that a development or change of use in the Ashford Growth Area should not be obliged to contribute Strategic Tariff or CIL towards the Transport Fund in general and/or the Project and/or the Works and/or the repayment of Funding in particular;

then in either case, unless the Agency agrees otherwise in its absolute discretion:-

- (c) the Parties will agree a suitable mechanism to replace such contribution (including any appropriate adjustment to clause 6.5.2 and/or otherwise if the contribution is subsequently received and any other appropriate terms and conditions) with a view to ensuring that Funding Advanced continues to be repaid as nearly as may be as anticipated in this Agreement, and which mechanism (unless the Parties otherwise agree) will comprise developer or other contributions and/or funds arising from and/or in relation to development or land or property in the Ashford Growth Area (or elsewhere) and may come from various sources including from Strategic Tariff or CIL (for example by varying the percentages and/or amounts of receipt per dwelling of Strategic Tariff or CIL which are paid into the Transport Fund), and/or from other existing or proposed Section 278 Agreements and/or Notified Section 106 Obligations, and/or from any new tariff or levy (including tariff or levy on non-residential development), and/or in any other manner as may be agreed;

6.7.8 The Parties agree that the Agency shall not be repaid more than once for any part of the Funding Advanced, and therefore for example:-

- (a) if any Court or competent tribunal determines that ABC or KCC should make a payment to the Agency based on and equivalent to a repayment of Funding Advanced; or
- (b) if a payment is made to the Agency based on and equivalent to a repayment of Funding Advanced by any person under an instrument or document executed pursuant to clause 6.13 (Further assurance)

then such payments to the Agency shall be treated for the purposes of this Agreement as repayments of Funding Advanced.

6.7.9 If at any time any repayment or reimbursement of Funding received by the Agency results in the Agency being repaid in excess of the Funding Advanced then;

- (a) the Agency shall promptly give notice thereof to ABC and KCC;
- (b) the Agency shall promptly pay to ABC any such excess received by it; and
- (c) ABC or KCC or any other party which is liable at that time or thereafter to make any such repayment or reimbursement to the Agency shall instead (in the case of ABC) retain the amount of such excess or (in the case of KCC or any other party) pay the amount of such excess direct to ABC (in either case promptly giving notice thereof to the Agency); and

- (d) ABC shall be at liberty to use any such monies retained or received under this clause 6.7.9 towards any infrastructure or other costs for which Strategic Tariff and/or CIL may be used and/or any purpose related thereto as ABC shall determine in its absolute discretion.

6.7.10 The Parties agree that for the purposes of clause 6.6.4 the Prepaid Amount (as defined in the Repton Park Junction 9 Section 278 Agreement) will be treated as received by KCC when the obligation to pay the £1,100,000 arises under the First Schedule of the Repton Park Junction 9 Section 278 Agreement.

## **6.8 Public procurement**

6.8.1 KCC shall comply with all applicable EU Procurement Requirements in connection with the procurement of any of the Works or any services in respect of which Funding is to be provided by the Agency and shall promptly provide to the Agency or any Government Office any information which the Agency or any Government Office may request in order to satisfy itself that KCC has done so.

6.8.2 All procurement of works, equipment, goods and services by KCC relating to the Works shall be based on value for money. In determining how this requirement should be met, KCC shall take account of public sector accountability and probity, and shall document the decision making process.

## **6.9 Works Contractor's contractor and employees**

KCC shall:-

- 6.9.1 take all reasonable steps to satisfy itself that the Works Contractor's procurement policies and procedures in relation to employees, suppliers and contractors (and its employees) are suitable and competent in all respects to allow the proper performance of all necessary work or tasks in relation to the Works; and
- 6.9.2 immediately notify the Agency of any claim brought against KCC or the Works Contractor arising out of or relating to the Works including any claim made against any supplier or contractor of which KCC receives notification.

## **6.10 Legislation**

In carrying out its obligations under this Agreement KCC shall (and shall procure that the Works Contractor and each of KCC and the Works Contractor shall require in contract documentation that the Works Contractor's major suppliers and sub-contractors) comply in all material respects with all relevant Statutory Requirements including legislation relating to health and safety and welfare at work and, in this regard:-

- 6.10.1 it shall and shall procure that the Works Contractor shall use reasonable endeavours to enforce the obligations in such contract documentation; and
- 6.10.2 evidence shall be provided to the Agency within a reasonable period following request of a policy covering equal opportunities so as to avoid unfair discrimination on the grounds of colour, race, creed, nationality or any other unjustifiable basis directly or indirectly in relation to the implementation of the Works and relevant evidence shall be provided as to the implementation of this policy as requested by the Agency.

## **6.11 Insurance**

KCC shall procure that the Works Contractor shall at all times during the carrying out of the Works:-

- 6.11.1 maintain or procure that there is maintained an insurance policy being an "all risks" insurance policy covering the usual risks covered by this type of policy in respect of all buildings relating to the Works and all works undertaken in carrying out the Works and all

unfixed goods and materials in connection with such works for, in every case, the full reinstatement or replacement costs thereof from time to time;

6.11.2 if requested, supply reasonable evidence of the insurance policy as referred to above;

6.11.3 if any building, infrastructure or other development works comprising part of the Works or any materials or goods required to undertake such Works are destroyed or damaged (other than as necessary as part of the carrying out of the Works), make an appropriate claim under the insurance policy referred to above and use any such proceeds received for the same in rebuilding, reinstatement or replacement of such building, infrastructure, work, goods or materials; and

6.11.4 not do or permit anything which may render such policy of insurance referred to above void or voidable.

## **6.12 Material Alterations to the Works**

KCC shall procure that the Works Contractor shall not, without the prior written consent of the Agency, make a material alteration to the Works which would have an effect on the Project Programme or the Milestones.

## **6.13 Further assurance**

At any time upon the written request of the Agency and at the Agency's cost, ABC and KCC shall promptly execute and deliver or procure the execution and delivery of any and all such further instruments and documents as may be reasonable and necessary for the purpose of obtaining for the Agency the full benefit of this Agreement and of the rights and powers herein granted.

## **6.14 Indemnity**

KCC shall be liable for and shall indemnify the Agency in full against any expense, liability, loss, claim or proceedings arising under statute or at common law in respect of personal injury to or death of any person whomsoever or loss of or damage to property whether belonging to the Agency or otherwise or any claim by any third party arising out of or in the course of or caused or contributed to by the Works and/or the performance or non-performance or delay in performance by KCC of its obligations under this Agreement except to the extent that the same is due to any act or neglect of the Agency;

# **7. PROJECT MONITORING**

## **7.1 Provision of information by KCC and ABC**

KCC shall (and in the case of clauses 7.1.1(c) and 7.1.9 ABC shall also):-

7.1.1 Provide to the Agency and the Partnership Board, both on an annual basis (from the date of this Agreement until the satisfaction by KCC of all its obligations under this Agreement (including but not limited to its obligations under Clause 6.6)) and with each Claim for Funding, a progress report, such report to include:-

- (a) a statement on the progress of the Project and the Works as against the Project Programme and any likely deviation from the Project Programme;
- (b) a Project Expenditure Statement compared against the Estimated Qualifying Expenditure Profile Plan and any likely future deviation from the Estimated Qualifying Expenditure Profile Plan;
- (c) a statement of what is reasonably considered to be the likelihood of;

- (i) further contributions specifically in respect of the Project and/or the Works and/or the repayment of Funding being secured under Notified Section 106 Obligations and/or Section 278 Agreements; and
  - (ii) the cumulative totals in the final column of the table in Schedule 4 being met; and
  - (d) other information as may be reasonably requested by the Agency from time to time;
- 7.1.2 provide minutes of any meetings of KCC's project board or team in relation to the Works and such other reports as are requested by the Agency;
- 7.1.3 procure that KCC Representative and/or any other officers of KCC as may reasonably be requested by the Agency shall attend such meetings as the Agency may reasonably request with the Agency and any third parties invited by the Agency to review progress in relation to the Works;
- 7.1.4 notify the Agency within 21 days of;
  - (a) the commencement of the Works; and
  - (b) the Date of Practical Completion of the Works;
- 7.1.5 provide the Agency with such information as the Agency may reasonably require in connection with the Project or the Works or any permitted variations thereto from the date hereof to the End Date;
- 7.1.6 on a Quarterly basis from the date of this Agreement until one year after the Date of Practical Completion of the Works use reasonable endeavours to provide to the Agency a report detailing KCC's performance against the Milestones;
- 7.1.7 provide, with the final Claim for Funding, an exit report detailing;
  - (a) a final statement on the progress of the Works as against the Project Programme and any deviation from the Project Programme;
  - (b) a final Project Expenditure Statement compared against the Estimated Qualifying Expenditure and detailing any deviation from the Estimated Qualifying Expenditure;
  - (c) a statement of realised and/or anticipated outputs from the Works and any other benefits anticipated to be derived from the provision of Funding for the Works;
- 7.1.8 on an annual basis submit to the Agency on or before 30 September each year an independent certification from an appropriate professionally recognised entity on the validity and accuracy of all Claims made in relation to the Project. The Agency may, from time to time, request copies of these certificates;
- 7.1.9 if requested in writing by the Agency, notify the Agency of the date of receipt of any financial contribution or payment of Strategic Tariff or CIL to which clause 6.5 applies.
- 7.1.10 provide the Agency with such other information as may be reasonably requested by the Agency.

## **7.2 Notification and Material Changes**

- 7.2.1 In addition to its reporting obligations under clause 7.1, KCC (and in the case of sub-clauses (c) and (d) ABC) shall notify the Agency in writing:-
  - (a) as soon as reasonably practicable thereafter in the event of a Material Change;

- (b) as soon as reasonably practicable thereafter of any event which might materially adversely affect the carrying out and completion of the Project and the Works or any part thereof;
- (c) as soon as reasonably practicable thereafter, in the event of the receipt by it or ABC of any other Public Sector Financial Assistance or the offer of same, in respect of the Project or the Works;
- (d) as soon as reasonably practicable if it considers that;
- (i) it may not be able to comply with its obligations in Clause 6.5; or
- (ii) the cumulative total shown in the final column of the table in Schedule 4 is unlikely to be achieved;
- (e) on the occurrence of an Event of Default.

7.2.2 Notwithstanding the provisions of clause 7.1 KCC shall notify the Agency each time a Claim for Funding is made of every Material Change.

7.2.3 In the event of notification under clauses 7.2.1 or 7.2.2, KCC shall provide, together with such notification, a proposal for resolution or mitigation of the change in Estimated Qualifying Expenditure or the effects of the event as relevant and shall take into account all representations of the Agency on such proposals.

### 7.3 Change Control

The Agency acknowledges that the Project Programme and the Milestones are indicative and may require amendment from time to time during the course of the Project. Where KCC considers that it will be unable to meet a Milestone or for any other reason a change to the Project Programme will be required KCC shall promptly notify the Agency and ABC in writing. Thereafter the Parties' representatives shall meet and endeavour (acting reasonably and in good faith) to unanimously agree such amendments to the Project Programme or changes to the Milestones or such other course of action as may be required and is appropriate in order to ensure that the Project may be completed.

### 7.4 Inspection and audit facilities

KCC shall:-

- 7.4.1 until the End Date or, if relevant, for such longer period to comply with a Statutory Requirement, retain documentary evidence of all capital and revenue purchases to support all amounts claimed from the Agency. These records shall include an invoice register of suppliers' and contractors' invoices and the carrying on of Works funded by the Agency or other amounts claimed under this Agreement;
- 7.4.2 subject to the Agency procuring that all persons entering comply with KCC's reasonable requirements regarding access including reasonable security and health and safety requirements, until the End Date allow or procure access to its business premises on five Working Days notice during 9.00 am-5.00 pm to the Agency's internal auditors or its other duly authorised staff or agents, Government Office, European Commission or the National Audit Office to inspect such documents and take copies (at the cost of the Agency) thereof as the Agency considers necessary in connection with this Agreement. The Agency shall be entitled to interview employees of KCC in order to obtain oral and/or written explanations of documents and KCC shall provide access to the relevant employees at such times as may be reasonably required to enable the Agency to do so. The Agency reserves the right to have such staff or agents carry out examinations into the probity, economy, efficiency and effectiveness with which KCC has used the Agency's resources in relation to the Works and the performance of this Agreement;



7.4.3 until the End Date permit the Agency or persons authorised by it to inspect the Works and to inspect, audit and take copies of the cost of the Agency of all reports, books, accounting records and vouchers which relate to the Agency's funding of the Works provided that in inspecting the Works the Agency:-

- (a) may not impede or obstruct the progress of the Works;
- (b) may not issue any instruction to the Works Contractor or to any workman employed on the Works (including without limitation any instruction to open up or to test any Works);
- (c) shall comply with any safety induction procedures of the Works Contractor or reasonable requirements of the Works Contractor in the interest of health and safety or to prevent any interference with the progress of the Works.

7.4.4 until the End Date maintain full and accurate accounts for the Works in accordance with all applicable law and accounting standards and (to the extent that no accounting standard is applicable) use generally accepted accounting principles and practices of the United Kingdom then in force. For the purpose of this Clause 7.4.4 "**Accounting Standards**" means the statements of standard accounting practice referred to in section 464 of the Companies Act 2006 issued by the Accounting Standards Board;

7.4.5 provide the Agency with a copy of the external audit report commissioned by KCC in respect of the Project and the Works within 21 days of KCC's receipt of the same.

## 8. EVENTS OF DEFAULT OR JEOPARDISING EVENTS

8.1 Each of the Agency, KCC and ABC agree that so far as is practicable they will endeavour to consult with each other before the Agency takes action in relation to an Event of Default or a Jeopardising Event.

8.2 KCC will have committed an Event of Default where:-

8.2.1 the Works or any part thereof have not been carried out in accordance with the Consents or otherwise in compliance with all relevant Statutory Requirements and KCC has failed or refused to take such steps as may be required to remedy such failure under the terms of the Works Contract within a reasonable period (having regard to the nature of the default) such period to be specified in a notice in writing served by the Agency upon KCC;

8.2.2 the Works or any part thereof have not been carried out in a good and workmanlike manner in accordance with the Works Specification and KCC has failed or refused to take such steps to remedy such failure under the terms of the Works Contract within a reasonable period (having regard to the nature of the default) such period to be specified in a notice in writing served by the Agency upon KCC; or

8.2.3 the Works have not been carried out in accordance with the obligations contained in this Agreement and by the Works Longstop Date (subject to Force Majeure);

8.2.4 it materially breaches its obligations under this Agreement.

8.3 ABC will have committed an Event of Default where ABC materially breaches its obligations under this Agreement.

8.4 A Jeopardising Event occurs when;

8.4.1 any Milestone has not been achieved by the relevant date in the Project Programme which has a material effect on the likelihood of the Project and the Works being completed in accordance with this Agreement;

- 8.4.2 any representation or warranty made pursuant to this Agreement, or included in an Inception Report, is incorrect and the error either is material in relation to the likelihood of the Project and the Works being completed in accordance with this Agreement, or was material in relation to any decision by the Agency in relation to Funding;
- 8.4.3 an event of Force Majeure occurs which has a material effect on the likelihood of the Project and the Works being completed in accordance with this Agreement but the Parties have not decided to abandon the Project under clause 5.2.
- 8.5 Where an Event of Default or Jeopardising Event has occurred (which is capable of remedy) the Agency may by notice to KCC (copied to ABC), or where the Event of Default is by ABC, to ABC (copied to KCC), require KCC (or ABC as appropriate) to prepare a plan to remediate and/or mitigate the effects of the Event of Default or the Jeopardising Event ("**Remediation Plan**") in accordance with the following provisions:
  - 8.5.1 KCC, or where the Event of Default is by ABC, ABC, shall submit a proposed Remediation Plan to the Agency within 10 Working Days of such requirement;
  - 8.5.2 the Agency (acting reasonably and in good faith) shall within 10 Working Days of receipt of the proposed Remediation Plan (and any further information required by the Agency) indicate in writing whether it is acceptable or, if not, indicate in writing any amendments that it requires to the Remediation Plan;
  - 8.5.3 following receipt of confirmation by the Agency that it accepts the terms of the Remediation Plan, KCC (or ABC as appropriate) shall forthwith take steps to implement and carry out the Remediation Plan in accordance with its terms.
- 8.6 The Agency may by notice to KCC and ABC suspend the payment of Funding whilst agreement is being sought over a Remediation Plan, and if at any time after a Remediation Plan has come into effect in accordance with clause 8.5.3, it becomes apparent that KCC (or ABC as appropriate) has failed to implement or carry out the Remediation Plan in accordance with its terms the Agency may by notice to KCC and ABC:
  - 8.6.1 suspend or alter the timing of the payment of Funding under this Agreement in relation to the Project or the Works for such period as the Agency shall determine; and/or
  - 8.6.2 require KCC to reimburse any Funding previously paid to KCC which does not relate to an item of Qualifying Expenditure which has been properly incurred by KCC as at the date KCC receives the Agency's notice, and KCC agrees that upon receipt of notice requiring reimbursement it shall reimburse the sums required within 28 days of receipt of such notice.
- 8.7 In the case of:
  - 8.7.1 an Event of Default or a Jeopardising Event which is not capable of remedy; or
  - 8.7.2 an Event of Default or a Jeopardising Event which is capable of remedy but has not been remedied by KCC (or ABC as appropriate) to the reasonable satisfaction of the Agency within such reasonable period as has been specified by the Agency by notice to that effect, or in accordance with an accepted Remediation Plan

then the Agency (acting reasonably) may terminate this Agreement by giving notice of termination to KCC and ABC and upon receipt of such notice:-

  - 8.7.3 (save in respect of Qualifying Expenditure incurred properly and in good faith by KCC prior to its receipt of notice of termination) the Agency shall cease to be under any obligation to provide any further Funding under this Agreement and (in addition) may by notice to KCC and ABC require KCC to reimburse any Funding previously paid to KCC which does not relate to an item of Qualifying Expenditure which has been properly incurred by KCC as at the date KCC receives the Agency's notice; and

- 8.7.4 notwithstanding such termination, ABC and KCC shall continue to perform their respective obligations under clauses 6.5, 6.6, and 6.7 (and any appropriate ancillary obligations).

8.8 In relation to the exercise by the Agency of its rights in this Clause 8:-

- 8.8.1 if the Agency shall suspend the payment of Funding pursuant to Clause 8.6, in the sole opinion of the Agency due to an Event of Default or Jeopardising Event which is capable of remedy, and KCC (or ABC as appropriate) shall, after notice in writing from the Agency, remedy the relevant Event of Default or Jeopardising Event within such period (as shall be specified in the notice) as the Agency shall determine to be reasonable (or such extended period as the Agency may thereafter determine in its discretion) or in accordance with an accepted Remediation Plan the Agency shall not (subject to the other provisions of this Agreement) continue such suspension after KCC (or ABC as appropriate) shall have so remedied the Event of Default or the Jeopardising Event to the satisfaction of the Agency as aforesaid;
- 8.8.2 the exercise by the Agency of its rights under Clause 8.6 in respect of an Event of Default or Jeopardising Event shall not preclude the exercise thereafter by the Agency of any other rights which it may have under Clause 8 in respect of the same Event of Default or Jeopardising Event; and
- 8.8.3 the exercise by the Agency of its rights under Clause 8 shall be without prejudice to any other right of action or remedy of the Agency (including any claim for damages in respect of loss incurred in respect of any breach by KCC or ABC of the provisions of this Agreement).

8.9 **Reinstatement**

Without prejudice to any other remedy, if any part of the Works is not carried out in accordance with this Agreement in all material respects then the Agency shall be entitled, at the Agency's option, to assess the cost of remedying the failure ("**the Remedy Cost**") and after giving notice to ABC and KCC to deduct from any sums due to ABC or KCC the Remedy Cost for the period that such failure continues.

9. **PUBLICITY**

9.1 **Marketing Material**

KCC (and ABC except in relation to clause 9.1.3) shall:-

- 9.1.1 Acknowledge, and KCC shall procure that the Works Contractor shall insofar as may be reasonable acknowledge, the receipt of Funding from the Agency in such manner as the Agency may from time to time reasonably require to enable the Agency to publicise its involvement in the Works;
- 9.1.2 use reasonable endeavours to inform the Agency at least ten Working Days prior to any promotional event relating to the Works; and
- 9.1.3 procure from a date not later than the Date of Practical Completion of the Works that if and for so long as KCC maintains advertising or signage in relation to the provision of the Works on or in the vicinity of the Works such advertising or signage includes a plaque recognising the Agency's involvement in the Works in a location approved in writing by the Agency.

9.2 **SEEDA Logo**

- 9.2.1 The Agency grants KCC and ABC and the Works Contractor during the term of this Agreement a non-exclusive licence to use the SEEDA Logo only for the purposes set out in Clause 9.1. KCC and ABC shall not and KCC shall procure that the Works Contractor shall not assign or grant sub-licences of this licence or any part of it and shall not use the SEEDA Logo for any other purposes save where approved in advance in writing by the Agency.

- 9.2.2 KCC and ABC acknowledge that the SEEDA Logo is owned by and shall remain the property of the Agency. KCC and ABC shall not acquire any further or other rights in respect of the SEEDA Logo by reason of the exercise of the rights granted by this Agreement.

## 10. REPUTATION OF THE AGENCY

- 10.1 KCC shall not, and shall use all its reasonable endeavours to procure that its suppliers and contractors shall not, knowingly do or omit to do, anything in relation to this Agreement, the Works or in the course of their other activities, that may bring the standing of the Agency into disrepute or attract adverse publicity for the Agency.

## 11. FREEDOM OF INFORMATION

### 11.1 Freedom of Information

- 11.1.1 Nothing in this Agreement shall prevent the Agency, KCC or ABC (hereinafter in this clause "the parties") from disclosing any Information which any party in its absolute discretion considers it is required to disclose in order to comply with the FOIA and/or the Environmental Information Regulations and any other statutory requirements whether or not existing at the date of this Agreement, PROVIDED ALWAYS that the parties shall, where reasonably practicable, seek to collaborate in relation to Requests for Information with a view to treating such requests in a consistent manner as between the parties.
- 11.1.2 If a party (the "**Recipient**") shall at any time notify any of the other party(s) (the "**Assistor**") that it has received a Request for Information in respect of which the Recipient reasonably requires the Assistor's assistance then:-
- (a) the Assistor shall at its own cost provide and procure that its sub-contractors (which expression shall for the purposes of this Clause 11.1 include the Works Contractor where the Assistor is KCC) use reasonable endeavours to provide all necessary assistance reasonably required by the Recipient in order to allow the Recipient to comply with the Request for Information within the period or periods when it is obliged to respond to the Request for Information; and
  - (b) without limitation to the foregoing the Assistor shall at its own cost within five Working Days of request supply and procure that its sub-contractors supply to the Recipient such Information and documents as are reasonably requested by the Recipient (but excluding any which the Assistor considers to be exempt information as defined in section 84 of the FOIA) in such form as reasonably prescribed by the Recipient.
- 11.1.3 The parties shall ensure that all Information produced in the course of the Works in relation to the Works and/or this Agreement is retained in line with their usual policies and shall permit a Recipient of a Request for Information to inspect such records as required from time to time (but excluding any Information which the party holding it considers to be exempt information as defined in section 84 of the FOIA)
- 11.1.4 In the event that any party ("the Recipient") shall at any time receive any Request for Information relating to the Works or this Agreement or any activities or business of the Recipient relating to the Works or this Agreement then the Recipient shall endeavour to supply the Request for Information to the other party(s) as soon as reasonably practicable after receipt and shall, prior to responding to any Request for Information, allow the other party(s) to make representations to the Recipient as to whether or not or on what basis Information held by the Recipient at the date of its receipt of the Request for Information and requested in the Request for Information should be disclosed to the requester, and whether further information should reasonably be provided by the requester in order to identify and locate the information requested, provided always that the Recipient of the Request for Information shall be responsible for determining at its absolute discretion:-

- (a) whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations;
- (b) whether the Information is to be disclosed in response to the Request for Information;

and shall be entitled to respond to a Request for Information within the statutory timeframe for response, whether or not the other party/ies have made any such representations.

## **12. REPRESENTATIVES**

### **12.1 Authority of KCC and ABC Representatives**

KCC Representative(s) and ABC Representative(s) shall have full authority to act on behalf of their appointing Party for all purposes of this Agreement. The Agency and the Agency Representative shall be entitled to treat any act of the KCC Representative(s) or the ABC Representative(s) in connection with this Agreement as being expressly authorised by their appointing Party (save where that appointing Party has notified the Agency in writing that such authority has been revoked) and the Agency shall not be required to determine whether any express authority has in fact been given.

### **12.2 KCC Representatives' and ABC Representative's Power to Delegate**

The KCC Representative(s) and the ABC Representative(s) may from time to time authorise any of their subordinates to exercise any of their respective powers under this Agreement by notice in writing of the same to one another and the Agency.

### **12.3 Authority of Agency Representative**

The Agency's Representative shall have full authority to act on behalf of the Agency for all purposes of this Agreement. KCC and ABC shall be entitled to treat any act of the Agency Representative in connection with this Agreement as being expressly authorised by the Agency (save where the Agency has notified KCC or ABC (as the case may be) in writing that such authority has been revoked) and neither KCC nor ABC shall be required to determine whether any express authority has in fact been given.

### **12.4 Agency Representative's Power to Delegate**

The Agency Representative may from time to time authorise any of its subordinates to exercise any of the Agency Representative's powers under this Agreement by notice in writing of the same to KCC and ABC.

### **12.5 Notices**

Subject to Clause 17, any notice, information, instructions or public communication given to:-

- 12.5.1 KCC Representative shall be given in writing and shall be deemed to have been given to KCC;
- 12.5.2 ABC Representative shall be given in writing and shall be deemed to have been given to ABC;
- 12.5.3 the Agency Representative shall be given in writing and shall be deemed to have been given to the Agency;

**12.6 Successor Representatives**

Any Party may change the identity of their respective Representative and shall appoint a successor following (as far as practicable) consultation with the other prior to the appointment of any replacement, taking account of the need for liaison and continuity in respect of this Agreement.

**13. STATUS OF KCC AND ABC**

13.1 In carrying out its obligations under this Agreement each of KCC and ABC agree that they will be acting on their own account as principal and not as the agent or partner of each other or of the Agency and neither KCC nor ABC shall be liable for any breach or default by the other.

13.2 Neither KCC nor ABC shall say or do anything which may pledge the credit of or otherwise bind the Agency or each other or that may lead any other person to believe that KCC or ABC is acting as the Agency or on behalf of the other.

**14. ASSIGNMENT AND SUB-CONTRACTING**

14.1 Each of the Agency, KCC and ABC may assign or novate its rights and/or obligations under this Agreement to a statutory successor body or where Government dictates this and in such circumstances the affected party will give the other party notice of the anticipated statutory assignment as soon as possible after the party has become aware of it and will notify the other parties within 5 Working Days of the completion of the statutory assignment.

14.2 The Agency may assign or novate any or all of its rights and/or obligations under this Agreement to:-

14.2.1 any separate entity or joint venture (whether corporate or contractual) to which it is party established in connection with the RIF; and/or

14.2.2 any other person providing finance (including by way of grant funding, debt finance or otherwise) in connection with the RIF.

14.3 Subject to Clause 14.1 and Clause 14.2 this Agreement is personal to the Parties who, except as expressly provided in this Agreement, may not, without the prior written consent of the other Parties, novate, assign, sub-license, sub-contract, transfer or charge this Agreement or any part of it.

**15. VALUE ADDED TAX**

15.1 The Parties believe that this Agreement does not constitute a supply or an agreement to supply services by KCC or ABC and that the payment of the Funding by the Agency under this Agreement is outside the scope of Value Added Tax, but if Value Added Tax is payable on any sum or other consideration under this Agreement then it is payable in addition upon receipt of a valid Value Added Tax invoice.

**16. NO FETTERING OF DISCRETION/STATUTORY POWERS**

16.1 Nothing contained in or carried out pursuant to this Agreement and no consents given by the Agency, shall unlawfully prejudice the Agency's or KCC's or ABC's rights powers or duties and/or obligations in the exercise of its functions or under any statutes, byelaws, instruments, orders or regulations.

**17. NOTICES**

17.1 Any notice or notification required to be served or given under this Agreement shall be in legible English and served as follows:-

17.1.1 in relation to notices to be served upon the Agency, by personal delivery or by sending it by recorded postal delivery to Cross Lanes Guildford GU1 1YN and marked for the attention of

the Agency Representative or to such other address as shall from time to time be notified in writing by the Agency to the other Parties;

17.1.2 in relation to notices to be served upon KCC or ABC, by personal delivery or by sending it by recorded postal delivery to their respective addresses specified in this Agreement and marked for the attention of the KCC Representative or the ABC Representative (as the case may be) or to such other addresses as shall from time to time be notified in writing by KCC or ABC to each of the other Parties;

17.2 Any such written notice shall (where sent by post) be deemed unless otherwise proved to have been served and received on the second business day following the day of posting and where delivered personally be deemed to have been given when received.

## **18. DISPUTES**

### **18.1 Use of Senior Officers**

If any dispute arises between any of the Agency, KCC and/or ABC relating to or arising out of this Agreement any party involved shall in the first instance notify the other that the dispute is to be considered by Senior Officers in order to seek a resolution of such dispute. The Senior Officer for the Agency will be the Agency Representative, for KCC will be Mike Austerberry, Executive Director for Environment, Highways and Waste and for ABC will be its Chief Executive Mr. John Bunnett. Each Party may change the details of such Senior Officers by written notice to the others.

### **18.2 Independent determination**

If resolution by Senior Officers under Clause 18.1 has not been possible within 30 days of reference to them under Clause 18.1 any party may give to the other parties involved written notice requiring the dispute to be determined by an independent expert under Clause 18.3.

### **18.3 Independent expert**

The Parties shall refer such disputes to:-

18.3.1 a professionally qualified expert (which may be an accountant, surveyor or other professional dependent on the nature of the dispute) having not less than ten (10) years' experience in the subject matter of the dispute; and

18.3.2 is to be appointed by agreement between the Parties or, in the absence of agreement, appointed pursuant to Clause 18.4.

### **18.4 Making of the appointment**

Any dispute over the appointment of the expert is to be referred at the request of any of the Parties involved to the President or other senior available officer of the professional body which represents experts of the relevant type, who may appoint an expert to determine the dispute and the parties involved in the dispute agree to accept the appointment of such expert.

### **18.5 Arbitration**

The expert is to act as an arbitrator and:-

18.5.1 all submissions made or evidence supplied to him are to be in writing unless the parties agree within ten (10) Working Days of his appointment that this requirement does not apply;

18.5.2 the date of his award will be deemed to be the date on which he serves a copy of the award on the Parties concerned;

18.5.3 he will not be entitled to order the rectification, setting aside or cancellation of this Agreement or any other deed or document;



18.5.4 he will not be entitled to direct that the recoverable costs of the arbitration, or any part of it, be limited to a specified amount; and

18.5.5 he will not be entitled to require that security be provided in respect of the costs of the arbitration.

#### 18.6 **Costs**

Responsibility for the costs of referring a dispute to an expert under this Clause 18 including costs connected with the appointment of the expert, but not the legal and other professional costs of any party in relation to a dispute, will be decided by the expert.

#### 18.7 **Matters of law**

This Clause 18 shall apply to disputes of a technical nature only and shall not apply to matters of law or to matters relating to the interpretation of this Agreement or the consequences of breach hereof and such matters will be subject to the jurisdiction of the courts.

### 19. **MISCELLANEOUS**

19.1 This Agreement confers no permission, consent or approval other than for the purposes of the Regional Development Agencies Act 1998.

19.2 Nothing in this Agreement shall constitute a partnership or joint venture between any of the parties hereto or constitute either KCC or ABC as the agent of the Agency or of each other for any purpose whatsoever.

19.3 Without prejudice to Clause 4.7 this Agreement may only be amended by a Deed duly executed by all the Parties.

19.4 If at any time any of the provisions of this Agreement become illegal, invalid or unenforceable in any respect under any law or regulation of any jurisdiction, neither the legality validity or enforceability of the remaining provisions of this Agreement shall be in any way affected or impaired as a result.

19.5 The Parties acknowledge that no Party is obliged to perform any obligation under this Agreement if the Courts finally determine that it would be unlawful to do so.

19.6 Where any amount is due to be paid by one Party to another under this Agreement, the relevant Party with the liability to pay shall pay interest thereon at the rate of 2% per annum above the Bank of England base interest rate compounded with rests on the usual quarter days for the period between the date on which the relevant amount should have been paid and the date on which it is paid (as well after as before judgment).

19.7 No failure or delay on the part of the Agency in exercising any right or power and no course of dealing between the Parties hereto shall operate as a waiver nor shall any single or partial exercise of any right or power of the Agency prevent any other or further exercise thereof or the exercise of any other right or power of the Agency. The rights and remedies of the Agency are cumulative and not exclusive of any rights or remedies which the Agency would otherwise have.

19.8 Nothing contained in or done under this Agreement and no consents given by the Agency shall prejudice or unlawfully fetter the Agency's rights, powers or duties and/or obligations in the exercise of its functions or under any statutes, bye-laws, instruments orders or regulations.

19.9 Nothing contained in or done under this Agreement and no consents given by KCC or ABC shall prejudice or unlawfully fetter KCC's or ABC's rights, powers or duties and/or obligations in the exercise of its functions or under any statutes, bye-laws, instruments orders or regulations.

- 19.10 Any approval by the Agency or any person on behalf of the Agency pursuant to this Agreement of any matter submitted by ABC for approval shall not be deemed to be an acceptance by the Agency of the correctness or suitability of the contents of the subject of the approval or consent.
- 19.11 The Agency shall not be liable to the other Parties for any advice given by a representative of the Agency. In addition, the Agency gives no assurance as to the suitability or viability of the Works and no endorsement of the same.
- 19.12 Nothing in this Agreement shall confer any rights or obligations on any person who has not executed this Agreement nor shall the consent of any person who has not so executed this Agreement be needed to make any modification, amendment, variation or release of the terms hereof. The parties to this Agreement expressly agree for the purposes of the Contracts (Rights of Third Parties) Act 1999 that they do not intend any person other than a Party to this Agreement to be able to enforce any term of this Agreement.
- 19.13 KCC, ABC and the Agency shall each act reasonably (and without delay) in deciding whether to give any consent, agreement, determination, or approval, or express its satisfaction, and whether to give any such consent, agreement, determination, or approval, or express its satisfaction, subject to restrictions, terms or conditions unless otherwise provided for in this Agreement and/or to do so would fetter its statutory powers, rights or obligations.
- 19.14 This Agreement and the documents referred to in it, constitute the entire agreement between the Parties and supersede and replace any previous agreement, understanding, representation or arrangement of any nature between the parties relating to the subject matter of this Agreement.
- 19.15 This Agreement may be executed in any number of counterparts and each counterpart shall, when executed be an original of this Agreement and all counterparts together shall constitute one instrument.
- 19.16 In connection with this Agreement the Parties shall and shall ensure that their respective officers and employees shall act at all times in a way which is compatible with the Convention Rights within the meaning of the Human Rights Act 1998.
- 19.17 In connection with this Agreement the Parties shall co-operate with one another in order to enable each party to fulfil its statutory obligations under the Data Protection Act 1998.
- 19.18 This Agreement shall be governed by and construed in accordance with the laws of England.

**IN WITNESS** of which this instrument has been duly executed as a deed and delivered on the date written at the beginning of this deed.

**SIGNED** as a Deed )  
(but not delivered until dated) by )  
**SOUTH EAST ENGLAND DEVELOPMENT** )  
**AGENCY** )  
corporate seal hereto affixed )  
authenticated by:- )

Authorised Signatory

Authorised Signatory

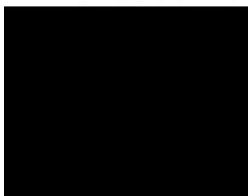
**THE COMMON SEAL of** )  
**ASHFORD BOROUGH COUNCIL** )  
was affixed to this Deed )  
in the presence of:- )  
)  
)

Mayor

Solicitor

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

Authorised Signatory



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## SCHEDULE 1

### DEFINITIONS

1. In this Agreement (including in the Background and Schedules) the following words and expressions shall have the following meanings unless the context otherwise requires:-

<b>"ABC Representative"</b>	ABC's Chief Executive, currently John Bunnett
<b>"A20 Drovers Roundabout Works"</b>	the Works as defined in a RIF Funding Agreement of even date and made between (1) the Agency (2) ABC and (3) KCC in respect of the A20 Drovers Roundabout
<b>"Accountable Body"</b>	the Agency having responsibility for the legal and financial project management of the RIF
<b>"Agency's Representative"</b>	the Agency's Chief Executive or such other person who may be nominated by the Agency giving written notice to the other parties from time to time
<b>"Ashford Growth Area"</b>	the town of Ashford and its immediate surrounding area identified as a growth area by the Core Strategy (or such part of the statutory development plan which replaces the Core Strategy from time to time)
<b>"Certificate of Practical Completion"</b>	any certificate or statement to be issued by the contract administrator in accordance with the Works Contract certifying that Practical Completion has taken place

**"CIL"**

- payment of community infrastructure levy required under Part 11 of the Planning Act 2008 and/or any relevant regulation and/or charging schedule adopted thereunder in connection with the grant of planning permission for and/or development of and/or change of use of any land for any dwellings in the Ashford Growth Area

and/or

- financial contribution levy charge tariff or tax required to be made or paid to an LPA in connection with the grant of planning permission for and/or development of and/or change of use of any land for any dwellings in the Ashford Growth Area by or under any successor legislation to Part 11 of the Planning Act 2008 and/or any relevant regulation and/or document thereunder which provides for a contribution levy charge tariff or tax to similar effect

but in either case excluding any payment or contribution required to be made or paid under any Section 278 Agreements or Notified Section 106 Obligations

<b>"Claim"</b>	an application for Funding in the form of the Claim Form
<b>"Claim Form"</b>	a claim form in the form annexed in Schedule 6 or such other form as shall be agreed by the Agency
<b>"Consents"</b>	any necessary approval, authorisation, consent, exemption, licence, permit, permission or registration by or from any governmental or other authority, the local planning authority, landlord, funder, adjoining land owner or any other person in relation to the Works or any part thereof or otherwise required to enable the same to be lawfully carried out and maintained
<b>"Core Strategy"</b>	the meaning given in recital (C)
<b>"Date of Practical Completion"</b>	the date certified in the relevant Certificate of Practical Completion as the date when Practical Completion of the Works (or as the case may be a relevant part thereof) was achieved and where in respect of the whole or any relevant part of the Works more than one Certificate of Practical Completion is issued the Date of Practical Completion of the Works or the relevant part (as the case may be) shall be the date certified in the last certificate issued in respect of the Works or such relevant part and references in this Agreement to the <b>"Date of Practical Completion of the Works"</b> are references to the date certified in the last Certificate of Practical Completion issued in respect of any Works undertaken under this Agreement
<b>"End Date"</b>	the date six years after the Date of Practical Completion of the Works
<b>"Environmental Information Regulations"</b>	the Environmental Information Regulations 2004 together with any guidance and/or codes of practice issued pursuant to or in relation to such legislation
<b>"Estimated Qualifying Expenditure"</b>	indicative anticipated amount of Qualifying Expenditure as shown in paragraph 2 of Schedule 3
<b>"Estimated Qualifying Expenditure Profile Plan"</b>	the indicative timing profile of Estimated Qualifying Expenditure set out in Schedule 3
<b>"Eureka Park Section 278 Agreement"</b>	an agreement (in a form approved by the Agency and ABC) intended shortly to be entered into between KCC and The Master Fellows and Scholars Of The College of The Holy and Undivided Trinity within the Town and University Of Cambridge of King Henry The Eighth's Foundation, Trinity College (Csp) Limited and Quadrant Holdings Limited pursuant to section 278 of the Highways Act 1980 by which The Master Fellows and Scholars Of The College of The Holy and Undivided Trinity within the Town and University Of Cambridge of King Henry The Eighth's Foundation, Trinity College (Csp) Limited and Quadrant Holdings Limited will be obliged to make financial contributions to KCC totalling £2.7 million specifically in respect of

	the Works and/or the repayment of Funding
<b>"EU Procurement Requirements"</b>	all applicable United Kingdom and European Union procurement legislation and any implementing measures and any other legislation in connection with the procurement of works, supplies or services including European Union directives 2004/18/EC, 89/665/EEC and 2004/17/EC, United Kingdom Statutory Instruments 1991/268, 1995/201, 1993/3228 and 2006/6 insofar as the same are applicable
<b>"Event of Default"</b>	any of the events or circumstances described in Clause 8.2 or 8.3
<b>"FOIA"</b>	the Freedom of Information Act 2000 and any subordinate legislation made thereunder from time to time together with any guidance and/or codes of practice issued pursuant to or in relation to such legislation
<b>"Force Majeure"</b>	<p>those events or circumstances as follows:-</p> <ul style="list-style-type: none"><li>(a) war, civil war, armed conflict or terrorist attack;</li><li>(b) nuclear, chemical or biological contamination of the site of the Works and its surroundings arising from war, civil war, armed conflict or terrorist attack;</li><li>(c) any matter which would entitle the Works Contractor to an extension of time under the Works Contract other than any matter arising from the default of KCC under the terms of the Works Contract</li><li>(d) any delay caused to the Works programme as a result of KCC being required to appoint an alternate works contractor following the termination of the Works Contract (for whatever reason) or in the event that the Works Contractor becomes insolvent.</li><li>(e) any other unpredictable occurrence which impacts upon the Works programme which is beyond the responsibility or control of KCC or the Works Contractor;</li></ul>
<b>"Funding"</b>	sums necessary to pay for any Qualifying Expenditure and which shall not exceed the Maximum Sum
<b>"Funding Advanced"</b>	<p>Funding which has been paid by the Agency to ABC net of:-</p> <ul style="list-style-type: none"><li>(i) any such Funding which has been reimbursed to the Agency by either ABC or KCC under any provision of this Agreement other than clause 6.5 (Repayment of Funding Advanced); and</li><li>(ii) any such Funding which is due to be reimbursed to</li></ul>

	the Agency by KCC under clauses 4.5, 8.6.2 and/or 8.7.3
<b>"Highway Authority"</b>	local highway authority as defined by sections 329(1) and 1(2) of the Highways Act 1980 (or any successor legislation making similar provision) for the area in which the Works are situated, that is to say at the current time KCC, and/or the Highways Agency as the case may be
<b>"Inception Report"</b>	a report substantially in the form set out in Schedule 7 required to be delivered by KCC to the Agency under clause 4.4.1(c)
<b>"Information"</b>	the meaning given under section 84 of the FOIA
<b>"Infrastructure Planning Commission"</b>	the body of that name created by section 1 of the Planning Act 2008 and any successor and/or other body (not being an LPA the Secretary of State or a planning inspector) in which the power of making a town and country planning decision may from time to time be vested
<b>"Instalment Periods"</b>	the period from 1 <sup>st</sup> April 2009 to 31 <sup>st</sup> March 2010 inclusive and thereafter the period commencing on the first day of each Quarter and ending on the last day of each Quarter inclusive the last of which shall expire not later than 15 months after the Date of Practical Completion of the Works or within such longer period as the Agency may agree in writing and "Instalment Period" shall be construed accordingly
<b>"Jeopardising Event"</b>	the meaning given in clause 8.4
<b>"Junction 10 Interim Scheme"</b>	the meaning given to that term in the Park Farm Agreement
<b>"Junction 10A Works"</b>	works to further improve Junction 10 of the M20 motorway in the future by way of the provision of a new Junction 10A and link road in the vicinity of the A20 and A2070 roads in Ashford Kent
<b>"KCC's Representative"</b>	Mike Austerberry, Executive Director for Environment, Highways and Waste



<b>"LPA"</b>	local planning authority as defined by section 1(1) of the Town and Country Planning Act 1990 or any successor legislation making similar general provision (and for the avoidance of doubt not including section 37 of the Planning and Compulsory Purchase Act 2004)
<b>"Material Change"</b>	a material change in the information on costs (whether actual or estimated) of carrying out the Works as detailed in the Estimated Qualifying Expenditure Profile Plan or the arising of any event which materially affects the continued accuracy of such information and for the avoidance of doubt a material change shall mean a fluctuation of One hundred thousand pounds (£100,000) or more;
<b>"Maximum Sum"</b>	the sum in paragraph 3 of Schedule 3 being the maximum amount of Funding to be provided by the Agency under this Agreement
<b>"Milestone"</b>	each of the indicative target milestones set out in paragraph 1 of Schedule 3
<b>"Notified Section 106 Obligations"</b>	<p>all Section 106 Obligations (or specifically-identified parts thereof) which may be:-</p> <p>(a) entered into after the date hereof (either by way of agreement between ABC and/or KCC in the capacity of LPA and a third party or by way of unilateral undertaking by a third party in favour of ABC and/or KCC in the capacity of LPA) (in a form approved by the Agency, and by ABC where ABC is not a party) by which a third party is and/or will be obliged to make any financial contribution to ABC and/or KCC in the capacity of LPA specifically in respect of the Project and/or the Works and/or the repayment of Funding</p> <p>and</p> <p>(b) expressly notified in writing either to the Agency and KCC by ABC or to the Agency and ABC by KCC as being a Notified Section 106 Obligation for the purposes of this Agreement</p>
<b>"Other Transport Infrastructure"</b>	strategic transportation infrastructure and/or facilities (other than the Works, the A20 Drivers Roundabout Works, the Junction 10 Interim Scheme, and the Junction 10A Works) which are required (in the view of ABC in its absolute discretion) to support and/or enable and/or service and/or provide access to development(s) in the Ashford Growth Area
<b>"Park Farm Agreement"</b>	the existing Section 106 Obligation dated 22 December 2005 and made between (1) ABC (2) KCC (3) Taylor Woodrow Developments Limited and (4) Pelham Homes Developments Limited (under which ABC is required to make certain payments to Taylor Woodrow Developments Limited as referred to in clause 1.13 thereof by way of reimbursement of its forward-funding of the Junction 10 Interim Scheme)

	and such (if any) amended or successor arrangement which ABC may make with the approval of the Agency
<b>"Partnership Board"</b>	the meaning given in recital (G)
<b>"Plans"</b>	the plans attached at Schedule 5
<b>"Practical Completion"</b>	completion of the Works (or where this Agreement expressly so provides, a part of the Works) in accordance with the definition of Practical Completion in the Works Contract;
<b>"Project"</b>	the scheme (embodied in various agreements made between KCC and other parties including this Agreement) to plan, fund, procure, acquire land for and deliver the Works
<b>"Project Expenditure Statement"</b>	a financial statement prepared by KCC showing a running balance of the Project Expenditure actually incurred
<b>"Project Expenditure"</b>	the actual and/or accrued Qualifying Expenditure from time to time
<b>"Project Programme"</b>	the development programme as approved in writing by the Agency from time to time an indicative version of which is attached to this Agreement at Schedule 3
<b>"Public Sector Financial Assistance"</b>	any funding (other than the Funding) received or receivable by KCC or ABC specifically in respect of Qualifying Expenditure from public sector bodies (including for this purpose funding from the European Commission, government bodies (whether national or local) or bodies in receipt of lottery funds from the National Lottery Distribution Fund pursuant to the National Lotteries Acts 1993 and 1998 and from the housing market renewal budget but not including any such funding received or receivable under any Notified Section 106 Obligations and/or Section 278 Agreements and/or under any bond given under Notified Section 106 Obligations and/or Section 278 Agreements) save for such funding which the Agency took into account in evaluating the Project and/or the Works and any Growth Area Funding provided to ABC or KCC in respect of Qualifying Expenditure
<b>"Qualifying Expenditure"</b>	<p>costs (estimated to be in total the Estimated Qualifying Expenditure) which the Agency is satisfied have been reasonably and properly incurred by KCC since 1 April 2009 in designing, procuring, delivering, administering and project managing the Project and the Works. Such costs;</p> <p>(i) shall include (without limitation) relevant site purchase costs, statutory fees, commuted payments to the Highways Agency for the maintenance of the slip roads (and if the Works include the foot/cycle bridge, the foot/cycle bridge), finance charges, publicity and communications costs including costs incurred under clause 9.1, and professional fees</p>

(including only such amounts agreed by the Agency in relation to KCC officer time as set out in the costs breakdown provided by KCC to the Agency prior to the date of this Agreement but excluding legal costs) together with;

a) all costs of statutory claims and compensation arising from the construction (other than any arising from default by the Works Contractor) and/or use of the Works and where such costs have not been incurred within the period covered by a Claim a reasonable provisional sum (agreed with the Agency) in respect of such anticipated costs; and

b) where the amounts of the commuted payments to the Highways Agency for the maintenance of the slip roads (and if the Works include the foot/cycle bridge, the foot/cycle bridge) have not been agreed with and demanded by the Highways Agency by 28 February 2011 a reasonable provisional sum (agreed with the Agency) in respect of such anticipated commuted payments;

it being agreed that;

c) any such agreed provisional sum shall be deemed to have been incurred for the purposes of clause 4.2.1 on the last day of the period covered by the Claim for the same; and

d) where any Funding paid by the Agency in respect of any agreed provisional sum in relation to a) exceeds the costs of the relevant statutory claims and compensation subsequently incurred by KCC, then KCC shall (when all claims have been settled and the time period for making claims has expired) reimburse to the Agency the difference with any interest earned; and

e) where any Funding paid by the Agency in respect of an agreed provisional sum in relation to b) exceeds the relevant commuted payment(s) subsequently paid to the Highways Agency, then KCC shall reimburse to the Agency the difference with any interest earned; but

(ii) shall not include input value added tax recoverable by KCC from HM Revenue and Customs

**"Quarter"**

each calendar period of 3 months ending on 30 June, 30 September, 31 December and 31 March in each year and **"Quarterly"** shall be construed as meaning in relation to each and any one Quarter

**"Relevant Percentage"**

in relation to any item of expenditure comprised within Qualifying Expenditure the percentage set out in paragraph 4 of Schedule 3 which is to be reimbursable by the Agency (but subject to Clause 4.7)

<b>"Remediation Plan"</b>	the meaning given in clause 8.5
<b>"Repton Park Junction 9 Section 278 Agreement"</b>	an agreement (in a form approved by the Agency and ABC) and entered into between KCC and Taylor Wimpey UK Limited and Westbury Homes (Holdings) Limited pursuant to section 278 of the Highways Act 1980 by which Taylor Wimpey UK Limited and Westbury Homes (Holdings) Limited will be obliged to make a financial contribution to KCC of £1.1 million specifically in respect of the Works and/or the repayment of Funding
<b>"Request for Information"</b>	the meaning in the FOIA or any apparent request for information under the FOIA, the Environmental Information Regulations or the Code of Practice on Access to Government Information (Second Edition)
<b>"RES"</b>	the Regional Economic Strategy of the Agency as published from time to time
<b>"RSS"</b>	the Regional Spatial Strategy for South East England from time to time
<b>"RIF"</b>	the meaning given in recital (A)
<b>"Section 106 Obligation"</b>	planning obligation pursuant to section 106 of the Town and Country Planning Act 1990 or any similar obligation or instrument under any successor legislation making provision to similar effect in connection with the town and country planning system
<b>"Section 278 Agreements"</b>	<p>(i) the Repton Park Junction 9 Section 278 Agreement</p> <p>(ii) the Eureka Park Section 278 Agreement</p> <p>and</p> <p>(iii) all agreements or instruments (or specifically-identified parts thereof) which may be:-</p> <p>(a) entered into after the date hereof (in a form approved by the Agency and ABC) between KCC in the capacity of Highway Authority and a third party pursuant to section 278 of the Highways Act 1980 or any successor legislation making provision to similar effect in connection with the grant of planning permission for development or change of use of land by which a third party is and/or will be obliged to make any financial contribution to KCC in the capacity of Highway Authority specifically in respect of the Project and/or the Works and/or the repayment of Funding</p> <p>and</p> <p>(b) expressly notified in writing to the Agency and ABC by KCC as being a Section 278 Agreement for the purposes of this Agreement</p>

<b>"SEEDA Logo"</b>	the SEEDA logo in the manner and style supplied by the Agency
<b>"Statutory Requirements"</b>	<p>all or any of the following:-</p> <ul style="list-style-type: none"><li>(a) Acts of Parliament and any statutory instruments rules orders regulations notices directions bye-laws and permissions for the time being made under or deriving validity from an Act of Parliament;</li><li>(b) European directives or regulations and rules having the force of law in the United Kingdom; and</li><li>(c) regulations orders bye-laws or codes of practice of any local or statutory authority having jurisdiction over the Works</li></ul>
<b>"Strategic Tariff "</b>	payment required by or under town and country planning legislation (including in particular but without limitation by or under a planning condition and/or a Section 106 Obligation) to be made to ABC in the capacity of LPA in connection with the grant of planning permission for and/or development of and/or change of use of any land for dwellings in the Ashford Growth Area which payment relates to a contribution to help fund the strategic physical infrastructure and other facilities needed to support the sustainable growth of the Ashford Growth Area as provided for in Policy CS8 of the Core Strategy (and/or any other policy which supersedes or amends that Policy and provides for a global strategic tariff to similar effect in the Ashford Growth Area) and/or any relevant supplementary planning document adopted by ABC pursuant to that Policy (and/or such other policy) but for the avoidance of doubt not including any payment or contribution required to be made or paid under any Section 278 Agreements or Notified Section 106 Obligations
<b>"Transport Fund"</b>	a fund consisting of such share(s) or part(s) of sums received by ABC by way of Strategic Tariff and/or CIL as are set aside by ABC under clause 6.5 of this Agreement and/or otherwise for the generic purpose of helping to provide fund and/or repay forward-funded costs of strategic transportation infrastructure and facilities which are required (in the view of ABC in its absolute discretion) to support and/or enable and/or service and/or provide access to development(s) in the Ashford Growth Area
<b>"Unconditional 278/106 Contributions"</b>	<ul style="list-style-type: none"><li>(i) the contribution referred to in the First Schedule to the Repton Park Junction 9 Section 278 Agreement; and</li><li>(ii) the contributions referred to in the First Schedule of the Eureka Park Section 278 Agreement; and</li></ul>

(iii) any financial contributions specifically in respect of the Project and/or the Works and/or the repayment of Funding which have been paid, are payable, or will become payable, at a future time and/or upon a future contingency under Section 278 Agreements (other than the Repton Park Junction 9 Section 278 Agreement and the Eureka Park Section 278 Agreement) and Notified Section 106 Obligations other than;

- (a) any such contributions which are held by KCC or ABC whilst it is ascertained whether such contributions will have to be repaid to the payer under the terms of the relevant Section 278 Agreements and Notified Section 106 Obligations; or
- (b) any such contributions which are repaid to the payer by KCC or ABC under the terms of the relevant Section 278 Agreements and Notified Section 106 Obligations; or
- (c) any such contributions which cease to be payable to KCC or ABC under the terms of the relevant Section 278 Agreements and Notified Section 106 Obligations; or
- (d) any such contributions which remain unpaid to KCC or ABC more than 6 months after the due date for payment set out in the relevant Section 278 Agreements and Notified Section 106 Obligations; or
- (e) any such contributions which are not payable to KCC or ABC because of any failure by KCC or ABC to perform its obligations under the relevant Section 278 Agreements and Notified Section 106 Obligations; or
- (f) any such contributions which remain unpaid to KCC or ABC after 31 March 2020

**"Working Day"**

8.00 am to 6.00 pm any day (other than a Saturday or Sunday) on which banks are open in London for normal banking business and excluding bank or public holidays

**"Works Contract"**

the works contract(s) approved by KCC and the Agency for the carrying out of the Works or part of the Works

**"Works Contractor"**

the contractor or developer appointed by KCC to carry out the Works under the relevant Works Contract

**"Works Longstop Date"**

15 months after the date for Practical Completion specified in the Works Contract provided always that the Agency may in its absolute discretion (but without any obligation so to do) from time to time extend the period within which the Works are to be carried out

and completed by giving notice in writing to KCC fixing a revised Works Longstop Date (whether or not the Works Longstop Date previously determined has passed) and upon the giving of such notice any such revised Works Longstop Date shall be substituted for the date previously fixed hereunder

**"Works Specification"**

the specification describing the Works attached at Schedule 2 and the Plans or as varied pursuant to any consent given by the Agency in accordance with the terms of this Agreement for which the relevant Works Contractor has obtained such statutory or other permissions, consents or agreements as are required

**"Works"**

infrastructure and road improvement works at Junction 9 of the M20 in Ashford Kent as briefly described in paragraph 1.2 of Schedule 2 or, if the provision of a new bridge to facilitate pedestrian and cycle crossing over the M20 is commenced, as briefly described in paragraph 1.1 of Schedule 2, and all as more particularly described in the Works Specification

1.2 In this Agreement, save where the context requires otherwise, the following words, terms and expressions shall have the meanings given to them below:-

- 1.2.1 any reference to **"this Agreement"** includes any subsequent variations and any supplemental agreement made from time to time by agreement between the parties;
- 1.2.2 any reference to the **"Agency"**, **"ABC"** and/or **"KCC"** includes reference to any statutory successors;
- 1.2.3 any reference to **"Party"** or **"Parties"** means a party or the parties to this Agreement;
- 1.2.4 words importing any gender include any other gender. Words in the singular include the plural and words in the plural include the singular;
- 1.2.5 the headings and index are inserted for convenience only and shall have no legal effect;
- 1.2.6 references in this Agreement to any clause, sub-clause or Schedule without further designation shall be construed as a reference to the relevant clause or sub-clause of or Schedule to this Agreement;
- 1.2.7 references to any statute or statutory provision in this Agreement shall be deemed to refer to those provisions as replaced, amended, extended or re-enacted from time to time whether by instruments, orders, bye-laws, statute or by directive or regulation (which is, in the case of a directive or regulation, intended to have direct application within the United Kingdom and has been adopted by the Council of the European Communities) and all statutory instruments or orders made pursuant to it;
- 1.2.8 where consent or approval of any party to this Agreement is required for any purpose under or in connection with the terms of this Agreement it shall be given in writing and within a reasonable time following receipt of a request in writing for such consent or approval;
- 1.2.9 any decision, act or thing which a party to this Agreement is required or authorised to take or do under the Agreement may be taken or done by any person authorised either generally or specially by that party to take or do that decision, act or thing, provided that each party shall provide the other parties with the name of any person so authorised upon receipt from the other of a written request for the same;

- 1.2.10 the term "**person**" includes any individual partnership, firm, trust, body corporate, government, governmental body, authority, agency or unincorporated body of persons or association;
- 1.2.11 the Schedules to this Agreement are an integral part of this Agreement and reference to this Agreement includes reference to the Schedules;
- 1.2.12 the words "including" and "in particular" shall be construed so as not to limit the generality of any words or expressions in connection with which they are used;
- 1.2.13 in the event of a conflict between any of the terms of this Agreement and the Schedules thereto, the terms shall take priority over the Schedules.



## **SCHEDULE 2**

### **WORKS SPECIFICATION**

1. A Brief Description of the Project –M20 Junction 9 and M20 Foot/Cycle bridge;
  - 1.1 the general scheme layout of M20 Junction 9 improvements (including the footbridge) as described in paragraphs 4.1 and 4.2 and shown on drawings numbered B0973500/005 Rev B and B0973500/011 rev A in Schedule 5; or, if the foot/cycle bridge is excluded,
  - 1.2 the general scheme layout of M20 Junction 9 improvements (excluding the footbridge) as described in paragraph 4.1 and shown on drawing number B0973500/005 Rev B as amended by B0973500/015 Rev 0 in Schedule 5.
2. **The Key Features of the Project include:-**
  - Widening of the existing M20 Junction 9 off slip roads (from 2 to 4 lanes) and improvements to the existing diverges
  - Widening of the M20 Junction 9 gyratory from 2 to 3 lanes, apart from the northern area adjacent to Trinity Road junction where it is to be widened to 4 lanes
  - Localised widening of the Trinity Road approach to 3 lanes
  - Installation of full traffic signalisation of M20 Junction 9
  - Widening of Fougères Way, in each direction, between M20 Junction 9 and Warren Lane Bridge
  - The optional construction of a new twin mast cable stay foot/cycle bridge over the M20, approximately 350m east of junction 9, to replace the existing link which is lost by the carriageway widening of the junction 9 gyratory (east side). The vision is for this bridge to act as a high quality landmark structure for Ashford

### **3. Land acquisition**

To enable the project to be constructed, land is required from Sainsbury. Additionally to enable the foot/cycle bridge to be constructed, land is required from Brook House, Trinity College and X-leisure, together with further land from Sainsbury.

A right of access from IBM trustees, Sainsbury and Trinity College and X-leisure required ensuring public access to the proposed bridge.

Section 6 agreements will be required to permit Kent County Council to carry out works on the Highways Agency network.

### **4. Construction Phase.**

Key elements of the construction phase will include:-

#### **4.1 M20 Junction 9:**

- Ecological mitigation works for dormice (eastbound off slip) and reptiles at various locations throughout the site.
- Traditional drainage measures to include ditches, gullies, pipework and chambers utilising existing outfalls where possible.
- Ducting for street lighting and traffic signal equipment

- Traditional earthworks to widen existing embankments including topsoil and seeding
- Resurfacing / reconditioning of existing carriageway together with new full depth carriageway construction (including high friction surfacing) and associated kerbing
- New signage and carriageway markings
- Installation of Vehicle Restraint Systems
- Lighting improvements to the gyratory and approximately 100m of each off slip road
- Diversion of major services including Highways Agency communication equipment
- Installation of new CCTV cameras
- Traffic Management including compliance with necessary Highways Agency / Kent Highways permit systems
- If the Works do not include the foot/cycle bridge described in paragraph 4.2, the Works will include the provision of temporary footways and cycle ways in the vicinity of J9 as shown on drawing B0973500/015 rev O in Schedule 5.

#### **4.2 M20 Pedestrian and Cycle Landmark Bridge**

The optional construction of a pedestrian and cycle bridge comprising the following elements:

- Construction of a new twin mast cable stay foot/cycle bridge over the M20, approximately 350m east of junction 9, to replace the existing link which is lost by the carriageway widening of the junction 9 gyratory (east side). The vision is for this bridge to act as a high quality landmark structure for Ashford
- The deck is supported by two inclined masts in a V-shape arrangement supporting a continuous two span structure with a third independent curved span crossing under the second span at right angles. The South Mast is approximately 42m high (above motorway level), whilst the North Mast is approximately 29m high.
- The bridge superstructure will comprise twin circular hollow sections with a steel plate deck.
- South side of M20 – construction of a pedestrian / cycle route through the Warren Retail Park to link to the existing toucan crossing of Simone Weil Avenue and the wider cycle / footway network. Reinforced Earth retaining walls to be constructed for the ramp on the south side and the south abutment will be formed from a cantilever reinforced concrete wall.
- North side of M20 – construction of twin mast and central pier supported on a rigid reinforced concrete pile cap in the existing M20 slip road embankment.
- Ecological mitigation works for reptiles, waders and aquatics
- Conventional drainage measures including localised diversion of the existing Bockhanger Dyke and construction of new culvert to enable maintenance access to mast base area
- Earthworks, particularly in restricted site area to north of M20 to construct the earth mound (total height of approximately 10m)
- Footway / cycleway construction including steps and ramped access
- New signage and markings

- Lighting to both approaches and LED lighting within the handrail over the deck structure
- Service diversions
- Complex Traffic Management to safely construct this landmark structure whilst minimising disruption to M20 users and maintaining access to both the Warren Retail Park and Eureka Leisure Park (including compliance with Highways Agency / Kent Highways permit systems).

5. **Safety Audits and Road Permitting**

- Manage the road space booking through the KCC road permitting scheme and HA road space booking procedures.
- Carry out stage 3 safety audit immediately prior to completion of the works.

## SCHEDULE 3

MILESTONES AND PROJECT PROGRAMME AND ESTIMATED QUALIFYING EXPENDITURE PROFILE  
PLAN AND MAXIMUM SUM AND RELEVANT PERCENTAGE

## 1. MILESTONES

## 1.1 J9 Works Milestones

1	2	3	4
Year	Quarter	Milestone	Date of completion
2009/10	quarter 1	see quarter 2 for scheme progress.	-
	quarter 2	All surveys & investigations completed. (ecological scoping study, geotechnical report, topographical surveys, drainage surveys, archaeological scoping).	Completed Aug 09
		public exhibition held	completed Nov 09
	quarter 3	OJEU process commenced	completed Dec 09
		Detailed designs completed	completed Jan 10
	quarter 4	Tender for works issued	completed 8th Feb 2010
2010/11	quarter 1	Project Management and governance arrangements submitted to SEEDA.	May-10
		Land acquisition from Sainsburys	May-10
		Highways Agency S6 agreement concluded	April-10
		revised S278 agreements in place with owners of Eureka Park and Templar Barracks to secure developer contributions in line with RIF conditions.	April-10
		Highways Agency ecological procedures RoD & NoD to be signed off.	May-10
		Works specification and contract approved by the Highways Authority (KHS/KCC) and submitted to SEEDA. (cd copy to be supplied)	Apr-10

		Contract for works awarded.	Apr-10
		Highways Agency approvals in place	Apr-10
		advance site clearance avoiding breeding birds	Apr-10
		Ecological mitigation - doormice	May-10
		start on site	May-10
		Ecological mitigation - reptiles	Jun-10
	quarter 2	ongoing works	Sep-10
	quarter 3	ongoing works	Dec-10
	quarter 4	construction completion.	Mar-11
		landscape works completed	Mar-11

## 1.2 Footbridge Works Milestones

1

2

3

4

Year	Quarter	Milestone	Date of completion
2009/10	quarter 1	see quarter 3 for scheme progress.	-
	quarter 2	see quarter 3 for scheme progress.	-
	quarter 3	design of options and outline designs completed.	completed Oct 09
		All surveys & investigations completed. (ecological scoping study, geotechnical report, topographical surveys, drainage surveys, archaeological scoping).	completed Oct 09
		public exhibition held	completed Nov 09
		planning application for footbridge submitted	completed 4th January 2010
	quarter 4	tenders for works issued.	completed 8th Feb 2010

		detailed design completed	Mar-10
2010/11	quarter 1	Project Management and governance arrangements submitted to SEEDA.	May-10
		planning permission for footbridge secured	Apr-10
		Ecological mitigation - water voles	Apr-10
		contract for works awarded	Apr-10
		Pre ordering of steel - (long lead in time), and bridge fabrication.	May-10
		land acquisition & permissive rights	May-10
		advance site clearance avoiding breeding birds	Aug-10
	quarter 2	commence bridge works construction on site	Sep-10
	quarter 3	ongoing works	Dec-10
	quarter 4	construction completed.	Mar-11

## 2. ESTIMATED QUALIFYING EXPENDITURE

### 2.1 Junction 9 Works

year	quarter	profile	actual (accruals) or forecast
2009/10	quarter 1	£17,234	actual (accruals)
	quarter 2	£36,788	actual (accruals)
	quarter 3	£109,107	actual (accruals)
	quarter 4	£288,146	forecast
<i>sub total 2009/10</i>		<i>£451,275</i>	
2010/11	quarter 1	£796,397	forecast
	quarter 2	£1,135,828	forecast
	quarter 3	£1,256,200	forecast

	quarter 4	£910,300	forecast
<i>sub total 2010/11</i>		£4,098,725	
GRAND TOTALS		£4,550,000	
check totals		£4,550,000	

## 2.2 Footbridge Works

year	quarter	profile	actual (accruals) or forecast
2009/10	quarter 1	£13,787	actual (accruals)
	quarter 2	£29,431	actual (accruals)
	quarter 3	£90,489	actual (accruals)
	quarter 4	£305,254	forecast
<i>sub total 2009/10</i>		£438,961	
2010/11	quarter 1	£68,882	forecast
	quarter 2	£760,441	forecast
	quarter 3	£1,695,516	forecast
	quarter 4	£586,200	forecast
<i>sub total 2010/11</i>		£3,111,039	
GRAND TOTALS		£3,550,000	
check totals		£3,550,000	

### 3. MAXIMUM SUM

The Maximum Sum to be provided under this Agreement is £4,550,000 if the Works comprise the Junction 9 works described in paragraph 1.2 of Schedule 2 or £8,100,000 if the Works also comprise the Pedestrian and Cycle landmark bridge described in paragraph 1.1 of Schedule 2.

### 4. RELEVANT PERCENTAGE

Relevant Percentage is 100%

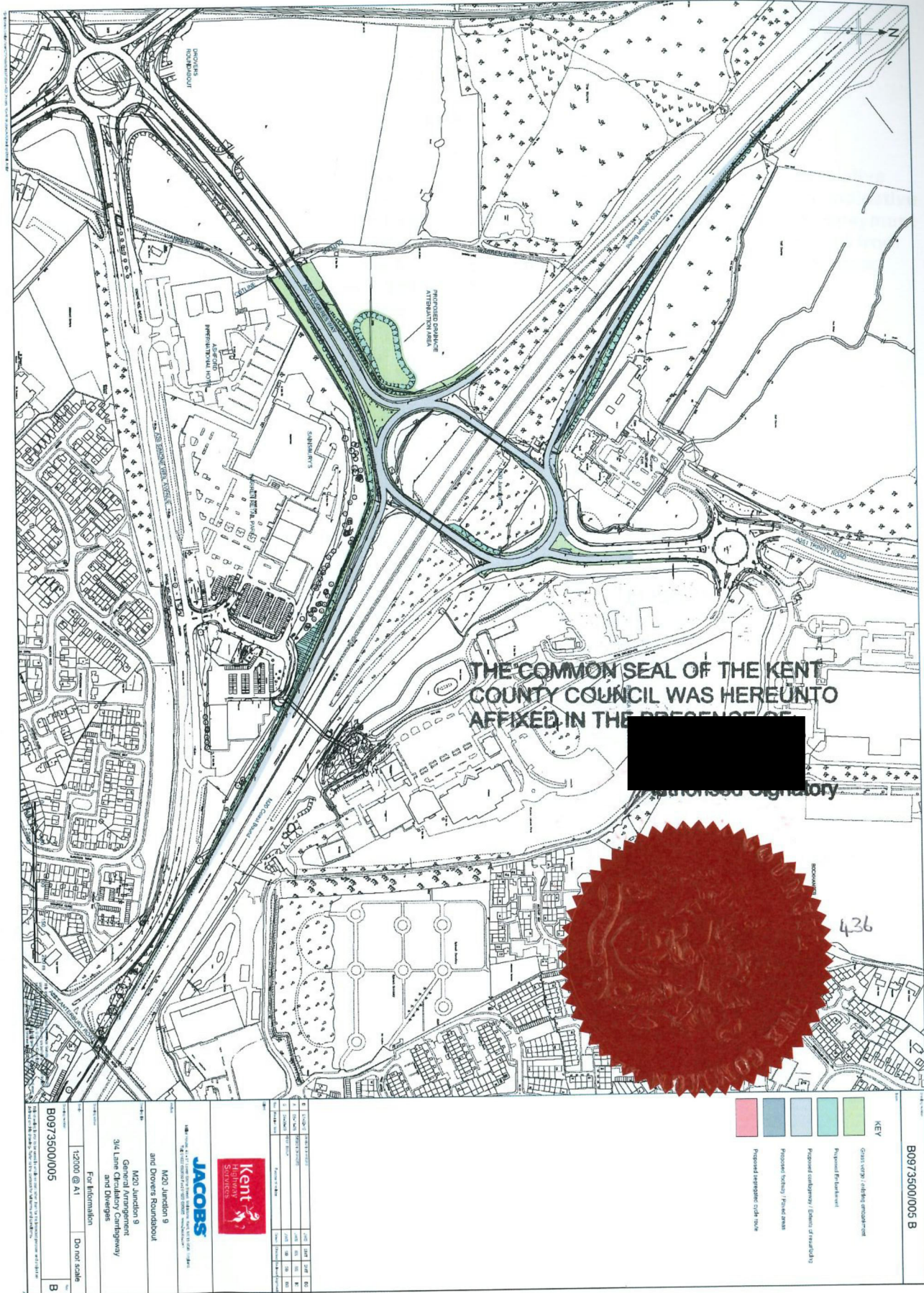
**SCHEDULE 4**  
**INDICATIVE REPAYMENTS OF FUNDING ADVANCED**

<b>Year during which Section 278 repayment received by KCC, or Strategic Tariff or CIL received by ABC</b>	<b>Indicative RIF repayment amount from Strategic Tariff or CIL</b>	<b>Indicative RIF repayment amount from Repton Park Junction 9 Section 278 Agreement</b>	<b>Indicative RIF repayment amount from Eureka Park Section 278 Agreement</b>	<b>Yearly total indicative RIF repayment amount from all sources</b>	<b>Cumulative total indicative RIF repayment amount from all sources</b>
1 April 2010 to 31 March 2011	Nil	Nil	Nil	Nil	Nil
1 April 2011 to 31 March 2012	£300,000	£1,100,000	£100,000	£1,500,000	£1,500,000
1 April 2012 to 31 March 2013	£613,000	nil	nil	£613,000	£2,113,000
1 April 2013 to 31 March 2014	£876,750	nil	£750,000	£1,626,750	£3,739,750
1 April 2014 to 31 March 2015	£777,875	nil	nil	£777,875	£4,517,625
1 April 2015 to 31 March 2016	£866,250	nil	£1,250,000	£2,116,250	£6,633,875
1 April 2016 to 31 March 2017	£866,125	nil	nil	£866,125	£7,500,000
1 April 2017 to 31 March 2018	nil	nil	nil	nil	£7,500,000
1 April 2018 to 31 March 2019	nil	nil	nil	nil	£7,500,000
1 April 2019 to 31 March 2020	nil	nil	£600,000	£600,000	£8,100,000



## **SCHEDULE 5**

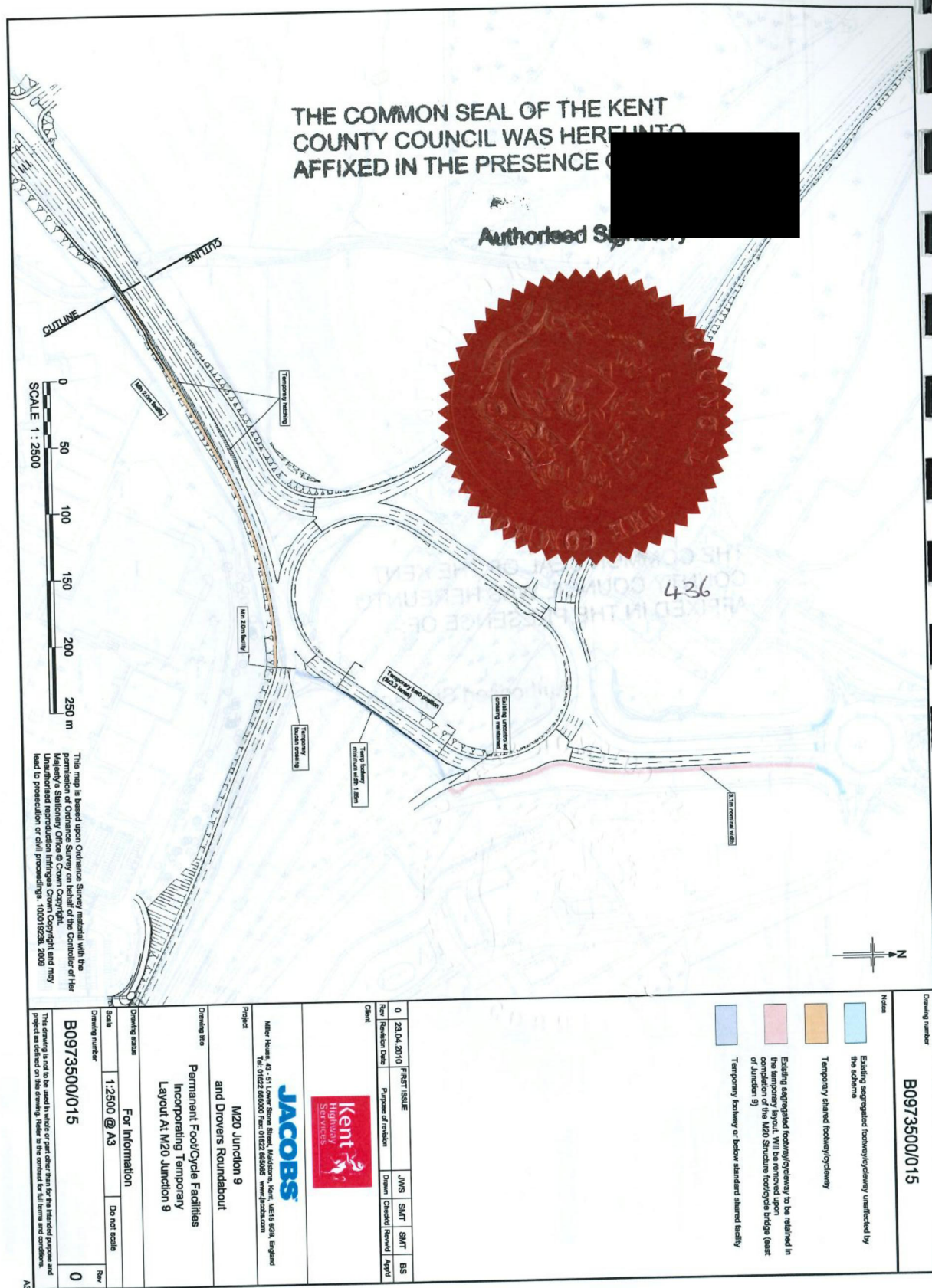
### **PLANS**











**SCHEDULE 6****CLAIM FORM**

Please write clearly if using ink comprising all sections and send the completed form to the office responsible for managing the project. Any amendments must be made in black ink and signed

<b>Project Name:</b>			
<b>Project Number:</b>			
<b>Name of Applicant:</b>			
<b>Claim period - please state dates and circle if interim or Final Claim</b>	<b>From</b>	<b>To</b>	<b>Interim or Final Claim</b>
<b>Forecast start date of project</b>		<b>Actual start date</b>	
<b>Forecast completion date</b>		<b>Action completion date</b>	
<b>SEEDA Capital Claim THIS QUARTER</b>	£	From Details of Claim Sheet	
<b>SEEDA Current Claim THIS QUARTER</b>	£	From Details of Claim Sheet	
<b>Non Recoverable VAT</b>	£	From Details of Claim Sheet	
<b>TOTAL Amount requested from SEEDA for this claim</b>	£	From Details of Claim Sheet	

For payment by BACS please complete the following:

<b>Bank or Building Society name</b>	
<b>Branch</b>	
<b>Sort Code</b>	
<b>Account Number</b>	
<b>Account Name</b>	
<b>Building Society Ref No</b>	

To be completed by Kent County Council:

<b>Certificate of s151 Officer (or equivalent)</b>
I certify that to the best of my knowledge and belief the information contained in this claim and the accompanying Inception Report (or updated Inception Report) is true and accurate. In signing this form I also confirm that all the property and equipment purchased with SEEDA investments is still being used for the approved purpose and that it has not been transferred to another person / organisation or disposed of.

<b>Signed</b>	<b>Date</b>
<b>Name in block capitals</b>	<b>Tel No</b>
<b>Position in Organisation</b>	<b>Qualification</b>

To be completed by Case Officer

Please state action required/taken as a result of the review of this claim form. If no action is required please state this.	
Date Reviewed	Signed
Case Officer Reviewing Report - Name in block capitals	

**SCHEDULE 7****INCEPTION REPORT / UPDATED INCEPTION REPORT**

This Inception Report\* /Updated Inception Report\* is submitted by KCC to the Agency in accordance with clause 4.4.1(c) (Inception Report)\* / (Updated Inception Report)\* on the [ ] day of [ ] 20[ ] ("the Relevant Date")

(\*delete as appropriate)

Item	Heading	Current Status	Material Risks
1	Programme		
2	Funding agreements: - GAF – top up for bridge; and -S278 agreements		
3	Design - M20J9 - M20 Foot/Cycle Bridge - Earthworks - Drainage - Signing - Traffic signals + CCTV		
4	Planning application - Bridge		
5	Land acquisition and creation of rights of access - Highways Agency - Sainsbury (M20J9) - Sainsbury ( Footbridge) - Brookhouse - Trinity College / X-leisure - Accommodation works		
6	Legal Matters - Section 6 Agreement with highway Agency for J9 - Section 6 Agreement with highway Agency (M20 Bridge)		

7	HA approvals - Departures from Standard - Technical Audit - Safety Audit - RoD & NoD - Bridge Approval - AIP - Commuted Sum		
8	Ecological Mitigation - Reptiles - Dormice - Water voles - Breeding Birds - Japanese Knotweed - Golf Course - Trinity College Land		
9	Road Permitting – Traffic Management - Road Space Booking (HA) - Road Permitting (KCC) - Operation Stack		
10	Stats Diversions		
11	Advance site Clearance Works		
12	Construction Works.		
13	Stage 2 Safety Audit		

KCC warrants to the Agency that the contents of 3<sup>rd</sup> (Current Status) and 4<sup>th</sup> (Material Risks) columns of this Report are true and accurate statements as to the current status of the Project and of any material risks known to KCC in connection with the Project as at the Relevant Date.

**Signed:** ..... (Authorised Officer)

For and on behalf of **THE KENT COUNTY COUNCIL**