

Builder Counter Indemnity Agreement

THIS AGREEMENT is made on XXXXX

BETWEEN:

- A. **[INSURER]** whose principal place of business is at XXXXX, XXXXX, XXXXX, XXXXX (the "Underwriter")
- B. **[BUILDER]** whose principal place of business is at XXXXX, XXXXX, XXXXX, XXXXX (the "Builder")

WHEREAS:

- A. The **Developer** (as defined below) has organised or facilitated and/or will from time to time in the future organise or facilitate the construction of **Housing Unit(s)** at various housing development sites (the **New Developments**) and has applied and/or will from time to time in the future apply to the **Scheme Administrator** of the **Underwriter** for the **Housing Unit(s)** in the **New Development(s)** to be insured with **Premier Guarantee**.
- B. The **Developer** has entered into the **Developer's Indemnity Agreement** (as defined below).
- C. The **Builder** has undertaken or will from time to time in the future undertake certain construction works in respect of the **Housing Unit(s)**.
- D. Upon the terms of this **Agreement** the **Builder** agrees to indemnify the **Underwriter** in respect of certain costs or liability incurred or suffered by the **Underwriter** arising from any **New Developments** in certain circumstances in connection with works undertaken by the **Builder**.

IT IS AGREED AS FOLLOWS:

1 DEFINITIONS AND INTERPRETATION

- 1.1 In this **Agreement**, unless the context otherwise requires, the following terms shall have the following meanings given to them:
 - 1.1.1 **Claims Procedure**

The Claims and Conciliation Procedure set out in the **Policy** and any other provisions of the **Policy** regarding the manner in which disputes or claims relating to the **Policy** are to be managed or determined
 - 1.1.2 **Relevant Cover**

The cover provided to the **Policyholder** under the **Policy** in respect of certain defects in or relating to the **Housing Unit(s)** or in certain materials or components within the **Housing Unit(s)**, in each case as more particularly described in the **Policy**
 - 1.1.3 **Developer**

The person, firm, company or other organisation who or which has organised or facilitated (and/or and will from time to time in the future organise or facilitate) the construction of the relevant **Housing Unit(s)**
 - 1.1.4 **Developer's Indemnity Agreement**

The agreement entered into between the **Developer** and the **Underwriter** pursuant to which the **Developer** has agreed to certain obligations and to provide certain indemnities to the **Underwriter** in connection with the **New Development(s)**
 - 1.1.5 **Developer's Obligations**

The obligations of the **Developer** to the **Underwriter** and the **Scheme Administrator** as set out in the **Rules** and the obligations of the **Developer** to the **Policyholder** as set out in the **Policy**
 - 1.1.6 **Policy**

The relevant policy of insurance between the **Policyholder** and the **Underwriter** issued by the **Scheme**

Administrator

1.1.7 Rules

The Rules of Registration] for the **Builder** or the **Developer** (as the case may be), as updated by the **Underwriter** and/or the **Scheme Administrator** from time to time.

1.2 In addition to the terms defined in clause 1.1, any other words shown in bold in this **Agreement** (including in the Recitals) shall have the meanings given to them in the **Policy** and/or the **Rules** (unless otherwise defined in this **Agreement** or where the context otherwise requires). For the avoidance of doubt, in the event that any of the defined terms in the **Policy** and/or the **Rules** are amended from time to time (including pursuant to the **Underwriter's** rights referred to in clause 6.2), then any such terms which are used in this **Agreement** shall have the meanings given to them as so amended. Where any term used in this **Agreement** is given the meaning ascribed to such term in the **Policy** and the **Rules** and such term is defined differently in the **Policy** and the **Rules** then the meaning given to such term in the **Policy** shall apply to this **Agreement**.

1.3 In this **Agreement** (unless the context otherwise requires):

1.3.1 the words including and include and words of similar effect shall be deemed have the words "without limitation" following them;

1.3.2 words importing the singular shall include the plural and vice versa;

1.3.3 references to a numbered clause or Schedule are to a clause of and a schedule to this **Agreement** so numbered;

1.4 The headings in this **Agreement** are for ease of reference only and shall not affect its construction or interpretation.

2 BUILDER'S OBLIGATIONS

2.1 Subject to clause 2.2, the **Builder** agrees:

2.1.1 to observe and comply with all of its obligations:

2.1.1.1 to the **Underwriter** and the **Developer** in respect of the construction of the **Housing Unit(s)** as set out in the **Technical Manual**;

2.1.1.2 to the **Underwriter** and the **Scheme Administrator** as set out in the **Rules**; and

2.1.1.3 to the **Policyholder** as set out in the **Policy**;

2.1.2 at its own cost, to participate in and comply with the **Claims Procedure** as required for each relevant matter which is the subject of the **Claims Procedure**;

2.1.3 to indemnify the **Underwriter** on demand and keep the **Underwriter** fully indemnified and held harmless from and against:

2.1.3.1 any payments made by or on behalf of the **Underwriter** to a **Policyholder** in connection with the **Relevant Cover** relating to the relevant **Defects Insurance Period**; and

2.1.3.2 any claims, liabilities, losses and expenses (including interest and all costs including legal and other professional costs) of whatsoever nature incurred by the **Underwriter** in connection with the **Relevant Cover** relating to the relevant **Defects Insurance Period**;

which arise out of:

(a) the **Developer's** failure to observe and comply with the **Developer's Obligations**; and

(b) the failure of the **Underwriter** to recover any sums that the **Developer** is liable to pay

to the **Underwriter** under the **Developer's Indemnity Agreement**; and

- (c) the **Builder's** contractual responsibility for the design and construction of the **New Development(s)**.

2.2 The liability of the **Builder** under this **Agreement** which arises as a result of the failure of the **Developer** to observe and comply with the **Developer's Obligations** shall be:

- 2.2.1 no greater than the liability of the **Developer** itself to the **Underwriter** in respect of such failure; and
- 2.2.2 limited to the **Builder's** contractual responsibility to the **Developer** (including any obligation referred to in clause 2.1.1.1).

3 POLICY CLAIMS AND ARRANGEMENTS

- 3.1 Any claim made under the **Policy** will be dealt with by the **Scheme Administrator** as agents on behalf of the **Underwriter** and the **Builder's** liability hereunder will not be altered or reduced in any way by such arrangement.
- 3.2 The **Underwriter** (acting through the **Scheme Administrator** where it requires) shall observe and comply with its obligations under the **Claims Procedure**.
- 3.3 Where a valid claim is made pursuant to the **Policy** or the nature of the claim and/or the sums involved is such that it is not practicable to defend such claim, the **Builder** acknowledges and agrees that the **Underwriter** shall be entitled to pay amounts to a **Policyholder** (including on an ex-gratia or without prejudice basis) without reference to or any authorisation from the **Builder**, whether or not the **Builder** disputes the validity of the payment. Any such payment shall be deemed to constitute a valid payment under or connected to the **Policy**.

4 CLAIMS MADE UNDER THIS AGREEMENT

- 4.1 Any claim(s) against the **Builder** hereunder shall be made by the **Scheme Administrator**, on behalf of the **Underwriter**, in writing and sent to the **Builder** in accordance with clause 5.1.
- 4.2 Any such claim(s) shall be accepted by the **Builder** as conclusive evidence (and admissible as such) that any sum stated therein is properly due and payable by the **Builder** to the **Scheme Administrator** or the **Underwriter** (at the **Underwriter's** option) for the purposes of this **Agreement**. The **Builder** agrees it will pay such sum within 28 days of the relevant notice without set off or counterclaim.

5 NOTICES

- 5.1 Any notice under or in connection with this **Agreement** may be sent by ordinary pre-paid post to either the **Builder** or to the **Scheme Administrator** acting as disclosed agents of the **Underwriter**. Such notices should be sent to the registered office of the **Builder** or **Scheme Administrator** as applicable.

6 OTHER AGREEMENTS

- 6.1 The **Underwriter's** rights under this **Agreement** shall not be in any way prejudiced or affected by any one or more other agreements, indemnities, guarantees, securities or obligations which the **Builder** or the **Underwriter** may enter into with any third party. The **Underwriter** shall not be obliged to take any steps against any third party before making a claim hereunder nor wait for the **Builder** or any third party to make a claim under any other document to which it is party.
- 6.2 Without consent of the **Builder** and provided that the amount of the **Builder's** liability, obligations and indemnities hereunder is not increased the **Underwriter** may from time to time, on giving the **Builder** not less than one month's notice of the same, modify, amend, renew or extend the terms and conditions of:
 - 6.2.1 any **Policy**;
 - 6.2.2 the **Rules**; and/or
 - 6.2.3 any agreements, indemnities, guarantees, securities or obligations it has entered into with a

third party;

and the **Builder** agrees that any such modification, amendment, renewal or extension shall not release nor in anyway lessen, remove, discharge or affect the **Builder's** liability hereunder.

- 6.3 The **Builder** agrees that no act, error, omission or matter whatsoever whether under this **Agreement** or any other contract whereby (but for this clause 6.3) the **Builder** would be exonerated either wholly or in part from this **Agreement** shall release nor in anyway lessen, remove, discharge or affect the **Builder's** liability hereunder (save if and to the extent otherwise provided by deed executed by the **Underwriter**).

7 JOINT AND SEVERAL LIABILITY

- 7.1 Where the **Builder** is a partnership or otherwise consists of more than one person the liability of the **Builder** under this **Agreement** shall be deemed to be joint and several liability of the partners or of such persons and any demand for payment made by the **Underwriter** to any one or more persons so jointly and severally liable shall be deemed to be a demand made to all such persons.
- 7.2 The **Builder** may not release or discharge any one or more of such persons from liability under this **Agreement** or compound with, accept compositions from or make any other arrangements with any of such persons without having obtained the prior written consent of the **Underwriter**.

8 EFFECT OF DELAY OR OMISSION

- 8.1 No delay or omission on the part of the **Underwriter** in exercising any right, power, privilege or remedy in respect of this **Agreement** shall impair such right, power, privilege or remedy or be construed as a waiver of it, nor shall any single or partial exercise of any such right, power, privilege or remedy preclude any further exercise of it or the exercise of any other right, power, privilege or remedy. The rights, powers, privileges and remedies provided in this **Agreement** are cumulative and not exclusive of any rights, powers, privileges or remedies provided by law.

9 ASSIGNMENT

- 9.1 The **Builder** shall not transfer or assign any of its obligations pursuant to this **Agreement** without having obtained the prior written consent of the **Underwriter**.

10 ARBITRATION

- 10.1 If any dispute arises between the parties under this **Agreement** concerning the construction, meaning or effect of this **Agreement** or concerning the rights and liabilities of the parties or any other matter arising out of or in connection with this **Agreement** it shall be referred to a single arbitrator to be agreed between the parties. Failing such agreement within 14 days of the request by one party to the other that the matter be referred to arbitration in accordance with this clause, such reference shall be to an arbitrator appointed (on the application of either party) by the President for the time being of The Royal Institute of Chartered Surveyors.
- 10.2 The decision of such arbitrator shall be final and binding upon the parties and no appeal shall lie to any Court save on a point of law or where the decision of the arbitrator can be deemed to be manifestly unfair. Any reference under this clause shall refer to arbitration within the meaning of the Arbitration Act 1996 including any statutory modification or re-enactment thereof for the time being in force.
- 10.3 Nothing in this clause 10 shall:
- 10.3.1 affect the **Claims Procedure**; or
 - 10.3.2 restrict the ability of a party from seeking any injunctive or interlocutory relief from the courts at any time.

11 GOVERNING LAW AND JURISDICTION

- 11.1 This **Agreement** shall be governed by, and construed in accordance with, the laws of England and Wales and (save as provided in clause 10) the parties submit to the exclusive jurisdiction of the courts of England and Wales.

This **Agreement** has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

SAMPLE

Signed as a deed by the **Underwriter**
acting by a director,

)
)

.....
[signature of director]
Director

Name of Director:.....

in the presence of:

.....
[signature of witness]

Witness name:

.....

Witness address:

.....

.....

.....

.....

Witness Occupation:

.....

Signed as a deed by the **Builder**
[acting by a [director]/[member],]

)
)

.....
[signature of [director]/[member]]

[Name of [Director]/[Member].....]

in the presence of:

.....
[signature of witness]

Witness name:

.....

Witness address:

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Witness Occupation:

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You may wish to seek legal advice before signing this document