

## Objective

Terms and conditions of NHBC Building Control Services Limited for the provision of the services of an 'Approved Inspector' under the Building Act 1984, in England or Wales.

## Part 1 - Introduction

1. Parts 1-3 contain the terms and conditions applicable when NHBC Building Control Services Limited ('NHBC') provides the services of an 'Approved Inspector' under the Building Act 1984, in England or Wales.
2. NHBC is a limited company, with company registration number 01952969, whose registered office is at Buildmark House, Chiltern Avenue, Amersham, Buckinghamshire HP6 5AP.
3. NHBC is a wholly owned subsidiary of the National House-Building Council, a company limited by guarantee, with company registration number 00320784, whose registered office is at Buildmark House, Chiltern Avenue, Amersham, Buckinghamshire HP6 5AP.
4. NHBC is licensed by the Construction Industry Council to act as an Approved Inspector in England and Wales.
5. The terms and conditions set out in this document apply to each Initial Notice served by NHBC on or after 1<sup>st</sup> August 2009. In each case when, at the request of a Client, NHBC serves an Initial Notice, that shall bring in to force with effect from the date of the Initial Notice a separate contract between NHBC and the Client for the provision by NHBC of the services of an Approved Inspector for the Building Work to which the Initial Notice refers ('Contract') and that Contract shall be on the terms and conditions set out in this document.
6. If the Client is registered with the National House-Building Council as builder or developer, the terms and conditions set out in this document shall not affect the Client's obligations under the NHBC Rules for Builders and Developers Registered with NHBC, nor under any new home warranty policies applicable to homes built or sold by the Client.
7. Throughout this document, certain capitalised words and expressions are used. They have the meanings set out in Part 3 of this document.
8. Any reference in this document to any statute or statutory provision shall be construed as including a reference to that statute or statutory provision as from time to time amended, modified, extended or re-enacted whether before or after the date any Contract comes into force and to all statutory instruments, orders and regulations for the time being made pursuant to it or deriving validity from it and (so far as may be applicable) any past statutory provisions (as from time to time amended, modified, extended or re-enacted) which such provision has directly or indirectly replaced.
9. Except insofar as the context otherwise requires, words denoting the singular shall include the plural and vice versa, words denoting any one gender shall include all genders, and words denoting persons shall include bodies corporate, unincorporated associations, partnerships and individuals.
10. Headings to clauses are included for ease of reference only and shall have no effect on the interpretation or construction of this document.

## Part 2 - Applicable Terms and Conditions

### 1. Provision of services

#### *Appointment*

- 1.1. Following the service of an Initial Notice by NHBC at the request of a Client, NHBC shall provide the Services for the relevant Building Work, subject to the terms and conditions set out in this document.
- 1.2. NHBC shall provide the Services with reasonable skill, care and diligence in accordance with the Building Act 1984 Part II and regulations made thereunder (including the Building (Approved Inspectors etc.) Regulations 2000, as amended) and with due regard to the Construction Industry Council's Code of Conduct for Approved Inspectors (as amended, modified, extended or re-issued from time to time).
- 1.3. NHBC shall prepare and provide to the Client an Inspection Notification Framework document, that sets out in outline how and when NHBC proposes to provide the Services; provided that in appropriate cases NHBC may use a generic Inspection Notification Framework document prepared for the Client generally and not specifically prepared or provided in respect of any particular Building Work.
- 1.4. When preparing the Inspection Notification Framework document and thereafter when providing the Services NHBC shall use reasonable endeavours to pay due regard to the scheduled programme of works for the Building Work, as advised to NHBC by the Client from time to time.
- 1.5. NHBC shall give a Final Certificate to the Local Authority for each part of the Building Work for which NHBC is satisfied (having regard to its duties as referred to in clause 1.1) that it is appropriate for it to do so.
- 1.6. NHBC may at any time by notice in writing inform the Client that in respect of the whole or any part of any Building Work NHBC is not satisfied (having regard to its duties as referred to in clauses 1.1 and 1.2) that it is appropriate for it to issue a Final Certificate (in which case clause 6.3 shall apply).

#### *Client information and assistance*

- 1.7. The Client shall promptly provide such information and assistance as NHBC reasonably requires from time to time in order to facilitate the timely provision of the Services, including and without the need for NHBC to request the same:
  - 1.7.1. the design documents for the Building Work, as relevant to matters pertaining to compliance with the Building Regulations;
  - 1.7.2. the scheduled programme of works for the Building Work;  
in each case promptly providing any modified or re-issued versions of the information or documents if any are created from time to time.
- 1.8. The Client shall (having due regard to the scheduled programme of works for the Building Work and the Inspection Notification Framework document) inform NHBC as soon as reasonably possible in advance and in any event not less than one clear working day in advance when inspection visits are required for the Building Work.

*Design, permits and approvals*

- 1.9. NHBC hereby informs the Client that NHBC is not responsible for the design, specification or management of construction work for the Building Work and the Services do not include the provision by NHBC of advice on or management of any aspect of the construction work for the Building Work.
- 1.10. NHBC hereby informs the Client that NHBC is not responsible for obtaining and/or implementing and/or providing any permits, licences or approvals required in connection with the Building Work, except for those that NHBC is obliged to obtain, implement and/or provide in its capacity as Approved Inspector.

*Compliance with Building Regulations*

- 1.11. NHBC hereby informs the Client that the Client is entirely responsible for ensuring that the Building Work meets the requirements of the Building Act 1984 and the Building Regulations and the Client acknowledges that the Services do not include NHBC advising the Client on how to meet those requirements.
- 1.12. NHBC hereby informs the Client that the issue of a Final Certificate is not a representation, warranty or certificate that each and every aspect of the Building Work meets the requirements of the Building Act 1984 and the Building Regulations.

*Access and Health and Safety*

- 1.13. The Client shall arrange for NHBC's personnel to have access to the Building Work at all reasonable times as necessary for NHBC to provide the Services.
- 1.14. NHBC shall ensure that its personnel comply with the Client's reasonable instructions in relation to their conduct when visiting the site of the Building Work.
- 1.15. The Client shall ensure that Health and Safety Requirements are complied with at the site of the Building Work.
- 1.16. Without prejudice to clauses 1.14 and 1.15, NHBC reserves the right to decline to carry out or complete an inspection visit for the Building Work when in NHBC's reasonable opinion to do so would put at risk the health and/or safety of the NHBC employee assigned to carry out the inspection.

**2. Documentation**

- 2.1. The copyright in all documents prepared by NHBC in connection with the provision of the Services shall belong to NHBC.
- 2.2. NHBC shall maintain accurate and reasonably detailed records of all work done by NHBC in the provision of the Services for a period of fifteen (15) years from the date of the applicable Final Certificate.

**3. Fees and expenses**

- 3.1. NHBC shall charge for the provision of the Services in accordance with the scale of charges most recently notified to the Client from time to time (or if not so notified, in accordance with its most recently published rates of charge published from time to time) and in all cases such rates of charge shall be quoted in UK pounds sterling, exclusive of UK Valued Added Tax but inclusive of the cost of disbursements.

- 3.2. NHBC reserves the right to charge reasonable additional fees, where additional site inspection and/or perusal of documents and/or attendance at meetings in excess of what is anticipated by the Inspection Notification Framework document are:
- 3.2.1. requested by the Client;
  - 3.2.2. necessitated by a change in the scheduled programme of works for the Building Work;
  - 3.2.3. necessitated by a change to the design of the Building Work;
  - 3.2.4. necessitated by the Client's Default;
  - 3.2.5. necessitated by an event of Force Majeure.
- 3.3. The Client shall pay NHBC's invoices within thirty (30) days of the date of the invoice.
- 3.4. If any sum payable by the Client is not paid on the due date it shall be paid with interest on the overdue amount calculated at the rate of 4% above the Bank of England's base lending rate for the whole period from the date upon which the sum ought to have been paid until the date of payment (whether before or after any judgement).
- 3.5. If a Contract is terminated, howsoever arising, the Client shall pay NHBC any instalments of the charges due up to the date of termination and a fair and reasonable proportion of the next instalment of the charges based on the amount of the Services provided prior to termination.

#### **4. Insurance**

- 4.1. NHBC shall maintain in force professional indemnity insurance and public liability insurance in accordance with its statutory obligations under the Building Act 1984.
- 4.2. On the Client's written request, NHBC shall provide evidence that these insurances are being properly maintained.
- 4.3. Where the Building Work includes the building of residential dwellings for sale or letting the Client shall ensure that each residential dwelling unit built is covered by NHBC's Buildmark new home warranty and insurance cover or by a similar designated warranty and insurance cover.

#### **5. Assignment and subcontracting**

- 5.1. NHBC shall not assign any Contract and shall not subcontract any part of the Services without the Client's prior approval, which shall not be unreasonably withheld or delayed.
- 5.2. The Client shall not assign the benefit of any Contract without NHBC's prior written approval, which shall not be unreasonably withheld or delayed.

#### **6. Termination**

- 6.1. Either party may at any time by notice in writing terminate a Contract if the other party commits a material Default and:

6.1.1. the material Default is capable of remedy and the party in Default shall have failed to remedy the material Default within twenty one (21) days of receipt of a written notice specifying the material breach and requiring its remedy;

6.1.2. the material Default is not capable of remedy.

6.2. Either party may at any time by notice in writing terminate a Contract as from the date of service of such notice if the other party passes a resolution, or the Court makes an order that the other party or its parent company be wound up, or a receiver, manager or administrator on behalf of a creditor is appointed in respect of the business or any part thereof of the other party or the parent company, or circumstances arise which entitle the Court or a creditor to appoint a receiver, manager or administrator or which entitle the Court otherwise than for the purpose of a bona fide reconstruction or amalgamation to make a winding up order, or the other party or its parent company is unable to pay its debts in excess of ten thousand pounds within the meaning of Section 123 of the Insolvency Act 1986 or any similar event occurs under the law of any other jurisdiction.

6.3. If NHBC serves a notice under clause 1.6, or a Contract is terminated, howsoever arising, NHBC shall notify the relevant Local Authority in writing (with a copy to the Client) to cancel the relevant Initial Notice in which case NHBC shall cease to be responsible for building control for the Building Work referred to in the Initial Notice from the date of notification of the Local Authority.

6.4. The termination of a Contract shall not prejudice any rights, duties or obligations of either party that are expressed as or are intended to be continuing after termination or which remain to be performed or discharged (as the case may be) after termination.

## 7. Limitation and mitigation

7.1. Neither party excludes or limits liability to the other party for death or personal injury caused by negligence, or for liability arising as a result of fraud.

7.2. Subject always to clause 7.1, NHBC's aggregate liability to the Client for any Default shall be limited in accordance with clauses 7.3 to 7.5.

7.3. Without prejudice to any other exclusion or limitation of liability, for each Contract the aggregate liability of NHBC for any loss and/or damage in respect of any Default shall be limited to that proportion as it would be just and equitable for NHBC to pay having regard to the extent of its responsibility for the loss and/or damage and on the assumptions that:

7.3.1. all other parties (including consultants, advisors, contractors, subcontractors and project managers) engaged in connection with the Building Work have provided contractual undertakings on terms no less onerous than those in the Contract in respect of their obligations in connection with the Building Work;

7.3.2. there are no exclusions of or limitations of liability nor joint insurance or co-insurance provisions agreed between the Client and any other party referred to in this clause and any such other party who is responsible to any extent for the loss and damage is contractually liable to the Client for the loss and damage;

7.3.3. all the parties referred to in this clause have paid to the Client such proportion of the loss and damage which it would be just and equitable for them to pay having regard to the extent of their responsibility for the loss and damage.

7.4. Subject always to clause 7.1, in no event shall either party be liable to the other for any one or more of the following that are sustained or incurred by the other in consequence of a Default; loss of profit, loss of business, loss of revenue, loss or impairment of goodwill, loss of opportunity, loss of anticipated savings, indirect loss or damage, and/or consequential loss or damage.

7.5. Without prejudice to any other exclusion or limitation of liability, for each Contract the total aggregate liability of NHBC for all loss and/or damage in respect of all Defaults occurring in connection with the same Contract shall in no event exceed the lesser of:

7.5.1. ten times the amount of the Fees payable for the Services under the Contract; or

7.5.2. ten million pounds sterling (£10,000,000.00).

7.6. The client shall refer only to NHBC (and not to individuals engaged by NHBC, including personnel and directors) for redress if the Client considers that there has been any breach of a Contract and the Client agrees not to pursue any claims in contract, tort (including negligence) or for breach of statutory duty against any individuals working for NHBC in carrying out its obligations under a Contract at any time and the Client acknowledges that such individuals are entitled to enforce this term of a Contract pursuant to the Contracts (Rights of Third Parties) Act 1999.

7.7. The Client shall use its best endeavours to mitigate any and all losses, costs and expenses incurred as a result of any Default.

## **8. Disputes and complaints**

If the Client is not satisfied with NHBC's performance of the Services, without prejudice to its other rights and remedies, the Client is entitled to request that NHBC investigate the matter in accordance with NHBC's complaints handling procedure, details of which can be obtained on request or from [www.nhbcbuilder.co.uk](http://www.nhbcbuilder.co.uk).

## **9. Rights of third parties**

Except as provided in clause 7.6, third parties have no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce the terms of any Contract, but this does not affect any right or remedy of a third party which exists or is available otherwise than under that Act.

## **10. Force majeure**

Neither party shall be in default of or liable for breach or delay in performance of its obligations under a Contract or be liable to make payment to the other or otherwise liable for any losses or damages whatsoever arising out of the prevention, hindrance or delay of the performance of any of its obligations to the extent that the performance of such is prevented or hindered by the occurrence of any event of Force Majeure.

## **11. Confidentiality**

11.1. The parties shall keep confidential all Confidential Information and use all reasonable endeavours to prevent their respective personnel, agents and contractors from making any disclosure to any person of any Confidential Information; save that the foregoing obligation shall not apply to:

11.1.1. any matter which the receiving party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this clause 11;

11.1.2. any disclosure by the receiving party which is required by any law (including any order of a court of competent jurisdiction), any Parliamentary obligation, or the rules of any stock exchange or governmental or regulatory authority having the force of law;

11.1.3. any disclosure by the receiving party of information that is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party.

**12. Notices**

Unless otherwise agreed, any notice or request required or permitted to be given under or in connection with a Contract shall be given in the English language in writing by prepaid registered or first-class mail, or facsimile to the recipient at its address as set out in the relevant Initial Notice or to such other address or addressee as may have therefore been furnished in writing by the recipient to the sending party in accordance with this clause.

**13. Law and jurisdiction**

13.1. Each Contract shall be governed by and construed in accordance with the laws of England and Wales.

13.2. In the event of litigation arising out of or in connection with a Contract the Courts of England and Wales shall have exclusive jurisdiction to settle any Claim, difference or Dispute (including set-offs and counterclaims) arising out of or in relation to an Agreement.

**14. Waiver**

The failure of either party at any time to enforce any provisions of a Contract shall in no way affect its right to require complete performance by either party of all its obligations under a Contract, nor shall the waiver of any breach of any provision be taken or held to be a waiver of any past or subsequent breach of any provision or to be a waiver of the provision itself.

**15. Set Off**

NHBC may without notice to the Client combine, consolidate or merge all or any of the liabilities of the Client to NHBC and may set off or transfer any sums from time to time owed by the Client to NHBC in or towards the satisfaction of any of those liabilities.

## Part 3 - Defined words and expressions

### Approved Inspector

Shall have the meaning given to the expression 'Approved Inspector' in the Building Act 1984 and the regulations made pursuant to that Act, including the Building (Approved Inspectors etc.) Regulations 2000 (as amended);

### Associate

Any person, firm or company who at any time is subject to any substantial degree, whether direct or indirect, to the same ownership management influence or control as you;

### Building Regulations

Means the Building Regulations 2000, S.I. 2000/2531 (as amended);

### Building Work

Means the building work referred to in an Initial Notice;

### Client

Means the person, firm or company that has requested that NHBC act as Approved Inspector and referred to as the 'person intending to carry out the works' in an Initial Notice;

### Confidential Information

Means (i) all information designated as such by either party in writing; and (ii) all other information which relates to the business, affairs, products, Building Work, trade secrets, know how, personnel, customers, suppliers or affiliates (including in the case of NHBC, the National House-Building Council and its subsidiaries) of either party; and (iii) information which may reasonably be regarded as the confidential information of the disclosing party or its affiliates; and (iv) data, including data, databases, reports and analyses prepared by or on behalf of NHBC;

### Contract

Is defined in Part 1, paragraph 5, under the heading 'Introduction';

### Default

Means any breach of the obligations of either Party under a Contract or any default, act, omission, negligence or statement of either Party in relation to the subject matter of a Contract and in respect of which the Party is liable to the other Party;

### Final Certificate

Shall have the meaning given to the expression 'Final Certificate', in the Building Act 1984 and the regulations made pursuant to that Act, including the Building (Approved Inspectors etc.) Regulations 2000 (as amended);

### Force Majeure

Means any cause affecting the performance by a Party of its obligations arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control including (but without limiting the generality thereof) emergency governmental regulations, fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, earthquakes, any disaster, war, civil war or armed conflict, acts or threats of terrorism, nuclear, chemical or biological contamination, pressure waves caused by aircraft, riot or civil commotion, failure in whole or in part by a statutory undertaker, utility company, local authority or other like body to carry out works or provide services, any accidental loss or damage to the parties' premises, or any road servicing those premises, any failure or shortage of power, fuel or transport, any blockade or embargo; provided that any such event is beyond the reasonable control of the party claiming relief and does not arise from any act, omission, negligence or wilful default of that party;

#### **Health and Safety Requirements**

Means each and every one of the Client's legal duties applicable to the health and/or safety of persons visiting the site of the Building Work, which are applicable on the date or dates on which NHBC personnel are visiting the site of the Building Work;

#### **Initial Notice**

Shall have the meaning given to the expression 'Initial Notice', in the Building Act 1984 and the regulations made pursuant to that Act, including the Building (Approved Inspectors etc.) Regulations 2000 (as amended);

#### **NHBC Company**

Any company within the same group of companies as National House-Building Council, including NHBC Building Control Services Limited and NHBC Services Limited;

#### **Party or Parties**

Means the Client and/or NHBC;

#### **Services**

Means the provision by NHBC of the services of an Approved Inspector.