

DATED \_\_\_\_\_ 20[ ]

**(1) LONDON UNDERGROUND LIMITED**

**(2) EARLS COURT PARTNERSHIP LIMITED**

**(3) EC PROPERTIES LP**

**(4) CAPITAL & COUNTIES LIMITED**

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**TUNNEL TOPS AGREEMENT**

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This Agreement is made the \_\_\_\_\_ day of \_\_\_\_\_ two thousand and [ ]

BETWEEN:

- (1) **LONDON UNDERGROUND LIMITED** (company registration number 1900907) whose registered office is at 42-50 Windsor House, Victoria Street, London SW1H 0TL ("**LUL**");
- (2) **EARLS COURT PARTNERSHIP LIMITED** a private limited company registered in England, (Company Number 8872070) whose registered office is at 15 Grosvenor Street, London, W1K 4QZ ("**JVCo**");
- (3) **EC PROPERTIES LP** a limited partnership registered in England and Wales under number LP14695 whose registered office is at 15 Grosvenor Street, London, W1K 4QZ acting by its general partner **EC PROPERTIES GP LIMITED** (Company Number 7696161) and EC Properties Nominee Limited (Company Number 07696994) whose registered offices are at 15 Grosvenor Street, London, W1K 4QZ ("**ECP**");
- (4) **CAPITAL & COUNTIES LIMITED** (No 00280739) whose registered office is at 15 Grosvenor Street, London W1K 4QZ ("the **Guarantor**")

WHEREAS:-

- (a) On the date hereof ECP has granted to JVCo a lease for a term of 999 years and 25 days of all that freehold land comprised in title number BGL66824;
- (b) ECP has transferred the freehold of such land to LUL subject to and with the benefit of the Lease; and
- (c) ECP has agreed to pay to JVCo the costs of certain works to part of the Premises demised by such Lease if such works are carried out by JVCo.
- (d) The Guarantor has agreed to guarantee to LUL and JV Co the obligations of ECP under this Agreement.

IT IS AGREED as follows:

## 1. DEFINITIONS

In this Agreement, unless the context requires otherwise

**"Base Rate"** either the base lending rate of Barclays Bank plc or such other clearing bank nominated by LUL at any time or, if the clearing banks cease at any time to publish a base lending rate, such comparable rate of interest as LUL may reasonably determine

**"Financial Year"** a 12 month period commencing on 1 January and ending on 31 December or such other 12 month period as LUL may specify

**"Index Linked"** in respect of the relevant sum or figure, such sum or figure adjusted annually on the first day of each Financial Year by applying the following formula:

$A \times C/B$  where:

A = the relevant sum or figure as set out in this Agreement but not

as previously Index Linked;

B = the UK RPI Index figure for [month preceding date of this Agreement] and

C = the UK RPI Index figure for the month preceding the date of calculation of the Index Linked sum or figure

|                     |   |
|---------------------|---|
| "Lease"             | means the lease of referred to in Recital (a) above   |
| "Premises"          | means the premises demised by the Lease   |
| "Prescribed Rate"   | means four per centum (4%) per annum above Base Rate from time to time  |
| "Transparency Deed" | means a Deed made between Transport for London (1) Capital & Counties Properties PLC (2) and Earls Court Partnership Limited (3) entitled Transparency Commitment and Confidentiality |
| "Tunnel Tops"       | means the part of the Premises forming the roof of the tunnels below the Premises as shown for identification only [hatched red] on Plan [ ]  |
| "Tunnel Walls"      | means the part of the Premises forming the walls of the tunnels (and the foundations to such walls) shown for identification only as [shaded blue] on Plan [ ]                        |
| "Working Day"       | any day from Monday to Friday (inclusive) which is not Christmas Day, Good Friday or a statutory Bank Holiday or other public holiday in England                                      |

- 1.1 Words importing one gender include all other genders words importing the singular include the plural and vice versa and any reference to a person includes a reference to any legal or natural person or authority board department or other body;
- 1.2 The clause headings do not form part of this Agreement and shall not be taken into account for the purposes of its construction or interpretation;
- 1.3 Any covenant by any party not to do or omit any act or thing shall include a covenant by any party not to permit or suffer it to be done or omitted by its employees, contractors (including their subcontractors (if any)) or agents;
- 1.4 References to clauses without further designation are references to the respective clauses of this Agreement;
- 1.5 Words and expressions defined in the Lease have the same meanings in this Agreement except to the extent that they are defined differently by this Agreement.

## 2. AGREEMENT

- 2.1 JVCo agrees with LUL that notwithstanding anything in the Lease it will not construct any permanent structure over the Tunnel Tops without first:
  - (a) having removed the Tunnel Tops; and
  - (b) having carried out such works of repair and strengthening to the Tunnel Walls as are required to prevent or avoid an Adverse Effect (as defined in the Lease); and
  - (c) having provided such fences or other security structures necessary as a result of the removal of the Tunnel Tops in order to prevent unauthorised access to or

objects falling on or otherwise causing danger to the Railway or an Adverse Effect;

**Provided That** the above shall not apply to temporary structures or works required to enable construction or other traffic to use the Premises as a roadway.

- 2.2 Before erecting any temporary structures or carrying out any works required to enable construction or other traffic to pass over the Tunnel Tops, JVCo will undertake, at its own cost, a detailed condition survey and associated assessment to determine the strength of the Tunnel Tops by a reputable and appropriately qualified professional (and provide a copy of such survey report with all supporting information, to the Engineer as soon as reasonably practicable and in any event within 20 Working Days following production of the report) to establish the extent to which any maintenance works need to be carried out to the Tunnel Tops to enable the Tunnel Tops to support the loading of such construction traffic, and before allowing such construction traffic to pass over the Tunnel Tops JVCo will carry out, at its own cost, the required maintenance works identified by the report.
- 2.3 JVCo agrees with LUL and with ECP that all works which are carried out pursuant to Clauses 2.1 and 2.2 shall be Critical Works (as defined in the Lease) and will be carried out in accordance with Schedule 5 to the Lease and JVCo will owe the same obligations to ECP in respect of the carrying out of such works as it owes to LUL pursuant to the terms of Schedule 5 to the Lease as if ECP were the Landlord and as if such terms were herein set out in full.
- 2.4 ECP agrees to pay to JVCo on a full indemnity basis all costs incurred by JVCo:
  - 2.4.1 in complying with JVCo's obligations under the Lease in respect of the maintenance, repair or otherwise relating to the physical state or condition of the Tunnel Tops and Tunnel Walls in respect of the period prior to JVCo carrying out the works referred to in Clause 2.1 hereof; and
  - 2.4.2 in carrying out the works or otherwise complying with its obligations referred to in Clauses 2.1 and 2.2 hereof (including all associated professional fees and other necessary costs relating thereto).
- 2.5 JVCo agrees with ECP and with LUL that before carrying out any works for which ECP shall be liable to pay under clause 2.4 hereof, the costs of such works shall be quantified and estimated as accurately as reasonably possible and agreed between JVCo and ECP (such agreement not to be unreasonably withheld by either party) and such agreed costs will be the limit of ECP's liability hereunder save for any increases which JVCo has taken all reasonable steps to avoid.
- 2.6 For the purposes of quantifying the liability of ECP under Clause 2.4 JVCo agrees that if such works are not carried out separately but are undertaken in conjunction with or as part of other works of development, JVCo will before carrying out the same, procure that such works are separately costed (as if they were being carried out separately but allowing ECP the benefit of any cost savings arising from the works being carried out in conjunction with other development works).
- 2.7 Any demand for payment by ECP hereunder shall be supported by evidence of the relevant costs in such detail as ECP shall reasonably require and such costs shall be paid by ECP to JVCo (net of any recoverable VAT) forthwith upon JVCo becoming liable to pay the same to the relevant building contractor or professional.
- 2.8 The liability of ECP hereunder shall cease and determine (save for any accrued cause of action) upon expiry of the defects maintenance period in respect of the works carried out under Clause 2.1 hereof.
3. The Guarantor hereby covenants with LUL and JV Co in the terms set out in Schedule 1.

#### 4. **SURRENDER OF WALLS AND AIRSPACE**

- 4.1 JVCo agrees with LUL that upon completion of the defects liability period of the works to the Tunnel Walls referred to in Clause 2.1(b), JVCo will surrender to LUL from the Premises demised under the Lease the Tunnel Walls and foundations thereto plus 200mm from the outside face of such walls and LUL will accept such surrender.
- 4.2 JVCo hereby agrees with LUL that upon completion of any permanent structure which is constructed on the Premises and which oversails the Railway Premises at a height above the Railway which is greater than the height of the existing Tunnel Tops, JVCo will surrender to LUL from the Premises demised under the Lease (and LUL will accept such surrender), all that airspace above the Railway Premises up to the underside of such permanent structure but subject to JVCo retaining such rights of access and servicing as are necessary for the purposes of repairing and maintaining such structure in accordance with its obligations under the Lease (such rights of access to be exercised in accordance with the provisions of Schedule 5 to the Lease).
- 4.3 JV Co and LUL shall effect any surrender pursuant to clauses 4.1 or 4.2 by entering into a deed of surrender in a form to be agreed between JV Co and LUL (each acting reasonably) and such deed shall contain appropriate rights of access and servicing in a form to be agreed between JV Co and LUL (each acting reasonably).

#### 5. **DISPUTES**

- 5.1 Any dispute or difference arising between the Parties under this Agreement, other than a dispute or difference which has regard to the meaning or construction of this Agreement shall be referred to and determined by an independent person (the "**expert**") if so required by any of the Parties by notice to the other Parties.
- 5.2 The expert shall:
- 5.2.1 have at least 10 years' experience in the relevant field or profession;
  - 5.2.2 have recent experience of matters similar to the type being referred; and
  - 5.2.3 have appropriate resources and support to be able to fulfil the functions required.
- 5.3 The expert shall be appointed by agreement between the Parties or, failing such agreement within five Working Days of the notice referred to in Clause 5.1, shall be appointed on the application of either of the Parties by such one of the following persons as the Parties shall agree to be appropriate having regard to the nature of the dispute or difference in question:-
- 5.3.1 the President (or the next most senior available officer) of the Law Society of England and Wales where the dispute relates to a point of law or legal drafting;
  - 5.3.2 the President (or the next most senior available officer) of the Chartered Institute of Accountants where the dispute relates to finance (including corporate finance), accounting or calculating the quantum of damages;
  - 5.3.3 the President (or the next most senior available officer) of the Royal Town Planning Institute where the dispute relates to planning;
  - 5.3.4 the President (or the next most senior available officer) of the Royal Institution of Chartered Surveyors where the dispute relates to real estate (including valuation), development or construction;
- or, in any such case, his duly appointed deputy or any other person authorised by him to make appointments on his behalf.
- 5.4 If one of the persons specified in Clause 5.3.1 to Clause 5.3.4 is required to be agreed and if within five Working Days after service of the notice referred to in Clause 5.1 the Parties have been unable

to agree which of the persons referred to in Clause 5.3 is appropriate to appoint the expert, the expert will be appointed, on the application of any of the Parties by the President for the time being of the Law Society or his duly appointed deputy or any other person authorised by him to make appointments on his behalf.

5.5 Any expert appointed under this Clause shall act as an expert and not as an arbitrator and the following provisions shall apply:-

5.5.1 the expert's decision shall be final and binding upon the Parties;

5.5.2 the expert shall consider, amongst other things, but shall not be bound by, any written representations on behalf of the Parties made within such time limits as he shall specify, which time limits shall be as short as he shall consider practicable in the circumstances;

5.5.3 the expert shall make available to each Party copies of the representations of the other Parties and allow the other Parties to make further written representations in response, to which Clause 5.5.2 shall apply;

5.5.4 upon receipt of any such representations the expert shall promptly inspect the Property if necessary and give notice of his instructions, if any, to the Parties and, if he shall so require, invite them or their advisers to attend his inspection and to make oral representations;

5.5.5 the expert shall as quickly as possible thereafter and in any event within six Working Days notify the Parties of his determination of the matter referred to him. The above period of six Working Days may be extended by a reasonable time (taking into account the obligation to act as quickly as possible) by notice to the referring Parties if reasonable to do so having regard to the complexity of the matter referred for determination;

5.5.6 the Parties shall use all reasonable endeavours to procure that the expert shall give his decision with reasons as speedily as possible;

5.5.7 the costs of appointing the expert and his costs and disbursements in connection with his duties under this Agreement shall be shared between the Parties in such proportions as the expert shall determine or, in the absence of such determination, equally between them; and

5.5.8 one Party may pay the costs required to be borne by another Party if they remain unpaid for more than five Working Days after they become due and then recover these and any incidental expenses incurred from the other Party on demand.

5.6 If the expert shall die or be or become unwilling or incapable of acting or in the reasonable opinion of either Party shall delay his determination avoidably or if for any other reason he shall not deliver his decision, any Party shall be entitled to apply to the President for the time being of the relevant professional institution to discharge the expert and appoint another in his place.

## 6. **VAT**

6.1 All sums payable or other consideration given for any taxable supply of goods and services under this Agreement by one Party to another shall be deemed to be exclusive of VAT and each Party shall pay any VAT properly chargeable in respect of any supply made to it by any other Party in addition to the sum or other consideration.

6.2 Each Party shall within the time limit relating to VAT laid down by statute supply a VAT Invoice to the Party making a payment of VAT.

6.3 Notwithstanding any provisions in this Agreement to the contrary, the due date or period for payment of the VAT which is chargeable by any Party to another Party shall be calculated from the date of receipt by the relevant Party of a valid VAT invoice addressed to it if the VAT invoice is

received by the relevant Party after the date for payment or the commencement of the period for payment for the supply to which it relates.

**7. INTEREST**

Any payment due from one Party to or at the direction of another Party pursuant to this Agreement shall bear interest at the Prescribed Rate from the date the payment fell due or, if applicable, from the expiry of the period for payment to the date of payment.

**8. NOTICES**

8.1 Any notice or other communication pursuant to, or in connection with, this Agreement shall be in writing and delivered personally, or sent by pre-paid first class post (air mail if overseas), to the Party due to receive such notice at its registered office from time to time (or to such other address as may from time to time have been notified in writing to the other Parties in accordance with this Clause).

8.2 Subject to Clause 8.3, any notice or other communication shall be deemed to have been served:-

8.2.1 if delivered personally, when left at the address referred to in Clause 8.1;

8.2.2 if sent by pre-paid first class post (other than air mail), two days after posting it; and

8.2.3 if sent by air mail, six days after posting it.

8.3 If a notice is given or deemed given at a time or on a date which is not a Working Day, it shall be deemed to have been given on the next Working Day.

**9. THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

A person who is not a party to this Agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

**10. GOVERNING LAW**

This Agreement shall be governed by English law and disputes or differences arising under or in connection with this Agreement shall be referred to the exclusive jurisdiction of the English Courts.

**11. CONFIDENTIAL INFORMATION AND FREEDOM OF INFORMATION**

Each of the parties acknowledges that the provisions of the Transparency Deed apply to the provisions of this Agreement.

This Agreement has been signed by the parties as a deed on the day and year written above.

## SCHEDULE 1

### GUARANTOR COVENANTS

1. The Guarantor in consideration of LUL and JV co entering into this Agreement guarantees to LUL and JV Co that ECP will comply with its obligations under this Agreement and if ECP shall fail so to do the Guarantor shall as a separate and independent primary obligation, if and in so far as LUL and/or JV Co shall require perform or procure the performance of all the outstanding obligations on the part of ECP hereunder and shall make good to LUL and JV Co on a full indemnity basis demand all losses, damages, costs and expenses thereby sustained by LUL and JV Co provided that the liability of the Guarantor under this guarantee shall not exceed in aggregate the sum of £20,000,000 (twenty million pounds) Index Linked.
2. The Guarantor acknowledges that its obligations in this Guarantee shall not be prejudiced by:
  - (a) any time or indulgence given to ECP;
  - (b) any variation or alteration of the terms of this Agreement being made or agreed between LUL and ECP;
  - (c) the liquidation administration or other insolvency or any change in the constitution of ECP or the Guarantor;
  - (d) any delay or forbearance by LUL or JV Co in enforcing the observance or performance of any of ECP's obligations in this Agreement;
  - (e) LUL or JV Co exercising any right or remedy against ECP for any failure to observe or perform ECP's obligations;
  - (f) any legal limitation or disability on ECP or any invalidity or irregularity of any of ECP's obligations in this Agreement or any unenforceability of any of them against ECP; and
  - (g) any other act, omission or thing whatsoever whereby the Guarantor might be released or as a result of which ECP's obligations hereunder may not be enforceable against the Guarantor.
3. LUL hereby acknowledges that the provisions of this Schedule create a guarantee and not an indemnity and that the liability of the Guarantor under this Agreement shall be no greater than the liability of ECP and that the Guarantor shall have available to it in defence of any claim, action or proceedings brought by LUL under this Agreement all the rights, defences and limitations available to ECP against LUL under this Agreement.
4. LUL hereby acknowledges that the Guarantor shall be entitled from time to time to request that another entity (a "Substitute Guarantor") be substituted for the Guarantor under this Agreement in accordance with the following provisions provided that the financial strength of the Substitute Guarantor (being its Net Asset Value assessed in accordance with UK GAAP for each of its two preceding accounting periods taking into account also any security offered by the Substitute Guarantor for performance of its obligations hereunder) is at least equal to £20,000,000 Index Linked (the "Covenant Requirement").
5. If:
  - (a) such accounts, financial and other information with regard to the Substitute Guarantor as may reasonably be required by LUL to assess whether the Substitute Guarantor satisfies the Covenant Requirement have been provided to LUL; and



- (b) LUL acknowledges that the Substitute Guarantor meets the Covenant Requirement (such acknowledgement not to be unreasonably withheld or delayed); and
- (c) a deed of covenant duly executed by the Substitute Guarantor which contains the same provisions as are set out in this Schedule 6 and pursuant to which the Substitute Guarantor assumed the same obligations to LUL as the Guarantor (as if the Substitute Guarantor was the Guarantor under this Agreement as from the date hereof) is delivered to LUL;

then upon delivery of such deed of covenant and completion of any additional security offered by the Substitute Guarantor in order to meet the Covenant Requirement the Guarantor shall from such delivery be released from any future liability under this Agreement.]

6. If LUL shall not have given its written acknowledgement that the Covenant Requirement has been met within 10 Working Days of having received the relevant information, then the matter may be referred to an Expert for determination in accordance with the provisions of Clause 5 of this Agreement.

**EXECUTED** as a deed by affixing )  
the common seal of )  
**LONDON UNDERGROUND LIMITED** )  
in the presence of: )

Authorised Signatory

**EXECUTED** as a Deed )  
(but not delivered until dated) by )  
**EARLS COURT PARTNERSHIP LIMITED** )  
acting by two Directors or a Director )  
and the Secretary:- )

Director

Director/Secretary

**EXECUTED** as a Deed )  
(but not delivered until dated) by )  
**EC PROPERTIES LP** acting by )  
**EC PROPERTIES GP LIMITED**, general partner )  
acting by two Directors or a Director )  
and a Secretary:- )

Director

Director/Secretary

**EXECUTED** as a Deed )  
(but not delivered until dated) by )  
**CAPITAL & COUNTIES LIMITED** )  
acting by two Directors or a Director )  
and the Secretary:- )

Director

Director/Secretary