Wholl. 431. 01202/95

SECTION 104 AGREEMENT

THIS DEED OF AGREEMENT is made the First day of May One thousand nine hundred and ninety-five **B E T W E E N HASSALL HOMES (CHESHIRE) LIMITED** of Ashbourne Road Macworth Derbyshire (hereinafter called "the Developer") of the first part and **NATIONAL HOUSE BUILDING COUNCIL** of Buildmark House Chiltern Avenue Amersham Buckinghamshire (hereinafter called "the Surety") of the second part and **MACCLESFIELD BOROUGH COUNCIL** (hereinafter called "the Council") acting on behalf of North West Water Limited (hereinafter called "the Undertaker") of the third part

W H E R E A S

(1) In pursuance of arrangements by virtue of Section 97 of the Water Industry Act 1991 the Council is exercising the powers and discharging the functions of the Undertaker under Section 104 of the Water Industry Act 1991 within the district of the Council

(2) The Developer is seised for an estate in fee simple of certain lands hereinafter described (which lands are hereinafter referred to as "the green land") and proposes to undertake certain development in relation to the same this including the construction of sewers (as defined in clause 20(4) in the Schedule to this Agreement and which Schedule is hereinafter referred to as "the Schedule") to serve the said development and which sewers he proposes should become vested in the Undertaker as public sewers and maintainable at public expense

(3) The Developer has in the Site sufficient rights to enable the Works (as defined in clause 1 of the Schedule) to be carried out therein and to permit the use repair maintenance and discharge from the same prior to the declaration referred to in clause 12(1) of the Schedule and to enable a valid and effectual declaration to be made under such clause and which rights are capable of transfer to the Undertaker without any payment therefor

(4) The Surety has agreed at the request of the Developer to be party hereto in manner hereinafter appearing

IN PURSUANCE of Section 104 of the Water Industry Act 1991 and all other powers the parties hereto enabling **THIS AGREEMENT** which (re-construction or amalgamation of the Developer excepted) is personal to the parties hereto **WITNESSETH** as follows:

1 The provisions in the Schedule shall apply in respect of the Works and all other matters therein contained as though the same had been set out in extenso in this part of this Agreement but incorporating the provisions of clauses 2 and 3 below

2 (a) 'The green land' referred to in recital (2) hereof refers to certain lands situate at Pool House Road Poynton Cheshire in the area of the Macclesfield Borough Council and which lands are shown edged with green on the site plan annexed hereto

(b) 'The Site' shall comprise the green land and other land and places (if any) on under in or through which the Works are proposed to be executed

(c) 'The Drawings' shall mean (subject however to the provisions of clause 2 of the Schedule and in particular paragraph (d) of such clause) those plans drawings calculations and other design or working documents relating to the carrying out of the Works or any part or parts thereof as were required by the Council are annexed hereto and comprise:-

Drawing No AJ/Eng/02.1/H, AJ/Eng/03/B, AJ/Eng/04/F and AJ/Eng/06A

3 The provisions of the Schedule shall be completed and construed in the following manner:

(a) the period in clause 4 (Period of Construction) shall be 12 months

(b) the financial limit within paragraph (a) of clause 16 (Obligations of Surety) shall be six thousand eight hundred pounds (£6,800)

(c) the address to which notices to the Council shall be sent (as specified in clause 18 (Notices) shall be Town Hall Macclesfield

(d) in clause 19 (Fees, Charges etc.) the sum specified in sub-clause (1) being the payment for the costs of the Council for supervision by the Engineer of the execution of the Works shall be one thousand seven hundred pounds (£1,700)

(e) references in the Schedule to recitals shall refer to the recitals contained in this part of the Agreement

IN WITNESS whereof the parties hereto have caused their Common Seals to be affixed hereto the day and year first before written

THE SCHEDULE
(being provisions applicable to this Agreement)

Construction of Works

1 **IF** the Developer shall construct the said sewers (as defined within clause 20(4) hereof) and other works (if any) (which sewers and other works (if any) are collectively referred to as 'the works') he will at his own expense properly construct and complete the same in accordance with the Drawings and the Specification (hereinafter referred to as 'the Specification') issued by the Water Authorities Association in 1989 as Part 3 of the Third Edition of 'Sewers for Adoption' (which Drawings and Specification shall be deemed to be part of this Agreement) or as varied by virtue of the powers contained in clause 2 hereof and the statutory provisions for the time being relating to new sewers and to the reasonable satisfaction of the Engineer in the positions and to the extent shown within the Drawings and

thereon indicated by lines and symbols as to foul and surface water sewers in accordance with Appendix V1 of the Third Edition of 'Sewers for Adoption' published in August 1989

Minor Variations

2 **WITHOUT** prejudice to clause 1 hereof the Engineer may at the request of the Developer at his own discretion give permission (which permission shall not be unreasonably withheld) to the Developer to construct the Works or some part or parts of the same otherwise than in strict conformity with the Drawings but subject to the following conditions:

(a) the request by the Developer (accompanied by such drawings as the Engineer may require) shall be made and the permission of the Engineer given (if at all) in writing provided however that if the Engineer shall consider it necessary to give an oral permission he shall confirm such permission in writing as soon as is reasonable in the circumstances

(b) without prejudice to the provisions of paragraph (a) above the Developer will not in the execution of the Works allow any variation from the Drawings without such written permission first having been obtained

(c) if the Developer shall prior to vesting by virtue of clause 12 hereof desire to make connection to that part of the Works which shall be a sewer otherwise than planned connections as shown in the Drawings he shall give reasonable notice of such desire to the Engineer and shall supply such details as the Engineer shall require (unless the same shall have been previously agreed) as to materials and mode of construction when:

(a) the consent of the Engineer shall not be unreasonably withheld or delayed and

(b) the said details (whenever supplied) shall form part of the Drawings

PROVIDED however that after such consent shall (if at all) have been given then the Developer may at his absolute discretion either

(i) himself undertake the desired connection and any ancillary works but subject to the supervision of the Engineer and will (in addition to all other costs of supervision payable by virtue of this Agreement) pay to the Council the cost as certified by the Council of such supervision

or

(ii) request the Council to undertake the desired connection and any ancillary works and reimburse the Council with the cost incurred by the Council of its undertaking such works as certified by the Council

(d) nothing contained within this clause shall permit or authorise any breach of the Specification

(e) where the context of this Agreement so requires the term 'the Works' shall include any amended extra or substituted works as permitted by the Engineer by virtue of this clause and for the purposes of clauses 1 and 12(1) of this Schedule any drawings submitted to the Engineer in pursuance of sub-clause (a) of this clause and upon which drawings the Engineer gives his permission by virtue of this clause shall be deemed to be included in the term 'the drawings' notwithstanding that the same shall not have been referred to in clause 2(c) of this Agreement

(f) the granting of any permission by the Engineer by virtue of this clause shall not in any way prejudice any rights of the Council or the Undertaker against the Developer or the surety in respect of any breach or non-observance of any part of this Agreement but the duties and obligations of the Surety shall apply in respect of the Works as varied as they apply to the Works as shown within the Drawings referred to in clause 2(c) of this Agreement

Notification of Intended Commencement

3 **THE** Developer shall notify the Engineer in writing of the date on which he intends to commence the Works or any parts thereof and shall submit to the Engineer for inspection such plans drawings and other design or working documents not previously submitted to him and which relate to the carrying out of the works as the Engineer may require

Period of Construction

4 **THE** Developer shall construct and complete the Works within the period specified in paragraph (a) of clause 3 of this Agreement such period commencing as at the date hereof (unless the Engineer shall in writing agree to an extension of that period) but before any building or property draining into any part or parts of the Works is brought into occupation such part or parts of the Works necessary to drain that building or property including all outfalls and all connections to existing public sewers shall be completed and in working order

Building-over

5 **UNTIL** such time as the Works shall have become vested in the Undertaker as hereinafter provided the Developer shall ensure that no building or structure is erected over any part of the Works or on or over land within three metres measured horizontally from the centreline of any sewer without the written consent of the Undertaker nor that access thereto on foot and with any necessary vehicles plant or equipment is obstructed and in particular shall include in any transfer conveyance lease or other disposition of the Site or any part thereof appropriate covenants in that respect binding upon the land the subject of such transfer conveyance lease or other disposition but this clause shall not prohibit the erection of plot boundary walls or fences roads and footpaths (whether intended for adoption or not) drives or paths if the same shall be shown on the Drawings (or agreed in writing by the Engineer as though the same were a minor variation of the Works as within the provisions of clause 2 of this Schedule) to lie across the Works or any part or parts thereof (manholes or ventilating shafts excepted)

Plans of Works as Constructed

6 **THE** Developer shall prior to the Works being vested in the Undertaker supply to the Engineer two full sets of plans at a scale of 1/500 and of sections showing at the scales used for those sections which form part of the Drawings the position level and type of construction of the Works as constructed. The completed sewers shall be shown on the plans by lines and symbols in accordance with Appendix V1 of the Third Edition of 'Sewers for Adoption'

Provisional Certificates

7(1) (a) **WHEN** the Developer is of the opinion that the Works have been completed he shall serve a written notice upon the Engineer to that effect

(b) **AFTER** receiving such notice the Engineer shall satisfy himself as to whether or not the Works have been completed and if then satisfied that the same have been completed shall issue his written certificate (hereinafter called 'the Provisional Certificate') on behalf of the Council to that effect

(c) **FOR** the purpose of this sub-clause the Works shall be deemed to be completed when:

(i) they shall have been substantially constructed in accordance with the preceding clauses of this Agreement; and

(ii) a majority of the premises intended to be served by such parts of the Works as shall be sewers have been occupied; and

(iii) all necessary connections or other things have been made or done whereby such occupied premises may be effectually drained

7(2) (a) **WHEN** the Developer is of the opinion that any substantial part or parts of the Works have been completed he may serve a written notice upon the Engineer to that effect

(b) **AFTER** receiving such notice the Engineer shall satisfy himself as to whether or not the part or parts of the works to which the notice relates are a substantial part or parts thereof and that they have been completed and if so satisfied on both matters may issue a Provisional Certificate as referred to in sub-clause (1) of this clause (which shall not be unreasonably withheld) in respect of such substantial part or parts of the Works which have been completed to his satisfaction

(c) **A** refusal by the Engineer to issue a Provisional Certificate by virtue of the provisions of sub-clause (1) of this clause in respect of the works shall not preclude the Developer from serving upon the Engineer a notice in respect of any substantial part or parts of the Works by virtue of the provisions of the present sub-clause

(d) **PARAGRAPH** (c) of sub-clause (1) of this clause shall apply in relation to this sub-clause save that references to 'the Works' shall be deemed to be references to a substantial part or parts of the Works

(e) **AFTER** the issue by the Engineer of a Provisional Certificate by virtue of the provisions of this sub-clause references in sub-clause (1) of this clause to the issue of a Provisional Certificate shall be deemed to refer to the residue of the Works in respect of which no Provisional Certificate had previously been issued

(f) **WHERE** the Engineer has in pursuance of his power so to do in this sub-clause issued a Provisional Certificate for some part or parts of the Works the term 'the Works' shall in clauses 8 and 12 of this Schedule where the circumstances and the context so require refer to parts of the Works

Maintenance Period

8 **IF** during a period of twelve months after the date of the issue of the Provisional Certificate (which period is hereinafter referred to as 'the Maintenance Period') or thereafter until the Works shall be vested in the Undertaker any defect or damage shall appear arise or occur in the Works or any blockage shall arise or occur in the Works the Developer shall at his own expense and within three months after such defect damage or blockage shall appear arise or occur (or forthwith if so required in writing by the Engineer) make the same good to the reasonable satisfaction of the Engineer and the Developer shall during the period prior to the Works becoming vested in the Undertaker maintain the works to the satisfaction of the Engineer as aforesaid

Access to the Works

9 **THE** Developer shall allow and arrange for the Engineer to have access to the Works and the Site at all reasonable times for the purpose of ensuring compliance with this Agreement

Inspections

10 **AT** any time before the Works shall have become vested in the Undertaker the Developer shall on being so requested in writing by the Engineer open for inspection any part of the Works which may have been covered up but should the Developer fail to comply with any such request (and without prejudice to all other rights accruing to the Council or the Undertaker on a breach of any part of this Agreement by the Developer) the Council may itself open up the Works or any part thereof and in the event of any part or parts of the Works being defective obstructed or otherwise failing to conform with the requirements of this Agreement the cost of such opening rectification and reinstatement shall (subject to the proviso hereinafter contained) be borne by the Developer but in any other case such cost shall be borne by the Council **PROVIDED THAT** in any case where the Engineer has not been given reasonable notice in accordance with this Agreement or has not been given facilities by the Developer to inspect any part of the Works and as a result thereof did not inspect the same the cost of the opening and reinstatement works and rectification works (if any) in relation to such part of the Works as shall have been opened up

shall be borne in any event by the Developer whether or not such opening up reveals any defect obstruction or other failure to comply with the requirements of this Agreement

Council's Right to Repair

11 **IF** at any time before the Works shall have become vested in the Undertaker the Developer shall fail to construct complete make good and maintain the Works or any part thereof in accordance with the preceding clauses of this Agreement the Council shall (as agents of the Developer) be entitled at its entire discretion to construct complete make good and maintain such part or parts of the Works as may be necessary in the opinion of the Engineer to drain effectually and properly all of those properties situated upon the green land which have been occupied and may do so either by its own employees or by contract or in such other manner as it thinks fit after first giving reasonable notice in writing to the Developer and the Surety of its intention in that behalf and the Developer shall upon demand pay to the Council the cost thereof including the necessary cost of the preparation and service of such notices and of necessary administration as certified by the Engineer

Final Certificate and Vesting Declaration

12(1) **THE** Council acting on behalf of the Undertaker shall (subject to the Developer complying with the terms of this Agreement and to the terms of the proviso immediately below) by declaration vest such parts of the Works as shall be sewers in the Undertaker in such manner that the Developer and all persons for the time being having a legal interest in any premises draining into the Works shall be exonerated from any liability to maintain and repair the Works **PROVIDED THAT** the Council shall not be required to vest or to take over responsibility for the Works or any part or parts thereof until the Developer shall (if so requested in that behalf) have produced to the Council a good sufficient and marketable title to the land within which the Works are situate or (where any part of such land in which the Works are situate is outside the green land) sufficient rights in such land to enable the making of a valid and effectual declaration and also until the Engineer shall have issued a Final Certificate in writing (such certificate not to be unreasonably withheld) that

(a) the Works have been constructed and completed in accordance with the Drawings and the Specification to his reasonable satisfaction and have been maintained by the Developer during the Maintenance Period and any defects arising or work required in connection with the Works during that period and prior to the date of his said Final Certificate have been made good or carried out by the Developer to the reasonable satisfaction of the Engineer **AND THAT**

(b) no building or structure save as hereinbefore permitted has been erected over any part of the Works or on or over land within three metres measured horizontally from the centreline of any sewer without the written consent of the Undertaker nor access thereto on foot or with any necessary vehicles plant or equipment obstructed **AND THAT**

(c) (i) where any part of the Works is shown in the Drawings discharging to an existing public sewer that part of the works has been connected (whether by the Developer or by or on behalf of the Undertaker) properly and directly and in the manner shown in the Drawings to a sewer having the status of a public sewer

(ii) where any part of the works is shown in the Drawings discharging to a watercourse that part does discharge properly and directly to the watercourse in the manner shown in the Drawings and in accordance with a consent obtained in that behalf by virtue of Section 88 of and Schedule 10 to the Water Resources Act 1991
AND THAT

(d) the Developer has complied with all requirements of the Undertaker or the Council in pursuance of clause 19(2) hereof

(2) **THE** Engineer shall not be obliged to issue a Final Certificate while any dispute exists between the Developer and any third party concerning the right of the Developer to construct the works or any part or parts of the same in the situation and the manner in which they have been constructed

(3) **TO** the intent that the works shall so soon as practicable after the expiration of the Maintenance Period receive the said Final Certificate:

(a) the Developer shall by way of a written notice two months before the end of the Maintenance Period remind the Engineer of the date upon which the Maintenance Period expires:

(b) whether or not the Engineer shall have received a notice by virtue of paragraph (a) of this sub-clause any inspection which the Engineer may require to make of the Works shall be made prior to the expiration of the Maintenance Period and he shall within fourteen days after such inspection advise the Developer in writing of any defects arising or work required in connection with the Works and which he requires to be rectified or done before the issue of the said Final Certificate

No Duty to Developer

13 **NOTHING** in this Agreement shall imply any obligation on the part of the Engineer the Council or the Undertaker to the Developer or to any other person to ensure that the Works or any part or parts of the same are properly constructed

Indemnity to Council by Developer

14 **THE** Developer shall indemnify the Council and the Undertaker against all actions costs claims and demands which may be made against them or either or them in connection with the construction and completion of the Works and those matters referred to in recital (3) of this Agreement provided that the said actions costs claims or demands shall have arisen not later than the vesting of the Works in the Undertaker

Bankruptcy etc of Developer

15 **IF** the Developer shall fail to perform any of the conditions herein contained on his part to be performed or observed or shall be adjudicated bankrupt or shall go into liquidation voluntarily or otherwise or shall execute a deed of assignment for the benefit of or otherwise compound with his creditors (except for the purpose of re-construction or amalgamation) the Council may without prejudice to its other rights remedies and powers against the Developer for such non-performance or non-observance by notice in writing to the Developer and Surety determine this Agreement and upon such notice being served this Agreement shall forthwith determine but without prejudice however to the obligations of the Surety to the Council under clause 16 and of the Developer to the Council and the Undertaker under clauses 11 and 19 of this Schedule

Obligation of Surety

16 (a) **THE** Surety will as a principal indemnify the Council in respect of any expenditure which the Council may incur in accordance with this Agreement by reason of the failure of the Developer to observe or perform in full his obligations according to this Agreement whether or not this Agreement has been determined or disclaimed but the obligations of the surety shall in no circumstances exceed the limit specified in paragraph (b) of clause 3 of this Agreement and as to which the Surety hereby binds itself and its successors and assigns to the Council

(b) **THE** amount of any such expenditure shall be that certified by the Engineer whose certificate shall be final

(c) **THE** Surety shall be discharged or released from its obligations under this clause when those parts of the works as shall be sewers shall have become vested in the Undertaker and such parts of the Works as shall not be sewers but which the Undertaker requires to be conveyed or transferred together with the rights referred to in clause 19(2) of this Schedule shall have been effectually conveyed or transferred to the Undertaker but it shall not be discharged or released from such obligations by any determination or disclaimer of this Agreement or by any arrangement between the Developer and the Council or by any alteration in the obligations of the Developer or by the execution of any amended extra or substituted works authorised by virtue of clause 2 hereof or by any forbearance whether as to payment performance time or otherwise whether made with or without the assent of the Surety

Arbitration

17 **IN** the event of any dispute or difference arising from the construction of the Works or application of this Agreement (sub-clause 7(2) excepted) the same may be referred for determination to a person to be agreed between the parties hereto (or failing such agreement to be appointed by the President for the time being of the Institution of Civil Engineers) the decision of the person so agreed or appointed to be final binding and conclusive on all the parties hereto

Notices

18 **ANY** notice to be served on or documents to be supplied or submitted to the Council shall be delivered or posted to the address specified in paragraph (c) of clause 3 of this Agreement

and any notices to be served on the Developer may be delivered or posted by prepaid letter to his last known address (or being a limited company to its registered office or to its last known registered or head office) or place of business and any notice to be served on the Surety may be delivered at or posted to its registered or head office for the time being

Fees, Charges etc

19(1) **THE** Developer shall on the execution of this Agreement pay to the Council the cost of the preparation and completion of this Agreement and a duplicate thereof; and shall on demand immediately after the Engineer carries out a first inspection of the Works or of any part of the same pay the sum specified in paragraph (d) of clause 3 of this Agreement in respect of the costs of the Council for the supervision by the Engineer of the execution of the works

(2) **THE** Developer shall prior to the declaration vesting such of the works as shall be sewers in the Undertaker:

(a) at the request of the Council or the Undertaker execute or secure the execution (at no cost to the Council or the Undertaker whether by way of consideration or disbursements) of

(i) a Conveyance or transfer to the Undertaker vesting in the Undertaker an estate in fee simple free from incumbrances (if so required by the Council or the Undertaker) of the land shown coloured green on Drawing No 2.1.H annexed hereto forming the site and curtilage of pumping stations and pumps or of balancing areas that form part of the Works together in each case with all rights necessary to gain access thereto with vehicles over and along the land shown coloured blue on the said drawing

(ii) the transfer or grant to it of such of the rights referred to in recital (3) of this Agreement as the Undertaker may require so that such rights will be effectually vested in the Undertaker

(b) in the case of a discharge from any part of the Works to controlled waters as defined by the Water Resources Act 1991 make application for and obtain consent to such discharge under that Act and comply with the conditions relating to that consent

(3) **FOR** the purposes of paragraph (2) above the Council or the Undertaker and any Solicitor acting on behalf of either is hereby granted full authorisation to make any necessary searches and obtain any office copies of titles or entries in land charge registries the Council or the Undertaker or such Solicitor may consider requisite

Interpretation

20(1) **THE** Interpretation Act 1978 shall apply for the interpretation of this Agreement as it applies for the interpretation of an Act of Parliament

(2) **NOTHING** in this Agreement shall in any way prejudice or exclude the exercise by the Undertaker of any of its statutory or common law rights and powers arising otherwise than by virtue of this Agreement