

Dated

2013

- (1) The Mayor and Burgesses of the London Borough of Lambeth
- (2) Brixton Hill Developments Limited
- (3) United House Group Limited

[Draft] Development agreement

relating to development of a mixed use development, SW2 Enterprise Centre, and for the disposal and development of surplus office accommodation

[Eversheds Note: Whilst this document reflects the summary note prepared by United House following a financial meeting with Grant Thornton on 28th August, the Council is not able to confirm that the contents of that note, and the contents of this agreement, are commercially acceptable to the Council]

[Ashurst Note: Proposed LAD figures agreed but will need to be apportioned between phases.]

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Documents attached to this Agreement

1. Land Registry Entries
2. Plan[s] numbered [DESCRIPTION]
3. Programme of Works
4. Measurement Plans
5. Employer's Requirements
6. Phasing Plan
7. Appraisal
8. Surplus Properties Lease
9. Local Labour Statement
10. Plan for CPO

PARTICULARS

Date

Council

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF LAMBETH of Lambeth Town Hall, Brixton Hill, London SW2 1RW.

Developer

BRIXTON HILL DEVELOPMENTS LIMITED (registered number 08459239) whose registered office is at United House Goldsel Road Swanley Kent BR8 8EX.

Developer's Guarantor

UNITED HOUSE GROUP LIMITED (registered number 02998303 whose registered office is at United House Goldsel Road Swanley Kent BR8 8EX.

Commitment

the aggregate of the Post Unconditional Commitment and the Pre-Unconditional Commitment but for the avoidance of doubt the following sums fall outside the Commitment but are still payable by Council in relation to the SW2 Enterprise Centre Development:

a) CIL in relation to the SW2 Enterprise Centre

b) Section 237 Costs in relation to the SW2 Enterprise Centre

c) CPO Costs

Council's Representative

[NAME] of [ADDRESS] or such other person as the Council may appoint and notify in writing to the Developer.

Council's Solicitors

Eversheds LLP of Eversheds House, 70 Great Bridgewater Street, Manchester M1 5ES (Ref: P.MAJB.048709.010035) or such other solicitors as the Council may appoint and notify in writing to the Developer.

Developer's Solicitors

Ashurst LLP of Broadwalk House 5 Appold Street London EC2A 2HA (Ref: JXM/UHDL1.00020) or such other solicitors as the Developer may appoint and notify in writing to the Council.

SW2 Enterprise Centre	The part of the Site edged [] on Plan [].
SW2 Enterprise Centre Development	<p>the</p> <p>(a) construction on the SW2 Enterprise Centre Site of an office building having an Internal Area of not less than [NUMBER] square meters<u>95 per cent. of the Target Area</u> and not more than [NUMBER] square meters;[‡]<u>the Target Area;</u></p> <p>(b) construction on the SW2 Enterprise Centre Site of all ancillary service areas, access roads, landscaping works and other facilities</p> <p>(c) works of refurbishment to the Town Hall;</p> <p>(d) works of fitting out to the SW2 Enterprise Centre Development</p> <p>to be more particularly described in the SW2 Enterprise Centre Specification and the SW2 Enterprise Centre Development Plans.</p>
SW2 Enterprise Centre Surplus Site	The part of the Site excluding the SW2 Enterprise Centre edged [] on Plan [].
Hambrook House	The buildings shown edged [] on Plan [] comprised in title number [].
Hambrook House Option	The option agreement dated 6 April 2012 made between Richmond Management (Northern) Limited (1) and the Council (2) relating to the freehold of Hambrook House.
Hambrook House West	The buildings shown edged [] on Plan [] comprised in title number [].
Ivor House	The buildings shown edged [] on Plan [] comprised in title number [].
Longstop Date	(a) (in the event that no CPO is required to satisfy the Site Assembly Condition) the date two years and six months from the date of

[‡]~~This needs to be specified now.~~

this Agreement; or

~~(b) (in the event that a CPO is required to satisfy the Site Assembly Condition) the date five years from the date of this Agreement.²~~

(b) (in the event that a CPO is required to satisfy the Site Assembly Condition) the date five years from the date of this Agreement.¹

Commitment

~~the aggregate of the Post Unconditional Maximum Commitment and the Pre Unconditional Maximum Commitment but for the avoidance of doubt the following sums fall outside the Commitment but are still payable by Council in relation to the SW2 Enterprise Centre Development:~~

~~a) CIL in relation to the SW2 Enterprise Centre~~

~~b) Section 237 Costs in relation to the SW2 Enterprise Centre~~

~~c) CPO Costs~~

Olive Morris House

The buildings shown edged [] on Plan [] comprised in title number [].]

Phase 1

[Note: Please confirm extent of Phase 1]

Phase 2

[Note: Please confirm extent of Phase 2]

Plan[s]

The plan[s] attached to this Agreement numbered [NUMBERS].

24 Porden Road

The buildings shown edged [] on Plan [] comprised in title number [].

Purchase Price

£[] ([] POUNDS) subject to the provisions of Part 2 of schedule 12.

Relevant Property

Each of the Surplus Sites as the context permits.

Site

The Town Hall, 1-7 Town Hall Parade, Hambrook House, Hambrook House West, Ivor House, 24 Porden

² ~~These dates are maximums, the Council will not accept that they extend further.~~

¹ These dates are maximums, the Council will not accept that they extend further.

Road, Wynne Road and Wanless Road.

**Surplus Property
Development**

The development:

- (a) on the SW2 Enterprise Centre Surplus Site of []
- (b) on Wanless Road of []
- (c) on Olive Morris House of []

[DN 1: To be inserted]

Surplus Sites

The SW2 Enterprise Centre Surplus Site, Wanless Road and Olive Morris House.

Title Numbers

[]

Town Hall

The Town Hall building shown edged [] on Plan [] comprised in title number [].

1-7 Town Hall Parade

The buildings shown edged [] on Plan [] comprised in title number [].

Unconditional Date

The date of satisfaction of the last of the Overarching Conditions.

Wanless Road

The buildings shown edged [] on Plan [] comprised in title [].

Completion Date

[[In relation to each Surplus Site \(or part thereof\) the date on which the Developer goes into occupation for the purposes of undertaking the Surplus Property Development.](#)]³

³ ~~When is it proposed leases of Surplus Sites will be granted—please specify~~

THIS AGREEMENT is made on the date set out in the Particulars

BETWEEN

- (1) the Council;
- (2) the Developer; and
- (3) the Developer's Guarantor.

BACKGROUND

- (A) The Council is the Owner of the Site (in the case of Hambrook House via an option to purchase the freehold) and, the occupational tenant of Olive Morris House.
- (B) The Council has procured the Developer via the competitive dialogue process to carry out the SW2 Enterprise Centre Development for the Council at the Developer's expense on the SW2 Enterprise Centre and the Surplus Property Development.
- (C) Subject to the terms of this Agreement the Council will let the Surplus Property to the Developer to enable the Developer to carry out the Surplus Property Development.

OPERATIVE PROVISIONS

1. INTERPRETATION

1.1 In this Agreement, the following words and expressions have the following meanings:

"Acceptance Tests" means all the tests usually carried out when commissioning items of mechanical and electrical plant such as those that will be incorporated in the Development Works and/or specified in the Specification and Development Plans with a view to demonstrating compliance with the respective design specifications and performance specifications of such items;

"Adverse Matters" any change in the SW2 Enterprise Centre or any terms contained in a Planning Permission, Planning Agreement, Infrastructure Agreement or a Statutory Consent or any other agreement with a third party which would or may:

- (a) alter the Internal Area of the SW2 Enterprise Centre Development by more than five per cent;
- (b) materially alter the layout of the SW2 Enterprise Centre Development;
- (c) materially alter the external appearance of the SW2 Enterprise Centre Development;
- (d) delay the Date of Practical Completion;
- (e) restrict the permitted use or uses of the SW2 Enterprise Centre Development;
or
- (f) reduce the value of the completed SW2 Enterprise Centre Development in the open market;

“Appointment Default”

- (a) the rescission of the Building Contract or any Appointment;
- (b) the determination of the Building Contract or any Appointment due to the act or default of the Developer or the Building Contractor or member of the Professional Team; or
- (c) the determination of the Building Contract or any Appointment due to the Insolvency of the Building Contractor or member of the Professional Team.

“Appointment”

each of the deeds of appointment of the Professional Team [to be entered into in accordance with **Part 1 of Schedule 2**] [and includes the existing Appointments] [briefly described in **Part 3 of Schedule 2**] [**DN: to be clarified in dialogue as to when appointments will be entered into**]

“Appropriation Condition” has the meaning ascribed in **Schedule 2**

“Architect”	[[NAME] of [ADDRESS] or such other reputable] architect who is a [member][fellow] of the Royal Institute of British Architects as the Developer or the Building Contractor appoints as the Architect for the SW2 Enterprise Centre Development Works in accordance with Part 1 of Schedule 2 [DN: Please confirm]
“BREEAM”	The Building Research Establishment’s Environmental Assessment Method
“Building Contract”	the [building contract or contracts for the carrying out of the Relevant Works to be entered into in accordance with Part 1 of Schedule 2] or any replacement building contract entered into in accordance with Part 1 of Schedule 2
“Building Contractor”	[[NAME] of [ADDRESS] [(company number [COMPANY NUMBER])] or such other] reputable building contractor as the Developer appoints as the building contractor for the purposes of the Relevant Works in accordance with Part 1 of Schedule 2 [DN: bidder to clarify identity]
“CDM Co-ordinator”	[[NAME] of [ADDRESS] or such other][such] reputable and suitably qualified person appointed by the Developer as the CDM Co-ordinator for the Relevant Works in accordance with regulation 14(1) of the CDM Regulations [DN: bidder to clarify identity]
“CDM Regulations”	the Construction (Design and Management) Regulations 2007
“Certificate of Making Good Defects”	each certificate to be issued in accordance with any Building Contract certifying that all defects in a Section or all defects in the Relevant Works which are the responsibility of the Building Contractor have been made good in accordance with the terms of the Building Contract

"Certificate of Practical Completion"	the certificates or statements to be issued in accordance with the Building Contracts certifying that Practical Completion has taken place
"Certificate of Sectional Completion"	each certificate or statement to be issued in accordance with each Building Contract certifying that Sectional Completion has taken place [DN: Please confirm if relevant]
"CIL"	has the meaning ascribed to it in the Community Infrastructure Levy Regulations 2010 (CIL Regulations) which for the avoidance of doubt includes Mayoral CIL
"Connected Party"	has the meaning given in Schedule 12
"Construction Industry Scheme"	the tax deduction scheme for the construction industry operated by HM Revenue and Customs under Chapter 3 of Part 3 of the Finance Act 2004 and The Income Tax (Construction Industry Scheme) Regulations 2005
"Construction Phase Plan"	the construction phase plan to be prepared in respect of the Relevant Works under regulation 23 of the CDM Regulations
"Council's Works"	[DN: Council is expecting bidders to price for ICT works and to submit mandatory variant bids for CAT B and FF&E. If Council do not select developer's CAT B and FF&E bids, then Council will require access to carry these out] [Ashurst: Noted and we understand this is being clarified] the Council's ICT Works to the SW2 Enterprise Centre
"Date of Practical Completion"	the date certified in the Certificate of Practical Completion as the date of Practical Completion
"Decant Strategy"	the decant strategy to be agreed or determined pursuant to clause 24

"Defects Liability Period" the defects liability period under each Building Contract which will be not less than twelve months

"Design Documents" all or any of the following which relate to the SW2 Enterprise Centre Development or the Surplus Property Development and the Relevant Works:

- (a) designs, drawings, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings, CAD materials and other materials provided or to be provided under this Agreement and any additions or alterations made to them;
- (b) the Specification and Development Plans; and
- (c) works, designs, calculations and inventions incorporated into any of the items listed in paragraphs (a) and (b) of this definition

"Development" means together the SW2 Enterprise Centre Development and the Surplus Sites Development (in each case including all Relevant Works)

"Development Default" the:

- (a) failure of the Developer substantially to begin the SW2 Enterprise Centre Development Works by the SW2 Enterprise Centre Start Date; or
- (b) the SW2 Enterprise Centre Termination Date occurring before Practical Completion of the SW2 Enterprise Centre Development Works has taken place

~~(c) failure of the Developer substantially to begin the Surplus Property Development Works by the Surplus~~

~~Property Start Date; or~~

~~(d) the Surplus Property Termination Date occurring before Practical Completion of all of the Surplus Property Works~~

(c) failure of the Developer substantially to begin the Surplus Property Development Works by the Surplus Property Start Date; or

(d) the Surplus Property Termination Date occurring before Practical Completion of all of the Surplus Property Works

“EIR”

the Environmental Information Regulations 2004 and any other Implementing Regulations in the UK of EC directive (2003/4Ec) on Public Access to Environmental Information and which may also include any binding guidance which may be published from time to time by the Department of Constitutional Affairs in relation to any such legislation

“Employer’s Agent”

✕[[NAME] of [ADDRESS]] or such other reputable person who is a [member][fellow] of the [Royal Institute of British Architects][Royal Institution of Chartered Surveyors] as the Developer appoints as the Employer’s Agent for the purposes of the Building Contract in accordance with **Part 1 of Schedule 2 [DN: Bidder to clarify identity]**

“Employer’s Requirements”

the Council’s Employer’s Requirements annexed to this Agreement

“SW2 Enterprise Centre Development Conditions”

has the meaning given to it in **clause 3.2**

“SW2 Enterprise Centre Development Works”

the following works:

(a) the demolition of the buildings currently on the SW2 Enterprise Centre (excluding the Town Hall);

(b) the SW2 Enterprise Centre Development;

~~“SW2 Enterprise Centre Development Works”~~

~~the following works:~~

~~(a) the demolition of the buildings currently on the SW2 Enterprise Centre (excluding the Town Hall);~~

(c) ~~(b) the SW2 Enterprise Centre Development;~~ any works required pursuant to any Infrastructure Agreement relating to the SW2 Enterprise Centre Development;

(d) the Services Works ancillary to the SW2 Enterprise Centre Development;

~~(e)~~ any works to be carried out pursuant to any other deed or document entered into by the Developer with any other person directly or indirectly related to the SW2 Enterprise Centre Development [or the carrying out of the Phase 1 Development Works]

“SW2 Enterprise Centre Plans”

the detailed plans, drawings, sections, elevations, specifications, priced bills of quantities, engineer’s drawings and calculations and other design and building details for the SW2 Enterprise Centre Development Works to be agreed pursuant to **Schedule 3**

“SW2 Enterprise Centre Specification”

the detailed specification of the SW2 Enterprise Centre Development Works to be prepared in accordance with **Schedule 3**

“SW2 Enterprise Centre Start Date”

Six months after the date on which all of the SW2 Enterprise Centre Development Conditions have been satisfied

“SW2 Enterprise Centre Termination Date”

~~{273 weeks~~The date six years after the Unconditional Date]⁴²

⁴ ~~The Council consider this too long and not in accordance with the programme.~~

² The Council consider this too long and not in accordance with the programme. - Ashurst: UH understand that the Council's objections were in relation to the Estimated PC dates, and these have been shortened. The Termination Date should offer headroom, given that they are non extendable.

"EPC"	the energy performance certificate for the SW2 Enterprise Centre Development as defined by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007
"Estimated Date of SW2 Enterprise Centre Practical Completion"	{ <u>the date 229 weeks after he Unconditional Date</u> subject to extension in accordance with paragraph 3 of Schedule 5 [DN: To be advised and tied into programme]
"Estimated Date of SW2 Enterprise Centre Sectional Completion"	[DN: to be discussed] <u>The date 117 weeks after the Unconditional Date subject to extension</u> in relation to phasing if relevant <u>accordance with paragraph 9 of Schedule 5</u>
"Estimated Date of Surplus Property Practical Completion"	[DN: Please confirm] <u>Repetition of definition of "Surplus Property Estimated Date of Practical Completion"</u>
"Event of Default"	<p>the occurrence of one or more of the following events:</p> <ul style="list-style-type: none"> (a) an Insolvency Default; (b) a Planning Default; (c) an Appointment Default, subject to the provisions of paragraph 8 of Part 1 of Schedule 2; (d) a Development Default; (e) a Measurement Default; (f) the Developer commits a material breach of this Agreement which cannot be remedied and which has a materially adverse effect on the Council; (g) the Developer commits a material breach of this Agreement which is capable of being remedied and: <ul style="list-style-type: none"> (i) does not begin diligently to

remedy that breach within ten working days of written notice from the Council or immediately in case of emergency; and

- (ii) does not remedy the breach within a reasonable period of time, to be specified in the notice, to the reasonable satisfaction of the Council;

(h) the Council commits a material breach of this Agreement which cannot be remedied and which has a materially adverse effect on the Developer;

(i) the Council commits a material breach of this Agreement which is capable of being remedied and:

- (i) does not begin diligently to remedy that breach within ten working days of written notice from the Developer or immediately in case of emergency; and

- (ii) does not remedy the breach within a reasonable period of time, to be specified in the notice, to the reasonable satisfaction of the Developer;

"FOIA"

the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time together with any guidance and/or codes of practice issued by the Information Commissions in relation to such legislation;

"Force Majeure"

any one or more of the following:

- (a) fire;
- (b) storm or other exceptionally adverse weather conditions;
- (c) war, hostilities, rebellion, insurrection, military or usurped power or civil war;
- (d) labour lockouts, strikes or other industrial disputes;
- ~~(e) riot, terrorist action, commotion, disorder;~~
- ~~(f) decree of government;~~
- ~~(g) non-availability of labour, materials or equipment; or~~
- ~~(h) any other causes or circumstances beyond the reasonable control of the Developer~~

(e) riot, terrorist action, commotion, disorder;

(f) decree of government;

(g) non-availability of labour, materials or equipment; or

(h) any other causes or circumstances beyond the reasonable control of the Developer

“Funding Condition” has the meaning ascribed to it in **Schedule 4**

“Handover Requirements” the provision of the matters specified in:

- (a) paragraphs 10.1.1 and 10.1.3 of Schedule 5; and
- (b) **paragraph 11.1.4 of Schedule 5**

“Health and Safety Executive” the Health and Safety Executive or any successor department or organisation having responsibility for the administration of the CDM

Regulations

“Health and Safety File”

the health and safety file to be maintained in respect of the SW2 Enterprise Centre Development Works and the completed SW2 Enterprise Centre Development under regulation 20(2)(e) of the CDM Regulations

“Information”

all records and information (including confidential information) held by the Developer on behalf of the Council or by the Council in relation to this Agreement and the SW2 Enterprise Centre Development falling within the scope of FOIA and/or EIR;

“Infrastructure Agreement”

an agreement or undertaking in respect of and affecting the Property or the Relevant Works, whether or not also affecting other property pursuant to:

(a) sections 38 or 278 Highways Act 1980;

~~“Infrastructure Agreement”~~

~~an agreement or undertaking in respect of and affecting the Property or the Relevant Works, whether or not also affecting other property pursuant to:~~

~~(b) ~~(a) sections 38 or 278 Highways Act 1980;~~section 104 Water Industry Act 1991 or any other provision of similar intent, within the meaning of the Water Act 1989, with an appropriate authority for the supply of water or the drainage of surface or foul water from the Property; or~~

(c) any agreement with an appropriate authority or utility company relating to the passage or transmission or gas, water, electricity, foul or surface water drainage or any of them

“Insolvency Default”

the Insolvency of the Developer or the Developer’s Guarantor

“Insolvency”

has the meaning given to it in **Schedule 7**

“Insured Risks”

the risks of:

- (a) fire, subterranean fire, lightning, storm, tempest, flood and explosion;
- (b) bursting or overflowing of water tanks, apparatus or pipes or the escape of water from any of them;
- (c) aircraft or other aerial devices or articles dropped or falling from any of them;
- (d) riot, civil commotion and malicious damage;
- (e) impact, earthquake, heave, landslip, subsidence; and
- (f) such other risks for which the Council reasonably requires insurance from time to time

“Internal Area”

the net internal area of the SW2 Enterprise Centre Works measured in square meters in accordance with the Code of Measuring Practice (Sixth Edition) RICS 2007) shown for identification edged [] on the Measurement Plans

“Investor”

any person approved in writing by the Council, such approval not to be unreasonably withheld or delayed, who has entered into an agreement with the Developer:

- (a) to purchase the Surplus Properties from the Developer; or
- (b) to provide funding to the Developer for the carrying out of the Surplus Property Development and performance of the Developer's obligations in this Agreement, whether or not in addition to purchasing the Surplus Property;

and/or

- (c) to refinance any of the foregoing

“Liability Period”

the period of one year from and including the later of:

- (a) the Date of the final Certificate of Making Good Defects; and
- (b) the date all of the Warranties have been provided to the Council under this Agreement

“Measurement Default”

either:

- (a) an Initial Measurement Default has occurred under **paragraph 12 of Schedule 5** and the Developer shall not have served a Remedy Notice by the A Date pursuant to **paragraph 12 of Schedule 5**; and
- (b) the Internal area of the completed SW2 Enterprise Centre Development Works is less than [] of the Target Area **[DN: Tolerances to be specified]**

“Measurement Plans”

the plans annexed at **Appendix 4**

“Mechanical and Electrical Services Engineer”

[[NAME] of [ADDRESS] or such other reputable] mechanical and electrical services engineer as the Developer or the Building Contractor appoints as the Mechanical and Electrical Services Engineer for the purposes of the Relevant Works in accordance with **Part 1 of Schedule 2 [DN: Bidder to confirm details]**

“Onerous Conditions”

has the meaning given to it in **paragraph 5.4 of Part 1 of Schedule 1**

“Option to Tax”

an option to tax the Site and all Surplus Property pursuant to Part 1 Schedule 10 to the VATA and “Opted to Tax” has a corresponding meaning.

"Overarching Conditions"	the conditions set out in clause 3.2
"Performance Bond"	the performance bond to be given by the Building Contractor in accordance with Part 1 of Schedule 2
"Phasing Plan"	the phasing plan for the SW2 Enterprise Centre Development Works annexed to this Agreement
"Planning Act"	the Town and Country Planning Act 1990
"Planning Default"	has the meaning ascribed to it in Schedule 1
"Planning Permission"	<p>planning permission for the SW2 Enterprise Centre Development or the Surplus Property Development (as the case may be) including approval of siting, design, access and use whether or not reserving approval for landscaping and materials, granted:</p> <ul style="list-style-type: none"> (a) pursuant to a Planning Application; or (b) by the local planning authority or by the Secretary of State or an Inspector.
"Planning Submission Date"	<ul style="list-style-type: none"> (a) (in the case of the SW2 Enterprise Centre Planning Application) within 20 working days of the approval by the Council of the SW2 Enterprise Centre Planning Application; and (b) (in the case of the Surplus Property Planning Application) within 20 working days of the approval by the Council of the Surplus Property Planning Application
"Planning Sum"	Any payment required pursuant to a S111 Agreement
"Practical Completion"	completion of the whole of the Relevant Works in accordance with the terms of the Building Contract but excludes any landscaping works that it is not possible to complete because of the planting season in which practical

“Principal Sub-Contractors”

completion occurs

the sub-contractors appointed or to be appointed by the Building Contractor for the carrying out of the following elements of the Relevant Works:

- (a) piling and foundations;
- (b) structural steel frame and roof structure;
- (c) floor slabs;
- (d) profiled metal cladding or curtain walling;
- (e) roofing;
- (f) mechanical and electrical services; and
- (g) lifts

together with any other sub-contractors with a material design responsibility for the Relevant Works

“Priority Agreement”

any agreement to be entered into between (1) the Council (2) an Investor and (3) the Developer to regulate priorities between the rights of the Council under the Council’s Charge and the rights of an Investor under any Security

“Professional Team”

each of the following:

- (a) the Architect;
- (b) the Employer’s Agent;
- (c) the Mechanical and Electrical Services Engineer;
- (d) the CDM Co-ordinator;
- (e) the Quantity Surveyor; and
- (f) the Structural Engineer

“Programme of Works”	the Programme of Works to be agreed pursuant to Schedule 3 for both the SW2 Enterprise Centre Development Works and the Surplus Land Development Works
“Prohibited Materials”	<p>any products or materials which are generally known to be deleterious at the time of specification or use, in the particular circumstances in which they are used, or those identified as potentially hazardous in or not in conformity with:</p> <p>(a) the report entitled “Good Practice in the Selection of Construction Materials” (1997, by Tony Sheehan, Ove Arup & Partners, published by the British Council for Offices and the British Property Federation) other than the recommendations for good practice contained in Section 2 of that report; or</p> <p>(b) relevant British or European Standards or Codes of Practice.</p>
“Quantity Surveyor”	[[NAME] of [ADDRESS] or such other reputable] quantity surveyor as the Developer or the Building Contractor appoints as the Quantity Surveyor for the purposes of the Relevant Works in accordance with Part 1 of Schedule 2 [DN: Bidder to confirm identity in dialogue]
“Reinstatement Cost”	<p>the costs, allowing for inflation during the period of reinstatement, of:</p> <p>(a) debris removal, demolition, property clearance and complete reinstatement of the Relevant Works, assuming their total destruction; and</p> <p>(b) all the Professional Team’s, design, legal and other professional fees in such reinstatement</p>
“Relevant Development	the SW2 Enterprise Centre Development Plans or the Surplus Property Development Plans (as

Plans	the context permits)
“Relevant Specification”	the SW2 Enterprise Centre Specification or the Surplus Property Specification (as the context permits)
“Relevant Works”	the SW2 Enterprise Centre Development Works or the Surplus Property Works (or both of them) (as the context permits)
“Request for Information”	has the meaning given to it in clause 17
“Road Closure Order”	f an order under the Planning Act formally stopping up or extinguishing either temporarily or permanently (as reasonably required by the Developer) any public rights of vehicular and/ or pedestrian passage over the area shown [DN: Plan of intended area to be covered by the order required] ⁵
“Satisfactory Planning Permission”	has the meaning given to it in paragraph 1 of Part 1 of Schedule 1
“Section”	Any section (s) that the Relevant Works are divided into under relevant Building Contract
“Sectional Completion”	completion of a Section in accordance with the terms of the relevant Building Contract but excludes any landscaping works that it is not possible to complete because of the planting season in which practical completion occurs
“Services Works”	the installation and connection of: <ul style="list-style-type: none"> (a) electricity, foul and surface water drainage, gas, water, and public telephone services within the Site or Surplus Properties to the public mains; (b) internet, cable and other computer or telecommunications media; and (c) all pipes, wires, ducts and other conduits for the passage of such

⁵ ~~Please confirm if a road closure order is required. You will also need to add provisions in the schedules dealing with the obtaining and satisfaction of this condition.~~

services

- "Site Assembly Condition"** has the meaning ascribed to it in **Schedule 3**
- "Specialist"** has the meaning given to it in **clause 13**
- "Statutory Consents"** any statutory approvals, consents, licences or permissions required from any local or other competent authority to enable the Developer lawfully to carry out and complete the Relevant Works or to reinstate them following their damage or destruction
- "Statutory Requirements"** all or any of the following:
- (a) any 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 any Act of Parliament;
 - (b) any European directive or regulations and rules having the force of law in the United Kingdom; and
 - (c) any regulations, orders, bye-laws or codes of practice of any local or statutory authority having jurisdiction over the Relevant Development Works
- "Statutory Successor"** any successor authority, public body or other authority who shall take over the function of the Council
- "Step-In Agreement"** any agreement to be made between (1) the Council (2) the Developer and (3) an Investor providing inter alia for the Investor to serve written notice on the Council within three⁶ months following notice from the Council specifying any Event of Default and giving notice of the Council's intention to terminate this Agreement (or such other period of time as the Investor may reasonably require to be

⁶~~The Council consider three months is more than adequate~~

specified) stating that the Investor intends either to step in to the obligations of the Developer or nominate another party (first approved by the Council acting reasonably) to do so complying with the terms of this Agreement and for allowing the Investor or such nominee to step-in to the obligations of the Developer on default by the Developer of any obligations owed by the Developer to the Investor, the terms of such agreement otherwise to be agreed between the parties acting reasonably

“Structural Engineer”

[[NAME] of [ADDRESS] or such other reputable] structural engineer as the Developer or the Building Contractor appoints as the Structural Engineer for the purposes of the Relevant Works in accordance with **Part 1 of Schedule 2 [DN: Please confirm]**

“Substation Leases”

[] [**Ashurst: details awaited**]

“Surplus Property Development Plans”

the detailed plans, drawings, sections, elevations, specifications, priced bills of quantities, engineer’s drawings and calculations and other design and building details for the Surplus Property Development Works to be agreed pursuant to **Schedule 3**

“Surplus Property Development Works”

the following works:

- (a) [demolition of the existing buildings on the Surplus Sites]
- (b) the Surplus Property Development;
- (c) the Services Works ancillary to the Surplus Property Development;
- (d) any works required pursuant to any Infrastructure Agreement or Planning Agreement relating to the Surplus Property Development;
- (e) any works to be carried out pursuant to

any other deed or document entered into by the Developer with any other person directly or indirectly related to the Surplus Property Development or the carrying out of the Surplus Property Development Works

“Surplus Property Estimated Date of Practical Completion”² ~~{DN: Separate dates will be needed for each element of the Surplus Property Development Works}~~ date 253 weeks after the Unconditional Date subject to extensions in accordance with this Agreement

“Surplus Property Estimated Date of Sectional Completion” the date 77 weeks after the Unconditional Date subject to extensions in accordance with this Agreement

“Surplus Property Specification” the detailed specification of the Surplus Property Centre Development Works to be prepared in accordance with **Schedule 3**

“Surplus Property Start Date” Six months after the date on which all of the Surplus Property Development Conditions have been satisfied.

“Surplus Property Termination Date” ~~{DATE}~~ ~~{273 weeks}~~ the date 6 years after the Unconditional Date³

“Target Area”

(a) ~~{}~~ 3,604 square metres of Internal Area in relation to the SW2 Enterprise Centre excluding the Town Hall; and

(b) ~~{~~ 10,376 square metres of Internal Area in relation to the Town Hall

~~but in any event not to be less than 13980 square meters⁸~~

² ~~The Council considers this too long—please reconsider.~~

³ The Council considers this too long, please reconsider. – Please see earlier comment re SW2 Enterprise Centre Termination Date.

⁸ ~~The Council require a target area to be specified in the document, it is not acceptable that this is to reflect planning drawings—there needs to be a base figure—they need to know what they are getting.~~

but in any event not to be less than 13,980 square meters

“Title Matters”

the agreements, covenants, declarations, easements, exceptions, provisions, reservations, stipulations and other matters referred to in the property and charges register of the Title Numbers as at []the date hereof except for []⁹financial charges securing the Seller's indebtedness;

“Transfer of Risk Date”

in relation to each part of the SW2 Enterprise Centre Works the later of:

- (a) the Date of Practical Completion of the SW2 Enterprise Centre Works or (if earlier) the date of Sectional Completion of the relevant section
- (b) the date on which the Building Contractor hands possession of the SW2 Enterprise Centre Development (or the relevant part thereof) to the Developer under the terms of the Building Contract
- (c) the satisfaction of the Handover Requirements (or if earlier the date on which the Council goes into beneficial occupation of the relevant part of the SW2 Enterprise Centre Development)

“Urgent Defects”

any defect shrinkage or fault in the SW2 Enterprise Centre Development Works which:

- (a) is or may become a threat to health and/or safety of persons on the SW2 Enterprise Centre Development; or
- (b) is or made become a potential or actual cause of damage to the SW2 Enterprise Centre Development (beyond the

⁹-Details to be inserted

damage inherent in the defect)

~~(c) will disrupt or cause disruption to the operation of the Council (apart from disruption which will necessarily arise from its rectification)~~

(c) will disrupt or cause disruption to the operation of the Council (apart from disruption which will necessarily arise from its rectification)

“VAT”

Value Added Tax

“VATA”

the Value Added Tax Act 1994

“Viability Condition”

has the meaning ascribed to it in **Schedule 6**

“Warranties”

either:

- (a) a deed of collateral warranty containing step-in provisions or
- (b) a right to enforce the relevant Building Contract, Appointment or sub-contract pursuant to the Contracts (Right of Third Parties) Act 1999

to be given by each member of the Professional Team, each Building Contractor and each Principal Sub-Contractor in institutionally acceptable forms satisfactory to the Council (acting reasonably) and to be on terms at least as beneficial as those that may be given to any Funder or Investor

1.2 In this Agreement:

1.2.1 the clause headings do not affect its interpretation;

1.2.2 unless otherwise indicated, references to clauses and Schedules are to clauses of and Schedules to this Agreement and references in a Schedule to a Part or paragraph are to a Part or paragraph of that Schedule;

1.2.3 references to any statute or statutory provision include references to:

- 1.2.3.1 all Acts of Parliament and all other legislation having legal effect in the United Kingdom; and
- 1.2.3.2 any subsequent statutes directly or indirectly amending, consolidating, extending, replacing or re-enacting that statute and also include any orders, regulations, instruments or other subordinate legislation made under that statute;
- 1.2.4 references to the Enterprise Centre or Surplus ~~Proeprties~~Properties include any part of them;
- 1.2.5 "including" means "including, without limitation,";
- 1.2.6 "indemnify" means to indemnify against all actions, claims, demands and proceedings taken or made against the indemnified party and all costs, damages, expenses, liabilities and losses incurred by the indemnified party subject to the indemnified party:
 - 1.2.6.1 using its reasonable endeavours to mitigate its loss; and
 - 1.2.6.2 (if any third party makes a claim, or notifies an intention to make a claim, against the indemnified party which may reasonably be considered likely to give rise to a liability under this indemnity (a "**Claim**")):
 - (a) as soon as reasonably practicable, giving written notice of the Claim to the indemnifying party, specifying the nature of the Claim in reasonable detail;
 - (b) not making any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the indemnifying party (such consent not to be unreasonably conditioned, withheld or delayed);¹⁰
- 1.2.7 if there is more than one Developer, the obligations which they undertake can be enforced against them all jointly or against each individually; and
- 1.2.8 if any provision is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remainder of the Agreement is to be unaffected.

¹⁰ ~~The Council is comfortable with this level of qualification~~

- 1.3 The Particulars form part of this Agreement and words and expressions set out in the Particulars are to be treated as defined terms in this Agreement.
- 1.4 The parties to this Agreement do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.
- 1.5 This Agreement is a "development agreement" for the purposes of Article 6 Construction Contracts (England and Wales) Exclusion Order 1998.
- 1.6 Use of all reasonable and commercially prudent endeavours by a party shall mean taking all reasonable steps which a prudent and determined party acting in its own interests and anxious to obtain the relevant outcome would have taken but not so that its own commercial interests were significantly and materially adversely affected. In the case of the Developer the standard of reasonableness shall be that of a competent and prudent developer, experienced in carrying out developments of the type, size, scope and complexity of the Development.
- 1.7 Words and expressions set out in the schedules to this Agreement are to be treated as defined terms in this Agreement.

2. **DEVELOPER'S WARRANTIES**

- 2.1 The Developer warrants to the Council that:
 - 2.1.1 the Developer is a validly existing company;
 - 2.1.2 the execution of this Agreement by the Developer has been validly authorised;
 - 2.1.3 the Developer's obligations under this Agreement constitute valid legal and binding obligations of the Developer enforceable against the Developer in accordance with the terms of this Agreement;
 - 2.1.4 neither the execution of this Agreement by the Developer nor compliance with its terms will:
 - 2.1.4.1 conflict with or result in any breach of any law or enactment or any deed, agreement or other obligation or duty to which the Developer is bound; or
 - 2.1.4.2 cause any limitation on any of the powers whatsoever of the Developer, or on the right or ability of the directors of the Developer to exercise such powers, to be exceeded;
 - 2.1.5 the Developer is not in default under any law or enactment or under any deed, agreement or other obligation or duty to which the

Developer is bound so as to affect adversely its ability to comply with the terms of this Agreement;

- 2.1.6 all consents required by the Developer for the execution, delivery, issue, validity or enforceability of this Agreement have been obtained and have not been withdrawn;
- 2.1.7 the Developer is not under any statutory obligation to undertake the Relevant Works or any part of them;
- 2.1.8 no litigation or administrative or arbitration proceedings before any court, tribunal, Government authority or arbitrator is presently taking place, pending or, to the knowledge of the Developer, threatened which might have a material adverse effect on its business, assets, condition or operations or might affect adversely its ability to comply with its obligations under this Agreement;
- 2.1.9 all information, documents and accounts of the Developer submitted to the Council as part of the competitive dialogue process are true and accurate and:
 - 2.1.9.1 no change has occurred since the date on which such information, documents and accounts was supplied which renders them untrue or misleading in any respect; and
 - 2.1.9.2 there has been no material adverse change in the business, assets, operations or prospects of the Developer since such information, documents and accounts was provided;
- 2.1.10 the Developer has disclosed to the Council all information which would or might reasonably be thought to influence the Council in procuring the Developer or providing funding to the Developer or the amount of that funding;
- 2.1.11 the Developer is not, after due enquiry, aware of anything which materially threatens the success or successful completion of the Relevant Works;
- 2.1.12 no Event of Default has occurred or is continuing in relation to the Developer.

3. **OVERARCHING CONDITIONS**

- 3.1 This Agreement (save for clauses []) is subject to satisfaction of the Overarching Conditions on the terms of this Agreement.

3.2 The Overarching Conditions are:

3.2.1 the Satisfaction Date having passed in relation to

3.2.1.1 Satisfactory Planning Permission;

3.2.1.2 Satisfactory Listed Building Consent; and

3.2.1.3 [Any Road Closure Order] [to include oversail agreements, partial stopping up]¹¹⁴;

3.2.1.4 [Party Wall Awards]¹²⁵,

for the SW2 Enterprise Centre Development and for paragraph (a) of the definition of the Surplus Site Development;

3.2.2 the Satisfaction Date having passed in relation to

3.2.2.1 Satisfactory Planning Permission; and

3.2.2.2 [Any Road Closure Order] [to include oversail agreements, partial stopping up]¹³⁶;

3.2.2.3 [Party Wall Awards]¹⁴⁷,

for the Surplus Property Development (excluding paragraph (a) of that definition)

3.2.3 the exchange in accordance with Schedule 1 of any Planning Agreement free from Onerous Conditions which is necessary in order to fully implement a Satisfactory Planning Permission.

3.2.4 the Site Assembly Condition;

3.2.5 the Funding Condition;

3.2.6 the Appropriation Condition; and

3.2.7 the approval of the SW2 Enterprise Centre Specification, SW2 Enterprise Centre Development Plans and Programme of Works in accordance with **Schedule 7**;

3.2.8 the Developer Viability Condition;

¹¹⁴ Operative provisions will be required to be inserted in the relevant schedule.

¹²⁵ As 11

¹³⁶ As 11

¹⁴⁷ As 11

- 3.2.9 the Council Viability Condition.
- 3.3 The Developer and the Council are to comply with their respective obligations in **Schedules 1 to 5** to procure that all of the Overarching Conditions are satisfied on the terms of this Agreement.
- 3.4 Once each Overarching Condition has been satisfied, the party responsible for satisfying the Condition Developer is to give notice in writing of the same to the other party within five working days of satisfaction and shall provide to the other such written evidence as the other party reasonably requires that the relevant condition has been satisfied on the terms of this Agreement.
- 3.5 The Overarching Conditions may not be waived by the Council or the Developer unless stated in the relevant Schedule.
- 3.6 The Developer or the Council (as appropriate) is to give written notice to the other within five working days of the last of the Overarching Conditions being satisfied.
- 3.7 If any of the Overarching Conditions above have not been satisfied on or before the Longstop Date either party may end this Agreement by serving written notice on the other.
- 3.8 Termination of this Agreement pursuant to **clause 3.8** shall be without prejudice to any claims for antecedent breach by any party and it shall be subject to the provisions of **clause 3.9**.
- 3.9 If this Agreement is determined following a failure to satisfy any of:
- 3.9.1 the Site Assembly Condition;
 - 3.9.2 the Appropriation Condition;
 - 3.9.3 the Council Viability Condition,
- (other than where the failure is due to the default of the Developer) then the Council shall pay an amount equal to the Developer's reasonably and properly incurred Eligible Development Costs incurred up to the date of such termination. Such costs shall be evidenced by the Developer to the Council on an open book basis and shall be paid by the Council within 20 Working Days of agreement or determination by a Specialist [of such costs](#) (whichever is the later).
4. **DEVELOPMENT OF THE SW2 ENTERPRISE CENTRE**
- 4.1 Subject to all of the SW2 Enterprise Centre Development Conditions being satisfied on the terms of this Agreement the Developer is to carry out or procure that the SW2 Enterprise Centre Works are carried out in accordance with

Schedule 9 at its own cost subject to payment by the Council of the sums payable by it under this Agreement;

4.2 The SW2 Enterprise Centre Development Conditions are:

4.2.1 the Building Contracts, Appointments and Warranties (excluding any from the Principal Sub-contractors) being entered into in accordance with **Schedule 6**;

4.2.2 all Statutory Consents that are required before beginning the SW2 Enterprise Centre Development Works being obtained in accordance with **paragraph 2 of Schedule 8**.

4.2.3 payment of any Planning Sum to the extent the same is required to be paid prior to commencement of the SW2 Enterprise Centre Development Works

4.3 Following the Unconditional Date the Developer and the Council are to comply with their respective obligations in **Schedules 6** and **8** to procure that all of the SW2 Enterprise Centre Development Conditions are satisfied on the terms of this Agreement.

4.4 Once each SW2 Enterprise Centre Development Condition has been satisfied, the Developer is to provide to the Council such written evidence as the Council reasonably requires that the relevant condition has been satisfied on the terms of this Agreement.

4.5 The SW2 Enterprise Centre Development Conditions may not be waived.

4.6 The Developer is to give written notice to the Council within five working days of the last of the SW2 Enterprise Centre Development Conditions being satisfied.

5. **SURPLUS PROPERTY DEVELOPMENT CONDITIONS**

5.1 Subject to all of the Surplus Property Development Conditions being satisfied on the terms of this Agreement the Developer is to carry out or procure that the Surplus Property Development Works are carried out in accordance with **Schedule 10** at its own cost.

5.2 The Surplus Property Development Conditions are:

5.2.1 the Building Contracts, Appointments and Warranties (excluding any from the Principal Sub-contractors being entered into in accordance with **Schedule 6**);

- 5.2.2 all Statutory Consents that are required before beginning the Surplus Property being obtained in accordance with **paragraph 2 of Schedule 8**.
- 5.3 Following the Unconditional Date the Developer and the Council are to comply with their respective obligations in **Schedules 6 and 8** to procure that all of the Surplus Property Development Conditions are satisfied on the terms of this Agreement.
- 5.4 Once each Surplus Property Development Condition has been satisfied, the Developer is to provide to the Council such written evidence as the Council reasonably requires that the relevant condition has been satisfied on the terms of this Agreement.
- 5.5 The Surplus Property Development Conditions may not be waived.
- 5.6 The Developer is to give written notice to the Council within five working days of the last of the Surplus Property Development Conditions being satisfied.
- 5.7 If any of the Surplus Property Conditions have not been satisfied on or before the Surplus Property Longstop Date the Council may end this Agreement by serving written notice on the Developer.
- 6. LICENCE TO OCCUPY**
- 6.1 The Council grants a non-exclusive licence to the persons listed in **clause 6.3** to enter and remain on the SW2 Enterprise Centre on and after the date the last of the SW2 Enterprise Centre Development Conditions is satisfied for the purposes set out in **clause 6.5**.
- 6.2 The licence in **clause 6.1** is granted to:
- 6.2.1 the Developer;
- 6.2.2 the Building Contractor, its sub-contractors, including Principal Sub-Contractors, and their respective agents and employees; and
- 6.2.3 the Professional Team;
- 6.3 The licence in **clause 6.1** permits those exercising the rights to bring upon the SW2 Enterprise Centre vehicles, plant, equipment and materials required for the carrying out and completion of the SW2 Enterprise Centre Development Works in accordance with the terms of this Agreement.
- 6.4 The licence granted in **clause 6.1** is granted for the purposes only of carrying out and completing the SW2 Enterprise Centre Development Works and rectifying any defects in them during relevant Defects Liability Period.

- 6.5 The licence granted in **clause 6.1** does not confer on the Developer or any other person any legal or equitable right, title, interest or estate in the SW2 Enterprise Centre.
- 6.6 The Licence granted in **clause 6.1** ends on the earlier of the following dates:
- 6.6.1 the date on which this Agreement ends under **clause 13**; and
- 6.6.2 the date of the final Certificate of Making Good Defects for the SW2 Enterprise Centre Development Works;
- 6.7 When the licence in **clause 6.1** ends, the Developer is to procure that the Site is vacated by the persons listed in **clause 6.2** and that all vehicles, plant, equipment and materials belonging to them are removed from the SW2 Enterprise Centre.

7. **INSURANCE**

- 7.1 The Developer is to procure that the Building Contractor keeps the Relevant Works (except for the works to the Town Hall) and all unfixed goods and materials insured under the terms of the Building Contract:
- 7.1.1 in their Reinstatement Cost;
- 7.1.2 against the Insured Risks;
- 7.1.3 until and including the Transfer of Risk Date;
- 7.1.4 (in relation to the SW2 Enterprise Centre Development only) in the joint names (as "dual" or "composite" insured) of the Developer, the Building Contractor and the Council;
- 7.1.5 with reputable insurance offices in or having a business office in the United Kingdom or through underwriters at Lloyd's; and
- 7.1.6 on reasonable commercial terms and subject only to reasonable excesses, exclusions and conditions of such cover.
- 7.2 The Developer is to use reasonable endeavours to procure that any exclusion in respect of terrorist activity is removed from the insurance maintained under **clause 7.1**.
- 7.3 The Developer is to use reasonable endeavours to procure that the insurers of the Relevant Works undertake with the Council not to cancel the insurance without first giving to the Council 15 working days' prior written notice of their intention to do so.
- 7.4 The Developer is to provide the Council with:

- 7.4.1 a copy of the insurance policy maintained under **clause 7.1** and evidence for the payment of the premium for the insurance;
 - 7.4.2 evidence of its renewal when reasonably requested by the Council; and
 - 7.4.3 any endorsements or other amendments to the relevant policies of insurance or of any notification or other correspondence received from the insurers.
- 7.5 The Council is to procure the insurance of the Town Hall during the carrying out of the SW2 Enterprise Centre Development Works:
- 7.5.1 in their Reinstatement Cost;
 - 7.5.2 against the Insured Risks;
 - 7.5.3 until and including the Transfer of Risk Date;
 - 7.5.4 in the joint names (as "dual" or "composite" insured) of the Developer, the Building Contractor and the Council;
 - 7.5.5 with reputable insurance offices in or having a business office in the United Kingdom or through underwriters at Lloyd's; and
 - 7.5.6 on reasonable commercial terms and subject only to reasonable excesses, exclusions and conditions of such cover.
- 7.6 The Council is to use reasonable endeavours to procure that any exclusion in respect of terrorist activity is removed from the insurance maintained under **clause 7.1**.
- 7.7 The Council is to provide the Developer with:
- 7.7.1 a copy of the insurance policy maintained under **clause 7.2** and evidence for the payment of the premium for the insurance;
 - 7.7.2 evidence of its renewal when reasonably requested by the Council; and
 - 7.7.3 any endorsements or other amendments to the relevant policies of insurance or of any notification or other correspondence received from the insurers
- 7.8 If the Relevant Works are damaged or destroyed by any of the Insured Risks on or before the Transfer of Risk Date:
- 7.8.1 (unless the damage or destruction relates to the Town Hall) the Developer is to use all reasonable and commercially sensible

- endeavours promptly to obtain the maximum payment of insurance moneys;
- 7.8.2 (if the damage or destruction relates to the Town Hall) the Council is to use all reasonable and commercially sensible endeavours promptly to obtain the maximum payment of insurance moneys
- 7.8.3 the Developer and the Council are, as joint insured, to procure that the insurance moneys received in relation to the SW2 Enterprise Centre Development Works are credited to a separate account nominated by the Council ("Nominated Account");
- 7.8.4 the Developer may require payments from the Nominated Account, up to a maximum of the insurance moneys paid into it, to enable it to comply with its obligations in **clause 7.9.5**;
- 7.8.5 the Developer will use all reasonable and commercially sensible endeavours to obtain all necessary Statutory Consents for rebuilding and as soon as reasonably practicable thereafter to procure that the Building Contractor rebuilds, repairs or otherwise reinstates the Relevant Works in a good and substantial manner in accordance with the terms of this Agreement and the Building Contract to the reasonable satisfaction of the Council;
- 7.8.6 if the moneys received in respect of such insurance are insufficient for the purpose of rebuilding, repairing or reinstating the Relevant Works, as between the Developer and the Council, the Developer is to make good any deficiency out of its own moneys (save to the extent that such deficiency is due to any act or default of the Council in which case such deficiency shall be paid by the Council); and
- 7.8.7 Practical Completion is not to take place unless and until the rebuilding, repairing and reinstating the Relevant Works has been completed.
- 7.9 Any insurance moneys received by the Developer in relation to damage or destruction of the SW2 Enterprise Centre Works are to be held in trust for the Council. If, for any reason, it becomes impossible or impracticable to reinstate the SW2 Enterprise Centre Works, the insurance moneys received in relation thereto will belong to the Council absolutely.
- 7.10 It is agreed that the risk of damage to or loss or destruction of the SW2 Enterprise Centre Works, including all buildings, fixtures, fittings, plant and equipment, is to pass to the Council only on the Transfer of Risk Date.
- 7.11 From the Unconditional Date until the Transfer of Risk Date the Developer is to:

- 7.11.1 maintain public liability insurance, with an indemnity to principals clause ~~benefiting~~benefitting the Council, against liability to the public and to third parties in such sum as may be prudent being however for not less than £10,000,000 in respect of any one claim; and
- 7.11.2 require that non-negligence insurance is maintained under the Building Contract.
- 7.12 If the Developer does not insure or procure all or any of the insurances required by this **clause 7** or fails to produce reasonable evidence that such insurances are in force, the Council may itself effect such insurance cover as it may consider prudent and the cost of so doing together will be recoverable from the Developer.
- 7.13 The parties recognise that the insurance requirements of the SW2 Enterprise Centre Development may change from time to time and will act in good faith to ensure that the SW2 Enterprise Centre Development remains insured at reasonable cost to the reasonable satisfaction of both parties.

8. **LIMITATION OF DEVELOPER'S LIABILITY**

- 8.1 The Developer is not to be relieved of liability for any breach of its obligations in this Agreement by:
 - 8.1.1 the consent or approval of the Council to any matter under this Agreement, whether or not this Agreement expressly requires the consent or approval of the Council (save for any obligation to obtain such consent which shall be satisfied thereby);
 - 8.1.2 the issue of a Certificate of Sectional Completion or Certificate of Practical Completion or the absence of any objection by the Council to its being issued or the terms which it contains;
 - 8.1.3 the making good of defects by a Building Contractor under the terms of a Building Contract;
 - 8.1.4 the right of the Council or the Developer to make a claim against the Building Contractor or members of the Professional Team;
 - 8.1.5 any delay or neglect by the Council in enforcing the terms of this Agreement or any time allowed by the Council for their performance; or
 - 8.1.6 any variation of the terms of this Agreement.

8.2 The liability of the Developer to the Council in respect of any breach of the terms of this Agreement relating to Relevant Works is to end on the last day of the Liability Period except in respect of:

8.2.1 claims begun before the end of the Liability Period;

8.2.2 any rights of action in respect of which the Council has given written notice to the Developer before the expiry of the Liability Period of its intention to make a claim (in relation to which the Developer's liability shall end on the date 6 months after the end of the Liability Period if no claim has been begun before such date);

8.2.3 any outstanding liability under any Statutory Consent or Infrastructure Agreement or Planning Agreement; and

8.2.4 any landscaping which remains to be carried out in the next planting season.

8.3 The Developer's liability under this Agreement shall not exceed TWENTY MILLION POUNDS (£20,000,000) in aggregate. This **clause 8.3** shall not:

8.3.1 exclude or limit the Developer's liability for:

8.3.1.1 wilful breach of contract;

8.3.1.2 fraud or fraudulent misrepresentation;

8.3.1.3 claims in connection with death or personal injury.

8.3.2 apply to any liability in respect of which sums are received under either the insurance taken out under **clause 7.1** or the public liability insurance referred to in **clause 7.9** (and for the avoidance of doubt the Developer shall make a claim for such sums pursuant to such insurances).

9. **ASSIGNMENT OF RIGHTS OF ACTION**

9.1 This **clause 9** applies to accrued rights of action, whether or not ascertained, against the Building Contractor or members of the Professional Team which relates to the SW2 Enterprise Centre Development Works only and to which the Developer is or may be entitled at the end of the Liability Period unless at that time it is the subject matter of a claim which has been begun by the Council against the Developer, or relates in whole or in part to a matter for which the Developer remains liable under **clause 8.2**.

- 9.2 Where an assignment of the rights of action is not prohibited under the Building Contract or an Appointment and any necessary consent to the assignment of the rights of action can be obtained:
- 9.2.1 the Developer is at the request and reasonable and proper cost of the Council to use reasonable endeavours to obtain any consent required for the assignment; and
 - 9.2.2 subject to any consents required being obtained, the Developer is to assign to the Council absolutely with full title guarantee all rights of action on terms to be agreed between the parties (acting reasonably) subject to receipt of a full indemnity from the Council for any future liability of the Developer under the relevant Building Contract or Appointment.
- 9.3 Where an assignment of the rights of action is prohibited under the terms of the Building Contract or the terms of an Appointment, or the Developer, having used reasonable endeavours to do so, has not been able to obtain any consent required for the assignment, the Developer is, in relation to the rights of action it retains at the request and cost of the Council, to prosecute claims against and seek redress from the Building Contractor or members of the Professional Team, hold the proceeds of such claims on trust for the Council and account to the Council for those proceeds provided that:
- 9.3.1 the Developer shall never be obliged to act against its own commercial interests as determined by the Developer acting reasonably;
 - 9.3.2 the Developer shall only be obliged to prosecute such claims and seek such redress where the Council is unable to do so under the Warranties and such inability is not the result of the Council's own default.

10. **DEVELOPER'S INDEMNITY**

- 10.1 The Developer is to indemnify the Council in respect of any of the following matters arising directly or indirectly in relation to the Relevant Works or any operations carried out by or on behalf of the Developer on the Site or Surplus Property:
- 10.1.1 the death of, injury to or accident to any person;
 - 10.1.2 the damage to or loss of any property;
 - 10.1.3 any breach of the Statutory Consents or Statutory Requirements;
 - 10.1.4 the infringement of the rights of any third party caused by the carrying out of the Relevant Works (save to the extent that liability for the

same is assumed by the Council under this Agreement or otherwise);
and

10.1.5 any nuisance or disturbance suffered by any third party caused by the carrying out of the Relevant Works.

10.1.6 any other claims arising from breach of this Agreement.

11. **VALUE ADDED TAX**

Sums payable under this Agreement are exclusive of VAT. Where, under the terms of this Agreement, a supply is made that is subject to VAT, the person receiving the supply is to pay the VAT to the person making the supply and a valid VAT invoice is to be issued by the person making the supply.

12. **CONSTRUCTION INDUSTRY SCHEME**

12.1 Where the Developer acts as a contractor or a sub-contractor within the meaning of the Construction Industry Scheme in relation to this Agreement or the SW2 Enterprise Centre Development Works or the Surplus Property Development Works, the Developer is to comply with the requirements of the Construction Industry Scheme and maintain all registrations required with HM Revenue and Customs.

12.2 The Council may make all payments under this Agreement net of any deduction or withholding which it is required by law to make under the Construction Industry Scheme. If it does so, it is to account to HM Revenue and Customs for the tax it withholds in accordance with the requirements of the Construction Industry Scheme.

13. **TERMINATION RIGHTS**

13.1 Following an Event of Default and subject to any Step-In Agreement, the party not in default may end this agreement by serving one month's written notice on the defaulting party.¹⁵

13.2 If the Council ends this Agreement pursuant to **clause 13.1** or **clause 3.8** the Developer is at the request of the Council and for no consideration to assign (so far as it is able to do so) to the Council or as the Council otherwise directs the benefit of all or any of the following:

13.2.1 the Building Contract(s) and any Performance Bond;

13.2.2 the Appointments;

¹⁵~~If termination for Council default is required, the definition of Event of Default will need changing to reflect this. The Council would be comfortable with material breach, subject to notice to remedy in the same was as is the current drafting for the Developer.~~

- 13.2.3 any other contracts or agreements entered into by the Developer in relation to the Relevant Works (excluding this Agreement);
 - 13.2.4 all the Developer's rights against the Building Contractor, Principal Sub-Contractors and the members of the Professional Team;
 - 13.2.5 all warranties whether as to design, materials or otherwise in relation to the Relevant Works and any other guarantees and warranties given by the Building Contractor, Professional Team and suppliers and manufacturers in respect of all plant, machinery and apparatus installed as part of the Relevant Works; and
 - 13.2.6 all rights of copyright vested in the Developer.
- 13.3 The Developer irrevocably appoints the Council by way of security to be the attorney of the Developer with full power and authority to do all acts and things and execute and deliver in the name of the Developer all deeds and documents which may be necessary to give effect to the terms of **clause 13.2**.
- 13.4 This **clause 13** will continue to apply after any rescission or determination of this Agreement.
- 13.5 The termination of this Agreement will not prejudice any rights or remedies of any party against any other party in respect of any outstanding breaches of this Agreement.

14. **DETERMINATION OF DISPUTES**

- 14.1 If any dispute arises between the Developer and the Council relating to or arising out of the terms of this Agreement, the Council or the Developer may give to the other written notice requiring the dispute to be determined under this **clause 15**. The notice is to:
- 14.1.1 propose an appropriate Specialist;
 - 14.1.2 state whether the Specialist is to act as an independent expert or an arbitrator, having regard to the terms of this **clause 14**; and
 - 14.1.3 specify the nature and substance of the dispute and the relief sought in relation to the dispute.
- 14.2 For the purposes of this **clause 14** a "Specialist" is a person:
- 14.2.1 qualified to act as an expert or an arbitrator in relation to the dispute;
 - 14.2.2 having not less than ten years' professional experience; and

- 14.2.3 having practical experience in relation to developments in the nature of the SW2 Enterprise Centre Development and property in the same locality as the Property.
- 14.3 The recipient of a notice under **clause 14.1** will be deemed to accept the identity of the Specialist and the capacity in which he is to act unless it gives notice in writing to the party serving the notice rejecting one or more of the proposals within ten working days of receipt of the notice and on the service of a notice rejecting one or more of the proposals, **clause 14.4** will apply.
- 14.4 Unless the Developer and the Council agree or are deemed to agree the terms for resolving the dispute set out in the notice served under **clause 14.1**:
- 14.4.1 any dispute over the type of Specialist appropriate to resolve the dispute or the capacity in which a Specialist is to act may be referred at the request of the Developer or the Council to the President or next most senior available officer of the Royal Institution of Chartered Surveyors who will have the power, with the right to take such further advice as he may require, to determine and nominate the appropriate Specialist or to arrange his nomination and to determine the capacity in which the Specialist is to act; and
- 14.4.2 any dispute over the identity of the Specialist is to be referred at the request of the Developer or the Council to the President or other most senior available officer of the organisation generally recognised as being responsible for the relevant type of Specialist. If no such organisation exists, or the parties cannot agree the identity of the organisation, then the Specialist is to be nominated by the President or next most senior available officer of the Royal Institution of Chartered Surveyors.
- 14.5 The reference to a Specialist is to be made to him as an expert unless:
- 14.5.1 both the Developer and the Council agree, or are deemed to agree, that the Specialist should act as an arbitrator;
- 14.5.2 this Agreement specifies that the dispute is to be determined by an arbitrator; or
- 14.5.3 **clause 14.6** applies
- and where this Agreement specifies that the dispute is to be determined by an expert such position shall prevail.
- 14.6 If any dispute raises or relates to the same or similar issues as those which have been or are being submitted to independent determination under the Building

Contract the Council and the Developer will endeavour to appoint the same person acting in the same capacity as may be appointed to resolve the dispute under the Building Contract and to have the dispute proceedings under this Agreement and the Building Contract consolidated.

14.7 Where a Specialist is to act as an independent expert:

14.7.1 the Developer and the Council may make written representations within ten working days of his appointment and will copy the written representations to the other party;

14.7.2 the Developer and the Council are to have a further ten working days to make written comments on each other's representations and will copy the written comments to the other party;

14.7.3 the Specialist is to be at liberty to call for such written evidence from the parties and to seek such legal or other expert assistance as he or she may reasonably require;

14.7.4 the Specialist is not to take oral representations from the Developer or the Council without giving both parties the opportunity to be present and to give evidence and to cross-examine each other;

14.7.5 the Specialist is to have regard to all representations and evidence before him when making his decision, which is to be in writing, and is to give reasons for his decision; and

14.7.6 the Specialist is to use all reasonable endeavours to publish his decision within 30 working days of his appointment.

14.8 Where a Specialist is to act as an arbitrator:

14.8.1 all submissions made or evidence supplied to him are to be in writing unless the parties agree within ten working days of his appointment that this requirement does not apply;

14.8.2 the date of his award will be deemed to be the date on which he serves a copy of the award on the Developer and the Council;

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

14.8.4 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

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

14.9 Responsibility for the costs of referring a dispute to a Specialist under this **clause 14**, including costs connected with the appointment of the Specialist and the Specialist's own costs, but not the legal and other professional costs of any party in relation to a dispute, will be decided by the Specialist.

14.10 This **clause 14** does not apply to disputes in relation to matters of law which will be subject to the jurisdiction of the courts.

14.11

14.11.1 Where stated in this agreement that any dispute or question between the parties is to be referred to fast track determination the provisions of **clauses 14.1 - 14.10** shall apply with the following modifications

14.11.2 The expert shall be [] of [] or if he is unwilling or unable to act, a person appointed on the application of either party by whichever of the bodies referred to in **clause 14.4** is as appropriate having regard to the nature of the dispute (and that body will be requested to make the appointment within two working days of receipt of the application) **[DN: identity of expert to be agreed]**

14.11.3 **clauses 14.7.1 - 14.7.4** shall not apply and the expert may (but is not obliged to) afford the parties such opportunity to make written or oral submissions as he sees fit having regard to the timescale in **clause 14.1.4** and the experts overriding duty to act fairly between the parties

14.11.4 The timescale in **clause 14.7.6** shall be reduced to 5 working days and the words "to use all reasonable endeavours" are deleted.

15. **CONFIDENTIALITY**

15.1 Neither the Developer nor the Council are without the prior written consent of the other knowingly to disclose or publish or permit or cause to be disclosed or published any details of this Agreement or its existence save only (and if practicable following consultation with the other party):

15.1.1 to the extent necessary in order to comply with the requirement of the Stock Exchange;

15.1.2 to HM Revenue and Customs or the rating authority;

15.1.3 to the extent necessary to effect noting or registration at the Land Registry by means only of a Unilateral Notice but without sending this Agreement or any copy of it to the Land Registry;

15.1.4 to the extent necessary to comply with statutory obligations;

- 15.1.5 to the extent necessary for audit purposes;
- 15.1.6 to the extent necessary to obtain professional advice in relation to the determination of any dispute under **clause 15** and to the Specialist;
- 15.1.7 to the extent ordered to do so by the court or any other competent authority; or
- 15.1.8 in the case of the Developer, to any prospective funder of or investor in:
 - 15.1.8.1 the SW2 Enterprise Centre Development and Surplus Property Development; and/or
 - 15.1.8.2 the Developer and/or any Connected Party of the Developer.
- 15.2 The Developer and the Council are to procure that their professional advisers and agents are fully instructed and required to comply with these restrictions on disclosure.
- 15.3 The parties shall not, unless unanimously agreed (such approval not to be unreasonably withheld or delayed by either party), make any public announcement or issue a press release or respond to any enquiry from the press or other media concerning or relating to this Agreement or its subject matter or any ancillary matter.

16. **FREEDOM OF INFORMATION**

- 16.1 The Developer understands and acknowledges that the Council is subject to the requirements of FOIA and the EIR and agrees to assist and co-operate with the Council to enable the Council to comply with its obligations under FOIA and the EIR insofar as they relate to this Agreement or the SW2 Enterprise Centre Development.
- 16.2 Subject to compliance by the Council with **Clause 16.3**, the Developer shall provide the Council with a copy of all Information required to comply with any Request for Information (to the extent that the Council does not already have such Information and has made a written request for the provision of such Information) and such Information shall be provided in:-
 - 16.2.1 such form as the Council may reasonably specify in writing; and
 - 16.2.2 sufficient time to ensure the Council should reasonably be in a position to comply with its obligations under FOIA and/or EIR in respect of the disclosure in connection with such Request for Information.

- 16.3 The Council shall be responsible for determining whether any Information is exempt from disclosure under FOIA and for determining in its absolute discretion the Information to be disclosed in response to a Request for Information provided always that the Council shall:-
- 16.3.1 promptly upon receipt of each Request for Information, give notice to the Developer of such Request for Information and in such notice shall:-
- 16.3.1.1 confirm (having given reasonable and proper consideration to the exemptions under FOIA) whether or not any Information is exempt from disclosure under FOIA pursuant to such Request for Information; and
- 16.3.1.2 (to the extent applicable) provide the Developer with sufficient information to allow it to collate and provide any Information which it hold and which is required to be disclosed in respect of such Request for Information;
- 16.3.2 consult with and seek the views of the Developer in respect of each Request for Information (giving due regard to any timely views obtained) before the Council:-
- 16.3.2.1 makes any determination pursuant to this **Clause 16.3**; and/or
- 16.3.2.2 discloses any Information;
- in respect of such Request for Information.

Provided that it is accepted by the Developer that such consultation may not impede the dealing with any Request for Information within the time limits required by FOIA.

- 16.4 Each party to this Agreement shall unless otherwise agreed by the other parties, bear its own costs and expenses in complying with its obligations under this **Clause 16**.

17. **COPYRIGHT**

- 17.1 The Developer:

- 17.1.1 grants to the Council an irrevocable, royalty-free licence to use and reproduce the Design Documents prepared by or in which the

Developer has copyright and which relate to the SW2 Enterprise Centre Development¹⁶; and

17.1.2 waives all moral rights to them under the Copyright, Design and Patents Act 1988.

17.2 The Developer is to be responsible for the payment of all royalties or other sums due to others for the use and supply of patents, articles, inventions and processes in the Design Documents and is to indemnify the Council against liability for the infringement of rights of third parties by such use by the Council pursuant to **clause 17.1.1**.

18. **DEALINGS**

18.1 Subject to the terms this **clause 18**, this Agreement is incapable of being assigned, charged, held on trust or in any way being dealt with by the Developer.

18.2 The Developer may, with the prior written consent of the Council, such consent not to be unreasonably withheld or delayed, assign or charge the benefit of this Agreement to one or more Investors subject in each case to:

18.2.1 the Investor entering into a Step-In Agreement;

18.2.2 (in the case of an assignment of the benefit of this Agreement) the Investor entering into direct covenants with the Council upon completion of such assignment:

18.2.2.1 to pay the Overage to the Council on the terms of this Agreement;

18.2.2.2 to carry out or procure that the Relevant Works are carried out in accordance with the terms of this Agreement;

18.2.2.3 not to use or permit the SW2 Enterprise Centre to be used before the Date of Practical Completion for any purpose other than the carrying out of the SW2 Enterprise Centre Development Works; and

18.2.2.4 not to use or permit the Surplus Property to be used before the Date of Practical Completion for any purpose other than the carrying out of the Surplus Property Development Works.

¹⁶~~The Developer is in control of its appointments and must ensure the licence can be granted and this clause complied with.~~

- 18.2.3 (in the case of an assignment of the benefit of this Agreement) the Investor entering into a direct covenant with the Council to comply with the provisions of this **clause 18** before any further assignment or charging of the benefit of this Agreement or the sale, transfer or charging of the Surplus Property.
- 18.3 The Developer may assign the benefit of this Agreement to any company within the same group as the Developer (within the meaning of section 42 or the Landlord and Tenant Act 1954) provided that the assignment is without prejudice to the guarantee given by the Guarantor and the assignee entering into a direct covenant with the Council to comply with the terms of the this Agreement.
- 18.4 The Developer may not create any legal or equitable charge over the Surplus Properties unless:
- 18.4.1 the legal or equitable charge is being provided to an Investor;
- 18.4.2 it obtains the prior written consent of the Council, such consent not to be unreasonably withheld or delayed; and
- 18.4.3 a Priority Agreement is entered into in such form as the Council shall first approve (such approval not to be unreasonably withheld or delayed).
- 18.5 The Council may assign this Agreement to a Statutory Successor or Public Sector Body without consent and to any other party with the Developer's prior written consent (not to be unreasonably withheld or delayed)
- 19. EFFECT OF THIS AGREEMENT**
- 19.1 The parties acknowledge that this Agreement forms the entire agreement between them relating to its subject matter.
- 19.2 No modification, variation or waiver of any of the terms of this Agreement will be effective unless made in writing and signed by the parties to this Agreement.
- 19.3 This Agreement does not create and is not in any circumstances to be taken as having created a partnership between the Council and the Developer.
- 19.4 The Developer is not and will not at any time hold itself out as the agent of the Council for any purposes and under no circumstances will the Developer have the authority to bind the Council or hold itself out to the public, the Building Contractor or any member of the Professional Team as having such authority.
- 19.5 All contracts and agreements entered into by the Developer pursuant to this Agreement will be contracts or agreements between the Developer as principal

and the respective third parties and the Council will have no obligation or liability under them.

- 19.6 The Developer acknowledges that it does not have and will not have any lien over the SW2 Enterprise Centre Development, the site or the Surplus Property in respect of payments due to it under this Agreement.

20. **COUNCIL AS PARTY**

The Council enters into this Agreement in its capacity as landowner only and nothing contained in this Agreement shall prejudice or affect all or any of the statutory rights powers obligations and/or duties from time to time vested in the Council and all such rights powers obligations and duties shall be enforceable and exercisable in relation to the Site and/or the Relevant Works by the Council as fully and freely as if the Council were not the owner of the Site or the Surplus Property or parts thereof and/or this Agreement had not been entered into.

21. **CORRUPT OR ILLEGAL PRACTICES**

- 21.1 Either party may determine this Agreement forthwith by notice in writing to the other and recover from the other the amount of any loss resulting from such determination if:

21.1.1 the other party shall have offered or given or agreed to give to any person any gift inducement or reward in relation to the obtaining or execution of this Agreement or any other contract with the Council or the Developer; and

21.1.2 any person acting on behalf of the other party (including in the case of the Developer all Building Contractors and members of the Professional Team) and with its knowledge commits any of the acts as referred to in **Clause 21.1.1**;

21.1.3 the other party shall (in relation to this Agreement or any other contract with the Council or the Developer as the case may be) have committed any offence under the Prevention of Corruption Acts 1889 to 1916 or under section 117(2) of the Local Government Act 1972 or under the Bribery Act 2010.

- 21.2 If this Agreement is terminated as provided in **Clause 21** the provisions of **Clause 13** will apply.

- 21.3 The Developer and the Council shall ensure that all persons engaged in the SW2 Enterprise Centre Development and the Surplus Property Development are aware of the terms of this Clause and if any of these commits any of the acts as

referred to in Clause 22.1 shall as soon as reasonably practicable terminate their Building Contract, Appointment or other form of engagement.

22. **COUNCIL POLICIES**

The Developer will comply with the following Council Policies as they are in force as at the date of this Agreement to the extent disclosed in writing to the Developer prior to the date hereof:

22.1 Internal Planning Guidance;

22.2 H&S;

22.3 Sustainability;

22.4 Apprenticeships;

22.5 Co-operative Council;

22.6 Community Benefit;

22.7 Local procurement;

22.8 London living wage.

23. **LOCAL LABOUR**

The Developer will comply with its local labour statement annexed to this Agreement

24. **DECANT STRATEGY**

The Council and the Developer will work together to agree a decant strategy document dealing with timings and manner of the Council vacating the SW2 Enterprise Centre and the Surplus Properties by the Planning Submission Date

25. **DEVELOPER'S GUARANTOR**

The Developer's Guarantor is to comply with its obligations in **Schedule 16**.

26. **CONSENT AND APPROVAL**

Wherever in this Agreement any action or obligation is authorised or required or agreed to be taken and performed to or by the Council it shall be sufficient if such action or obligation is taken or performed by the Chief Executive of the Council or other officer or agent duly authorised by the Chief Executive of the Council or having ostensible authority.

27. **NO RESTRICTIONS ON ADJOINING PROPERTY**

Nothing herein contained or implied shall be deemed to restrict in any way the rights of the Council to lease occupy use build on develop or otherwise dispose of any adjoining property belonging to the council respectively upon such conditions and terms as the Council may reasonably think fit and whether free from or subject to similar or entirely different restrictive or other covenants agreements or other provisions not shall impose or be deemed to impose any restrictions on the use of any land or buildings now or hereafter belonging to the Council and not comprised in this Agreement or give the release or modification of any covenant agreement condition or stipulation entered into by any lessee or tenant of the Council or any other person in respect of property not comprised in this Agreement or operate to prevent or restrict in any way the development of any land not comprised in this Agreement.

28. **NOTICES**

28.1 Any notice to be given by one party to any other party under, or in connection with this Agreement shall be in writing and signed by or on behalf of the party giving it. It shall be served by sending it by fax to the number/address set out in **clause 28.3** and confirming it by letter either delivered by hand or sent by pre-paid recorded delivery, special delivery or registered post, to the address set out in **clause 28.3** and in each case marked for the attention of the relevant party (or as otherwise notified from time to time in accordance with the provisions of this **clause 28**). Any notice so served shall be deemed to have been duly given and received by the party to whom it is addressed:

28.1.1 in the case of delivery by hand, when delivered as aforesaid;

28.1.2 in the case of fax only when confirmed by letter in which case **clauses 28.1.1, 28.1.3 and 28.1.4** will apply as appropriate;

28.1.3 in the case of prepaid recorded delivery, special delivery or registered post, at 10.00 a.m. on the second working day following the date of posting; and

28.1.4 in the case of registered airmail, at 10.00 a.m. on the fifth working day following the date of posting

provided that in each case where delivery is by hand and occurs after 5.00 p.m. on a working day or on a day which is not a working day, service shall be deemed to occur at 9.00 a.m. on the next following working day and provided further that any failure to serve by fax shall not prejudice service by the methods (or any of them) set out in **clauses 28.1.1, 28.1.3 or 28.1.4** above.

28.2 In proving such service it shall be sufficient to prove that the envelope containing such notice was addressed to the address of the relevant party set out in **clause 28.3** (or as otherwise notified by the party hereunder) and delivered either to that address and acknowledged or into the custody or the postal authorities as a pre-paid recorded delivery, special delivery, registered post or airmail letter.

28.3 The addresses and fax numbers of the parties for the purposes of **clause 26.1** are as follows:

Council

Address: London Borough of Lambeth, Lambeth Town Hall, Brixton, London, SW2 1RW

Fax: 0207 926 2544

For the attention of: []

E-mail: []

Developer

Address: United House, Goldsel Road, Swanley, Kent BR8 8EX

Fax: []

For the attention of: []

E-mail: []

28.4 A party may notify any other party to this Agreement of a change to its name, relevant addressee, address or fax number for the purposes of this **clause 26**, provided that, such notice shall only be effective on:

28.4.1 the date specified in the notice as the date on which the change is to take place; or

28.4.2 if no date is specified or the date specified is less than five working days after the date on which notice is given, the date following five working days after notice of any change has been given

28.5 All notices under or in connection with this Agreement shall be in the English language.

29. **PROTECTION OF THIS AGREEMENT**

The Developer is not entitled to protect this agreement against the SW2 Enterprise Centre Site.

30. **ENFORCEMENT**

30.1 This Agreement is to be governed by and interpreted in accordance with English law.

30.2 The courts of England are to have jurisdiction in relation to any disputes between the parties arising out of or related to this Agreement.

31. **CONTRACTING OUT**

The Council and the Developer have agreed to exclude the provisions of sections 24 to 28 Landlord and Tenant Act 1954 in relation to the tenancy to be created by the ~~Building Leases~~ leases to be granted pursuant to Schedule 13. The Developer confirms that before the date of this Agreement:

31.1.1 the Council served on the Developer a notice ("the Notice") dated [DATE] in relation to the tenancy to be created by the ~~Lease~~ leases in a form complying with the requirements of Schedule 1 to The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003;

31.1.2 the Developer, or a person duly authorised by the Developer, in relation to the Notice made a statutory declaration ("the Declaration") dated [DATE] in a form complying with the requirements of Schedule 2 to The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003; and

31.1.3 where the Declaration was made by a person other than the Developer, the declarant was duly authorised by the Developer to make the Declaration on the Developer's behalf

32. **EXECUTION**

32.1 The Developer, the Developer's Guarantor and the Council have executed this Agreement as a deed on the date set out in the Particulars.

32.2 Any person who witnesses the sealing of this Agreement is to be treated as having signed this Agreement for the purposes of section 2 Law of Property (Miscellaneous Provisions) Act 1989.

~~1.1~~

SCHEDULE 1

Planning Conditions and Listed Building Consent

PART 1: PLANNING PERMISSION

1. Defined terms

1.1 In this Schedule, the following words and expressions have the following meanings:

- “Appeal”** all or any of the following:
- (a) an application to the local planning authority under section 73 of the Planning Act against the presence of an Onerous Condition in a Planning Permission;
 - (b) an application to the Secretary of State under sections 78 and 79 of the Planning Act following a Planning Refusal by the local planning authority; or
 - (c) a Calling-In
- “Calling-In”** a direction by the Secretary of State that a Planning Application be referred to him for determination under section 77 of the Planning Act
- “Challenge Period”** the following periods, each calculated from and including the Permission Date:
- (a) following the grant of Satisfactory Planning Permission by the local planning authority (including after the determination of an application under section 73 of the Planning Act), the period of three months and two weeks; or
 - (b) following the grant of Satisfactory Planning Permission by or on behalf of the Secretary of State, the period of six weeks

"SW2 Enterprise Centre Onerous Condition (Developer)"	Has the meaning ascribed to it in paragraph 4.8
"SW2 Enterprise Centre Onerous Conditions (Council)"	Has the meaning ascribed to it in paragraph 4.7
"SW2 Enterprise Centre Onerous Conditions"	SW2 Enterprise Centre Onerous Conditions (Council) and SW2 Enterprise Centre Onerous Conditions (Developer)
"SW2 Enterprise Centre Planning Application"	the initial application made by or on behalf of the Council for Planning Permission for the SW2 Enterprise Centre Development and the Development set out in paragraph (a) of the definition of "Surplus Property Development" and includes any further applications or variations made in accordance with this Schedule
"Inspector"	any person appointed by the Secretary of State under the Planning Act to determine appeals made under section 78 of the Planning Act or to determine a Calling-In.
"Permission Date"	the date of a Satisfactory Planning Permission which means the date written, printed or stamped on the Planning Permission issued by the local planning authority or the letter or other document issued by the Secretary of State or the Inspector following an Appeal or a Calling-In
"Planning Agreement"	an agreement or undertaking in respect of an affecting the Site or Surplus Property or the Relevant Works, whether or not affecting other property pursuant to: <ul style="list-style-type: none"> (a) Section 106 of the Planning Act; or (b) Section 111 Local Government Act 1972
"Planning Applications"	The SW2 Enterprise Centre Planning Application and the Surplus Property Planning Application

“Planning Counsel”	the planning counsel appointed under paragraph 7.2
“Planning Decision”	a Planning Refusal or the grant of Planning Permission whether by the local planning authority, the Secretary of State or an Inspector
“Planning Default”	<p>one or more of the following:</p> <ul style="list-style-type: none"> (a) the Developer does not submit the Planning Applications by the relevant Planning Submission Date; (b) a Calling-In; (c) a Planning Refusal which does not arise from a failure to give notice of a decision within the period required under section 78(2) of the Planning Act and Planning Counsel advises that there is not a substantial likelihood of an Appeal or Planning Proceedings resulting in the grant a Satisfactory Planning Permission; (d) a failure to obtain Satisfactory Planning Permission within the Planning Period
“Planning Period”	the period of 18 months beginning on the date of this Agreement subject to extension in accordance with Part 1 of this Schedule
“Planning Proceedings”	<p>all of any of the following:</p> <ul style="list-style-type: none"> (a) an application made for judicial review by a third party following the grant of a Planning Permission by the local planning authority; (b) an application for judicial review by the Developer following a Planning Refusal by the local planning authority; (c) an application made under section 288 of the Planning Act by a third party following the grant of Planning Permission by the Secretary of State or an Inspector; or

- (d) an application made under section 288 of the Planning Act by the Developer following a Planning Refusal by the Secretary of State or an Inspector; and
- (e) includes any appeal to a higher court made against a judgement given in a lower court.

“Planning Refusal”

any of the following:

- (a) a refusal by the local planning authority to grant planning permission pursuant to a Planning Application;
- (b) a refusal by the local planning authority to vary or remove an Onerous Condition pursuant to an application made by the Council under section 73 of the Planning Act;
- (c) a refusal by or on behalf of the Secretary of State to grant planning permission following a Planning Appeal or a Calling-In ;
- (d) a failure by the local planning authority to determine the Planning Application within the period required under section 78(2) of the Planning Act; or
- (e) the grant of a Planning Permission which is subject to any Onerous Condition or requires a Infrastructure Agreement to be entered into on terms which contain an Onerous Condition

“Satisfaction Date”

has the meaning ascribed in **paragraph 2.4**

“Satisfactory SW2 Enterprise Centre Planning Permission”

a Planning Permission that does not contain:

- (a) any Site Onerous Conditions; or
- (b) any conditions or stipulations requiring a Planning Agreement to be entered into on terms that contain any SW2 Enterprise

Centre Onerous Condition

“Satisfactory Planning Permission”	a Satisfactory SW2 Enterprise Centre Planning Permission or a Satisfactory Surplus Property Planning Permission (as the context permits)
“Satisfactory Surplus Property Planning Permission”	a Planning Permission that does not contain: (a) any Surplus Property Onerous Conditions; or (b) any conditions or stipulations requiring a Planning Agreement to be entered into on terms that contain any Surplus Property Onerous Condition
“Secretary of State”	the Secretary of State or any other minister or authority for the time being entitled to exercise the powers given under sections 77, 78 and 79 of the Planning Act
“Surplus Property Onerous Conditions”	Has the meaning ascribed in paragraph 5.7
“Surplus Property Planning Application”	the initial application made by or on behalf of the Developer for Planning Permission for Outline the Surplus Property Development (excluding paragraph (a) in that definition) includes any further applications or variations made in accordance with this Schedule
“Surplus Property Strategic Brief”	the strategic brief prepared by the Developer for the Surplus Property a copy of which is annexed at Annexure [●] [<i>Ashurst: This is the relevant part of the bid submission.</i>]

2. **Obtaining Satisfactory Planning Permission**

- 2.1 The Developer is to use all reasonable and commercially sensible endeavours to obtain the Satisfactory Planning Permissions as soon as reasonably practicable after the date of this Agreement.
- 2.2 The Developer is to act in accordance with any reasonable and proper instructions of the Council given in connection with the Planning Applications so long as they do not materially and adversely affect the Developer’s chances of obtaining Satisfactory Planning Permission or materially increase the cost of or materially add delay to the obtaining of the same.

- 2.3 Neither the Developer nor the Council is to commence Planning Proceedings following the grant of a Satisfactory Planning Permission.
- 2.4 Following the grant of the Satisfactory Planning Permissions, the Overarching Conditions set out at **clauses 3.2.1** and **3.2.2** will not be satisfied until the date on which:
- 2.4.1 the relevant Challenge Period has expired without Planning Proceedings being commenced; or
- 2.4.2 if Planning Proceedings are commenced during the Challenge Period, those proceedings are finally disposed of leaving in place a Satisfactory SW2 Enterprise Centre Planning Permission and a Satisfactory Surplus Property Planning Permission
- (in relation to each Satisfactory Planning Permission, the "**Satisfaction Date**").
- 2.5 If the Planning Period would otherwise come to an end, the Planning Period is to be extended to the latest of the following (and for the avoidance of doubt the Planning Period may be extended more than once and may be extended as a result of matters arising during an extension of the Planning Period):
- 2.5.1 following the grant of Satisfactory Planning Permission, to the day after the Challenge Period expires;
- 2.5.2 following a Planning Refusal, to the date eight weeks after the date of the Planning Refusal, subject to further extensions under **paragraph 2.4.3**;
- 2.5.3 if the Developer makes an Appeal or commences Planning Proceedings in accordance with this Schedule following a Planning Refusal:
- 2.5.3.1 if the Appeal or Planning Proceedings result in the grant of a Satisfactory Planning Permission, the date following the disposal of the Appeal or Planning Proceedings calculated in accordance with **paragraph 2.5.1**;
- 2.5.3.2 if the Appeal or Planning Proceedings result in a Planning Refusal, the date following the disposal of the Appeal or Planning Proceedings calculated in accordance with **paragraph 2.5.2**;
- 2.5.4 if Planning Proceedings are begun by a third party during a Challenge Period, to the date ten working days after all Planning Proceedings have been determined or discontinued;

- 2.5.5 if an application is made to Planning Counsel or a Specialist under this Schedule, to the date eight weeks after the Council receives written notice of his determination; and
- 2.5.6 if a decision notice is awaited from the planning authority in relation to any Planning Application, to the expiry of the Challenge Period following the grant of a Satisfactory Planning Permission or the expiry of a period of 8 weeks after the Planning Refusal

3. The Planning Applications

- 3.1 The Developer shall as soon as practicable after the date of this Agreement prepare the Planning Applications and any applications for a Road Closure Order which the Developer reasonably requires. The Developer shall liaise regularly with the Council in relation to such preparation and may (but shall not be obliged to) submit elements of the proposed Planning Applications and proposed Road Closure Order applications (including any proposed variations to the Employer's Requirements or the Surplus Property Strategic Brief) to the Council for approval at any time prior to submission to the Council of the Planning Applications and proposed Road Closure Order applications. The Council shall give comments in writing and such elements (including, where applicable, whether or not it approves such elements) within 20 working days of submission.
- 3.2 The terms of the SW2 Enterprise Centre Planning Application (insofar as it relates to the SW2 Enterprise Centre Development only) are to be approved by the Council in its capacity as future occupier of the SW2 Enterprise Centre, such consent not to be unreasonably withheld or delayed where the application is made in accordance with the Employer's Requirements.
- 3.3 The terms of:
 - 3.3.1 the SW2 Enterprise Centre Planning Application insofar as it relates to the Development set out in paragraph (a) of the definition of "**Surplus Property Development**"; ~~and~~
 - 3.3.2 the Surplus Property Planning Application; and
 - 3.3.3 any application for a Road Closure Order,**are to be approved by the Council in its capacity as freeholder, such consent not to be unreasonably withheld or delayed, provided that the Council shall not withhold consent to any terms of the Surplus Property Planning Application that are consistent with the Surplus Property Strategic Brief.

- 3.4 The Council shall notify the Developer in writing within 20 working days of receipt of each draft Planning Application and Road Closure Order application pursuant to this paragraph 3 whether or not it approves the same (and if it does not approve the same specifying its objections).
- 3.5 If the Council gives notice to the Developer that it does not approve either or both of the draft Planning Applications or Road Closure Order application then the Developer shall consult with the Council and the provisions of paragraphs 3.2 to 3.4 shall be repeated until such applications are approved.
- 3.6 The SW2 Enterprise Centre Planning Application is to be submitted in the joint names of the Developer and the Council.
- 3.7 The Developer may submit the Planning Applications in duplicate.
- 3.8 The Developer:
- 3.8.1 is to submit the Planning Applications and any Road Closure Order application to the local planning authority by the Planning Submission Date (subject to extensions of time agreed by the parties or in default of agreement determined by a specialist where the Council has not responded to any submission within the time limits specified in **paragraphs 3.1 and 3.4**) and in any event before the date ~~12~~ months~~1~~ from and including the date of this Agreement;
- 3.8.2 may, with the prior written consent of the Council, such consent not to be unreasonably withheld or delayed:
- 3.8.2.1 amend any Planning Application and any Road Closure Order application made to the local planning authority;
or
- 3.8.2.2 withdraw a Planning Application and any Road Closure Order application and immediately submit a fresh Planning Application
- in each case where it is reasonable to do so in order to obtain Satisfactory Planning Permission and Road Closure Order; and
- 3.8.3 may agree with the local planning authority any extension to the statutory period not exceeding six months for determining the Planning Applications and any Road Closure Order application under section 78(2) of the Planning Act.
- 3.9 The Developer may enter into negotiations or discussions with the local planning authority to facilitate the grant of the Planning Permissions and any Road Closure Order application but will not enter into any agreement with the local

planning authority without the prior written consent of the Council, such consent not to be unreasonably withheld or delayed.

3.10 The Developer is to:

- 3.10.1 work with the Council throughout the planning process to ensure the Planning Applications and Planning Permissions and any Road Closure Order application meet with the Council's aspirations;
- 3.10.2 provide to the Council a copy of each Planning Application and application for a Road Closure Order made to the local planning authority;
- 3.10.3 keep the Council informed at reasonable intervals, but not more than once in each calendar month, of the progress of each Planning Application and application for a Road Closure Order, amendments made to each Planning Application and application for a Road Closure Order, each withdrawal of a Planning Application and application for a Road Closure Order and details of all discussions and negotiations with the local planning authority;
- 3.10.4 give the Council reasonable prior notice of any meetings with the local planning authority and allow the Council and its planning consultants to attend those meetings; and
- 3.10.5 provide the Council with copies of all notes, correspondence, documents and minutes of meetings concerning the Planning Applications and application for a Road Closure Order.

4. **Planning Decisions – SW2 Enterprise Centre**

- 4.1 The Developer is to notify the Council of each Planning Decision in relation to the SW2 Enterprise Centre Planning Application and provide a copy of the Planning Decision to the Council not later than five working days after notice of the Planning Decision has been given to the Developer.
- 4.2 If there is a Planning Refusal, the Developer is to notify the Council in writing within two weeks after the date of the Planning Refusal whether it wishes to make an Appeal or commence Planning Proceedings in respect of that Planning Refusal.
- 4.3 If Planning Permission is granted, the Council is to notify the Developer in writing within four weeks after the Permission Date whether it considers that:
 - 4.3.1 the Planning Permission contains SW2 Enterprise Centre Onerous Conditions (Council) ; or

- 4.3.2 the Planning Permission is a Satisfactory SW2 Enterprise Centre Planning Permission.
- 4.4 On the service or deeming of notice by the Council under **paragraph 4.3**, the Planning Permission is to be treated as a Planning Refusal or a Satisfactory Planning Permission as the case may be.
- 4.5 If Planning Permission is granted, the Developer is to notify the Council in writing within four weeks after the later of the Permission Date for the SW2 Enterprise Centre Planning Permission and the Permission Date for the Surplus Property Planning Permission whether it considers that:
- 4.5.1 the Planning Permission contains SW2 Enterprise Centre Onerous Conditions (Developer); or
- 4.5.2 the Planning Permission is a Satisfactory SW2 Enterprise Centre Planning Permission.
- 4.6 On the service or deeming of notice by the Developer under **paragraph 5.3**, the Planning Permission is to be treated as a Planning Refusal or a Satisfactory Planning Permission as the case may be.
- 4.7 An SW2 Enterprise Centre Onerous Condition (Council) is a condition which, in the opinion of the Council:
- 4.7.1 Reduce the net internal area of the SW2 Enterprise Centre to less than 13,980 sq metres of Internal Area (excluding the civic space and assembly rooms in the Town Hall);
- 4.7.2 Impose conditions relating to phasing of the SW2 Enterprise Centre Development Works which conflict with the Phasing Plan.
- 4.7.3 Makes the Planning Permission personal to the Council or to any specific person or class of persons.
- 4.7.4 Imposes time limits within which the SW2 Enterprise Centre Development must be commenced or applications for approval of reserved matters must be made which are more restrictive than those set out in section 91 and 92 of the Planning Act and which are inconsistent with the timescales set out in this Agreement.
- 4.7.5 Prevents the occupation and use of the SW2 Enterprise Centre Development before a specified date or event (where such date or event could reasonably be expected to conflict with the Phasing Plan) with the exception of any proper and reasonable condition which is limited to requiring only:

- 4.7.5.1 approval of any reserved matter; or
- 4.7.5.2 completion of vehicular and pedestrian access to and within the SW2 Enterprise Centre Development, including any off-site highways works;
- 4.7.6 Restricts or prohibits the use of the SW2 Enterprise Centre Development for the purposes envisaged by the Planning Application at any time.
- 4.7.7 Restricts or prohibits deliveries to and servicing of the SW2 Enterprise Centre Development at any time between 9.00 a.m. and 5.00 p.m. Monday to Friday (excluding bank holidays).
- 4.7.8 Contains Adverse Matters in relation to the SW2 Enterprise Centre Development.
- 4.7.9 Imposes limits on the generation of noise from the SW2 Enterprise Centre Development which will:
 - 4.7.9.1 adversely restrict the occupation or operation of the SW2 Enterprise Centre Development;
 - 4.7.9.2 unreasonably add to the costs of construction or maintenance of the SW2 Enterprise Centre Development; or
 - 4.7.9.3 otherwise impose an unreasonable burden on the ownership, use or occupation of the SW2 Enterprise Centre Development,
- 4.8 An SW2 Enterprise Centre Onerous Condition (Developer) is a condition which in the opinion of the Developer:
 - 4.8.1 When combined with any planning conditions in the Surplus Property Planning Permission and/or in any Planning Agreements has the effect that (in the Developer's reasonable opinion) the Viability Condition will not be met.
 - 4.8.2 Imposes conditions relating to phasing of the Relevant Works which conflict with the Phasing Plan.
- 4.9 If the Council does not give notice under **paragraph 4.3** within four weeks of the Permission Date, the Developer may serve notice in writing on the Council requiring the Council to serve notice under **paragraph 4.3** and if the Council does not do so within two weeks of the Developer's notice, the Planning Permission is to be treated as a Satisfactory Planning Permission.

- 4.10 If the Council serves notice on the Developer under **paragraph 4.3** that the Planning Permission contains one or more Onerous Conditions, the Developer may serve notice on the Council within two weeks of the date of the Council's notice requiring the question of whether the Planning Permission contains one or more Onerous Conditions to be determined by a Specialist who will act as an expert under the fast track determination process in clause 14.11.
- 4.11 If the Developer does not give notice under **paragraph 4.3** within four weeks of the Permission Date, the Council may serve notice in writing on the Developer requiring the Developer to serve notice under **paragraph 4.3** and if the Developer does not do so within two weeks of the Council's notice, the Planning Permission is to be treated as a Satisfactory Planning Permission.
- 4.12 If the Developer serves notice on the Council under **paragraph 4.3** that the Planning Permission contains one or more Onerous Conditions, the Council may serve notice on the Developer within two weeks of the date of the Developer's notice requiring the question of whether the Planning Permission contains one or more Onerous Conditions to be determined by a Specialist who will act as an expert under the fast track determination process in clause 14.11.
- 4.13 Time is to be of the essence in relation to **paragraphs 4.9, 4.10, 4.11 and 4.12.**

5. **Planning Decisions – Surplus Property**

- 5.1 The Developer is to notify the Council of each Planning Decision in relation to the Surplus Property Planning Application and provide a copy of the Planning Decision to the Council not later than five working days after notice of the Planning Decision has been given to the Developer.
- 5.2 If there is a Planning Refusal, the Developer is to notify the Council in writing within two weeks after the date of the Planning Refusal whether it wishes to make an Appeal or commence Planning Proceedings in respect of that Planning Refusal.
- 5.3 If Planning Permission is granted, the Developer is to notify the Council in writing within four weeks after the later of the Permission Date for the SW2 Enterprise Centre Planning Permission and the Permission Date for the Surplus Property Planning Application whether it considers that:
- 5.3.1 the Planning Permission contains Surplus Property Onerous Conditions;
or
- 5.3.2 the Planning Permission is a Satisfactory Surplus Property Planning Permission.

- 5.4 On the service of notice by the Developer under **paragraph 5.3**, the Planning Permission is to be treated as a Planning Refusal or a Satisfactory Planning Permission as the case may be.
- 5.5 An Surplus Property Onerous Condition is a condition which, in the opinion of the Developer:
- 5.5.1 When combined with any planning conditions in the SW2 Enterprise Centre Planning Permission and/or in any Planning Agreements has the effect that (in the Developer's reasonable opinion) the Viability Condition will not be met.
- 5.5.2 Imposes conditions relating to the phasing of the Relevant Works which conflict with the Phasing Plan.
- 5.6 If the Developer does not give notice under **paragraph 5.3** within four weeks of the Permission Date, the Council may serve notice in writing on the Developer requiring the Developer to serve notice under **paragraph 5.3** and if the Developer does not do so within two weeks of the Council's notice, the Planning Permission is to be treated as a Planning Refusal.
- 5.7 If the Developer serves notice on the Council under **paragraph 5.3** that the Planning Permission contains one or more Onerous Conditions, the Council may serve notice on the Developer within two weeks of the date of the Developer's notice requiring the question of whether the Planning Permission contains one or more Onerous Conditions to be determined by a Specialist who will act as an expert under **clause 13**.
- 5.8 Time is to be of the essence in relation **paragraphs 5.6 and 5.7**.

6. **Appeals and Planning Proceedings**

- 6.1 Following a Planning Refusal:
- 6.1.1 the Developer is not to Appeal or commence Planning Proceedings except in accordance with this **paragraph 6**;
- 6.1.2 following a Planning Refusal by the local planning authority:
- 6.1.2.1 if the Planning Refusal arose because of the failure by the local planning authority to determine the Planning Application within the period required under section 78(2) of the Planning Act (taking into account any extensions permitted by the Developer in accordance with this Schedule), the Developer is to make an Appeal; and
- 6.1.2.2 if the Planning Refusal arose for any other reason:

- (a) the Developer and the Council are to instruct Planning Counsel to advise on whether an Appeal or Planning Proceedings would stand a substantial likelihood of resulting in the grant of a Satisfactory Planning Permission; and
- (b) if Planning Counsel advises that there would be a greater than 50% chance of obtaining Satisfactory Planning Permission on an Appeal or following Planning Proceedings, the Developer is to Appeal or commence Planning Proceedings depending upon Planning Counsel's advice as to which option maximises the chances of obtaining Satisfactory Planning Permission unless in the reasonable opinion of the Developer the cost of conducting an Appeal or Planning Proceedings would have the effect that the Viability Condition will not be met.

6.1.3 If Planning Counsel advises that the chances of obtaining Satisfactory Planning Consent would be less than or equal to 50% the Developer may elect to Appeal or commence Planning Proceedings but shall not be obliged to do so.

6.2 If the Developer makes an Appeal or commences Planning Proceedings it is to:

- 6.2.1 prosecute the Appeal or Planning Proceedings with all due diligence and in a good and efficient manner;
- 6.2.2 continue the Appeal or Planning Proceedings to their conclusion unless the Council otherwise agrees (acting reasonably);
- 6.2.3 keep the Council and its planning consultants informed on the progress of the Appeal or Planning Proceedings including all correspondence, notifications, instructions to and advice of counsel, evidence of expert and other witnesses and the dates of any inquiry, hearing or for the submission of written representations; and
- 6.2.4 allow the Council and its planning consultants to attend at conferences with counsel and other relevant meetings.

7. **References to Planning Counsel**

7.1 Where any matter is to be referred to Planning Counsel in accordance with this Schedule, the provisions of this **paragraph 7** are to apply.

7.2 Planning Counsel is to be appointed by agreement between the Developer and the Council and is to be such Queen's Counsel of not less than ten years' calling

experienced in town and country planning matters as the Developer and the Council agree to instruct.

- 7.3 If there is any dispute about the appointment of Planning Counsel, either the Developer or the Council may ask the Chairman for the time being of the Bar Council to nominate Planning Counsel who satisfies the criteria set out in **paragraph 7.2** and if he is unable or unwilling to do so, the next senior officer of the Bar Council may make the nomination.
- 7.4 The Developer and the Council are to co-operate with each other by instructing Planning Counsel jointly. Instructions to Planning Counsel are to be prepared by the Developer who will take due account of the Council's reasonable representations.
- 7.5 The decision of Planning Counsel on the matter or matters referred to him is to be final and binding on the Developer and the Council and he is to determine how the costs of the referral and any costs incurred by the Developer and the Council in relation to the matter are to be borne between them.
- 7.6 If a matter is referred to Planning Counsel for determination and Planning Counsel is of the opinion that the matter, or any part of the matter, is not one which Planning Counsel would reasonably be able to determine, Planning Counsel may direct that the matter, or the part of it in question, be referred by the Developer and the Council for determination by a Specialist in accordance with **clause 15**.

PART 2: LISTED BUILDING CONSENT CONDITION

8. Definitions

In this Part of this Schedule the following words and expressions have the following meanings:

"Listed Building Application" an application to be made by or on behalf of the Developer for Listed Building Consent or any substituted application which may be made by or on behalf of the Developer;

"Listed Building Consent" a listed building consent as referred to in the Relevant Act;

"Relevant Act" the Planning (Listed Buildings and Conservation Areas) Act 1990;

“Satisfactory Listed Building Consent” a Listed Building Consent pursuant to the SW2 Enterprise Centre Planning Application to be made by or on behalf of the Developer that does not contain any SW2 Enterprise Centre Onerous Conditions.

9. **Listed Building Condition**

This Condition is:

9.1 the grant of a Satisfactory Listed Building Consent; and

9.2 the Satisfactory Listed Building Consent being free of Challenge meaning:-

9.2.1 no Planning Proceedings are made in respect of it within the Challenge Period; or

9.2.2 if any Planning Proceedings are made within the Challenge Period either:

9.2.2.1 the proceedings are abandoned, lost or finally disposed of leaving in place a Satisfactory Listed Building Consent; or

9.2.2.2 if such proceedings are successful and the subject matter of the proceedings are referred back to the local planning authority or Secretary of State for reconsideration that (in consequence of such reconsideration) a Satisfactory Listed Building Consent is granted.

10. **Obligations**

The provisions of **paragraphs 1-6** of **Part 1** of this Schedule shall apply to the parties respective endeavours to secure satisfaction of this Condition insofar as relevant to a Listed Building Consent and with such paragraphs being read and construed as referring to the Listed Building Application instead of the Planning Application, to the Listed Building Consent instead of the Planning Permission and to the provisions of the Relevant Act which correspond or are similar in purpose to the provisions of the Planning Act referred to in those paragraphs.

11. **Waiver**

11.1 Following the grant of a Listed Building Consent the Council may waive:

11.1.1 its right to object to the terms of the Listed Building Consent because of the presence of any Onerous Condition(s) by serving written notice to this effect on the Developer; and

11.1.2 the provisions of **paragraph 2.2** of this **Part 2** of the Schedule.

12. Time Limit

The time limit for satisfying this Condition is the Planning Period.

PART 3: PLANNING AGREEMENTS

13. The Developer is to enter into any Planning Agreement required by the local planning authority as a condition to the grant of Planning Permission subject to the following conditions being satisfied:

13.1 the Planning Agreement does not contain terms which:

13.1.1 take effect before the date of the Planning Permission; or

13.1.2 are Onerous Conditions

13.2 The Planning Agreement is to be conditional on the Relevant Works being implemented.

PART 4: CIL

1. When terms defined in the CIL Regulations are used in this provision, those definitions apply in this clause.

2. Subject to the provisions of paragraphs 4 and 5 below the Council shall retain liability in respect of CIL in relation to the SW2 Enterprise Centre Development.

3. If the local authority has adopted a CIL charging schedule before the grant of a Satisfactory SW2 Enterprise Centre Development Planning Permission the Developer shall submit the Notice of Commencement of Chargeable Development prior to commencement of development of the SW2 Enterprise Centre Development and shall provide a draft of the same to the Council at least 7 working days in advance.

4. The Developer shall assume liability for CIL in respect of the Surplus Properties Development.

4.1 If the local authority has adopted a CIL charging schedule before the grant of an Satisfactory Surplus Property Planning Permission:

4.1.1 the parties agree that the Surplus Properties Development is a chargeable development;

4.1.2 the Developer shall assume liability to pay CIL in respect of the Surplus Properties Development and shall submit an assumption of

liability notice to the collecting authority before the completion of the lease relating to the relevant Surplus Property pursuant to **schedule 17;**

4.1.3 the Developer shall submit a Notice of Commencement of Chargeable Development prior to commencement of development.

4.2 The Developer is to indemnify the Council in respect of any costs, fees, liabilities, or other expenses arising out of the failure by the Developer to pay CIL in respect of the Surplus Properties Development, including but not limited to a failure to comply with any Liability Notice, Demand Notice, or any enforcement proceedings arising out of the same

SCHEDULE 2

Site Assembly Condition

1. Definitions

In this Schedule the following words and expressions have the following meanings:

- “Appropriation”** the appropriation for planning purposes of such parts of the Site as shall not be held for planning purposes, such appropriation to be effected by the Council pursuant to Section 122 of the Local Government Act 1972 (or such other appropriate powers as may be applicable) and cognate words shall be construed accordingly;
- “Appropriation Condition”** means the Council making an Appropriation Resolution in accordance with paragraph 6 of this Schedule and such Appropriation Resolution having become Free from Challenge;
- “Appropriation Resolution”** a delegated decision or (as the case may be) a resolution by the Council to effect the Appropriation so that Section 236 and/or 237 of the Planning Act may be relied upon to authorise the erection, construction or carrying out or maintenance or use of the SW2 Enterprise Centre Development and the Surplus Sites Development notwithstanding that the activity in question involves interference with Section 237 Interests;
- “CPO Land”** the land (and each and every part of it) in or over which interests or rights including any New Rights are to be acquired (if applicable) pursuant to the CPO and which is shown in draft for identification purposes only on the plan at Schedule [] to this Agreement;
- “Confirmation”** confirmation of the CPO by the Secretary of State either in whole or in part and Confirm and Confirmed shall be construed accordingly

“CPO Costs”

the aggregate of all compensation costs and expenses payable to all Owners and all administrative / project management / acquisition / professional other costs and expenses) reasonably and properly¹⁷ incurred or to be incurred by the Council from and including the arising from or in connection with the preparation for and the making and obtaining confirmation of and the implementation of a CPO

“Councils Surveyors”

tbc

“Inquiry”

a public inquiry or public inquiries conducted by a person appointed for that purpose by the Secretary of State to report to him on the objections made to the CPO

“New Right”

any right (not in existence at the date the CPO is made) in or over the CPO Land required to implement the Development as described in section 13(1) of the Local Government (Miscellaneous Provisions) Act 1976;

“Olive Morris House CPO”

Means that part of the CPO Land edged [] on Plan []

“Outstanding Interest”

(a) any freehold or leasehold interest in or any lease or tenancy or licence or any other right (including any right to enforce a covenant or obligation) or any other matter which would prevent or interfere with the Development and not in the ownership of the Council or the Developer at the date of this Agreement in or over the CPO Land; and

(b) any New Right

and “Outstanding Interests” shall be construed accordingly

¹⁷ ~~Should not matter to developer — Council pays~~

“Owner”

any party owning an Outstanding Interest or from whom a New Right is to be acquired and (if applicable) the successors in title to such party

“Section 237 Costs”

any compensation costs and expenses payable to Owners pursuant to the provisions of sections 236 or 237 of the Planning Act and all administrative / project management / acquisition / professional other costs and expenses reasonably and properly incurred or to be incurred by the Council from and including the arising from or in connection with the Appropriation

“Section 237 Interest”

a Third Party Interest which comprises an interest or right to which Section 236 and/or 237 of the Planning Act applies or which comprises a restriction as to the user of land as referred to in the said Section 236 or 237;

“Secretary of State”

the Secretary of State for Communities and Local Government or other ministry or authority for the time being having or entitled to exercise the powers now conferred upon that Secretary of State by Parts IX and X of the Act and the Acquisition of Land Act 1981 and any other relevant legislation and where the context requires shall include a person appointed by the said Secretary of State to make a determination on his behalf;

“Third Party Interest”

an interest in the Site the benefit of which is vested in a party other than the Developer or the Council and which is either:

- a) freehold or leasehold; or
- b) any other right, easement, covenant or other interest (including easements or any right to enforce a covenant obligation or other matter) which would prevent or materially impede or be materially infringed by the carrying out of the SW2 Enterprise Centre Development or any part thereof or the

use of the Site for the SW2 Enterprise Centre Development or the carrying out of the Surplus Property Development or the use of the Site for the Surplus Property Development

and "Third Party Interests" shall be construed accordingly.

"Town Hall Parade CPO Land" Means that part of the CPO Land edged [] on Plan []

"Town Hall Parade Interests" (c) a lease dated 5th February 1996 made between [] relating to the second and third floor flat

(d) a lease dated 26 June 2000 made between the Council (1) and Fridge Properties Limited (2) (registered under title TGL178502) relating to the basement, ground and first floors);

(e) a licence dated 2 December 2012 made between Friday Properties Limited (1) and Yoshiha Entertainment Limited (2) relating to the basement ground and first floors; and

"Upper Tribunal" Means the Lands Chamber of the Upper Tribunal

2. **Site Assembly Condition**

2.1 The Site Assembly Condition is:

2.1.1 the Council exercising the Hambrook House Option and completing the purchase of Hambrook House pursuant to the Hambrook House Option and the provision to the Developer of a completed transfer evidencing the purchase of Hambrook House which is sufficient to allow the Council to be registered with freehold title absolute to such property;

2.1.2 The Council being the registered proprietor with title absolute of the freehold interest of the entirety of the Enterprise Centre and the Surplus Sites.

2.1.3 All third party occupational interests in and third party licences and charges relating to the Enterprise Centre and the Surplus Sites having been determined or discharged and (where applicable) removed from the relevant Land Registry titles (provided that the Council shall not be required to determine [*insert details of UKPN substation leases*]).

~~18~~

2.1.4 the Council having acquired the Town Hall Parade Interests by private treaty, or (if required) by CPO, or the Town Hall Parade Interests being terminated by any means (including (without limitation) surrender, or forfeiture and the provision to the Developer of evidence of the same¹⁹;

2.1.5 the Council having acquired the Olive Morris House interest by private treaty, or (if required) by CPO, and the provision to the Developer of a completed transfer evidencing the same which is sufficient to allow the Council to be registered with freehold title absolute to such property; and

2.1.6 the satisfaction of the Appropriation Condition.

2.2 This Condition will be satisfied on the date on which the later of the events referred to in **paragraphs 2.1.1 to 2.1.3** above has occurred.

3. **Endeavours**

3.1 **Obligations**

The Council will use its reasonable endeavours to satisfy the Site Assembly Condition as soon as reasonably practicable and without limitation:

3.1.1 The Council will exercise the Hambrook House Option prior to the "End Date" (as defined in the Hambrook House Option) and following exercise of the Hambrook House Option will comply with its consequent obligations in the Hambrook House Option.

3.1.2 The Council will use all reasonable and commercially sensible endeavours to acquire the Town Hall Parade Interests initially by purchase or surrender by private treaty but if necessary will look at all other potential options for acquisition of the Town Hall Parade Interests.

~~18~~ The Appropriation Condition should deal with any existing or new title matters

~~19~~ Your amendment is not appropriate—the interests Council is acquiring are tenancies—the Council own the freehold.

3.1.3 The Council will keep the Developer regularly updated as to its progress in satisfying the Site Assembly Condition and shall not enter into any transfer or letting relating to the Town Hall Parade Interests Olive Morris House or Hambrook House without the consent of the Developer (not to be unreasonably withheld or delayed where the terms of such transfer or letting ~~do~~do not prohibit the Development to be built in accordance with this agreement).

3.2 **Registration of Title**

3.2.1 Within ten Working Days after entering into any acquisition contract in respect of any Outstanding Interest(s) the Council is to make an application to the Land Registry on Form UN1 to register a notice of such acquisition contract against the then current owner's title number(s). On completion of the registration of the notice, the Council is to provide the Developer with official copies of that/those title number(s) showing the registration of the notice.

3.2.2 Following completion of the purchase of each of Hambrook House, Olive Morris House and the Town Hall Parade Interests the Council is to use all reasonable and commercially sensible endeavours to complete its registration at the Land Registry as proprietor.

3.3 **Waiver**

The Site Assembly Condition cannot be waived.

3.4 **Time Limit**

The time limit for satisfaction of the Site Assembly Condition is the date 6 months prior to the Longstop Date.

4. **Compulsory Acquisition – Covenants by the Council**

4.1 In the event that the Council's Surveyor is unable to agree terms for acquisition with the relevant Owner or Owners for the acquisition of Third Party Interests in the Town Hall Parade CPO Land and/or the Olive Morris House CPO Land as the case may be such acquisition shall (subject to the terms of this Agreement) be pursued by means of the CPO.

4.2 Provided that it is satisfied that there is a compelling case in the public interest to pursue it the Council shall use its reasonable endeavours to seek authority from the Council's Cabinet to make the CPO as soon as is reasonably practicable.

4.3 In progressing any CPO the Council shall liaise with and have due regard to the views of the Developer in settling the form of CPO and the statement of reasons.

- 4.4 As soon as reasonably practicable after authority has been given by the Cabinet in accordance with Paragraph 4.2 the Council shall make the CPO and seek confirmation from the Secretary of State of the CPO in accordance with all relevant statutory requirements
- 4.5 The Council shall regularly consult with and have proper regard to all representations of the Developer in respect of the CPO and shall keep the Developer fully advised of progress of the CPO throughout the CPO and any other related proceedings.
- 4.6 Without prejudice to the generality of paragraph 4.6 above the Council shall following service of notice of making of the CPO and the statement of reasons on the Owners promptly supply the Developer with copies of all relevant documents submitted to the Secretary of State as the confirming authority for the CPO.
- 4.7 The Council shall be entitled to request from or pursue with the Secretary of State:
- (a) such amendments additions variations and/or substitutions to a CPO and
 - (b) such other application or applications in relation thereto
- as it shall reasonably determine to be necessary or desirable to assist in procuring the confirmation of a CPO.
- 4.8 In the event that objections are made to a CPO within the period prescribed by statute and are accepted as such by the Secretary of State the Council shall forthwith send to the Developer copies of all such objections and the Council shall decide whether or not to proceed with a CPO
- 4.9 In the event that a CPO is opposed the Council and the Developer shall work together with the aim of securing the withdrawal of every objection made to the CPO and in particular the Council shall:
- (a) (unless otherwise agreed with the Developer) use all reasonable endeavours to obtain the earliest practicable date for the holding of the Inquiry;
 - (b) keep the Developer informed of the arrangements for the holding of the Inquiry;
 - (c) use all reasonable endeavours to prepare for the Inquiry in liaison with the Developer;

- (d) liaise with and have due regard to (but shall not be bound by) the views of the Developer in connection with the preparation for the Inquiry and in particular shall:
 - (i) consult with the Developer as to the content of the statement of case prior to its submission and the content and nature of any evidence to be submitted to the Inquiry; and
 - (ii) generally permit the Developer to take an active part in the preparation of and strategy for the Inquiry where the Council deem it appropriate to do so (including the giving of all relevant evidence by the Developer and its advisors in support of the confirmation of the CPO (which the Developer hereby covenants to do))
- (e) keep the Developer advised of the progress and result of the Inquiry; and
- (f) notify the Developer of any challenge to the confirmation of a CPO

4.10 If a CPO is Confirmed the Council shall comply with all relevant statutory requirements in relation thereto (including publishing and serving notice of such confirmation so as to enable a CPO to become operative) as soon as reasonably practicable

4.11 Upon Confirmation of the CPO the Council will:

4.11.1 forthwith supply to the Developer a copy of a CPO as Confirmed and a copy of the CPO map together with a copy of the Secretary of State's decision and any inspector's report and

4.11.2 update the entry in the Local Land Charges Register in respect of a CPO as Confirmed

4.12 In the event that:

- (a) the Secretary of State declines to Confirm the CPO whether as to the whole or some part thereof (other than the exclusion from the CPO of some interest or right which does not materially adversely affect the carrying out of the Development or render the same materially more costly or more lengthy to complete or materially adversely affect the use or enjoyment of the Site for the various purposes anticipated by the parties); or
- (b) a third party applies to the court to challenge the decision of the Secretary of State

the Council shall (in either event) consult with (but not be bound by) the Developer as to the appropriate manner in which to respond to such decision or challenge in order to facilitate the implementation of the Development but the Council's decision on this issue shall be final

4.13 As soon as reasonably practicable after the Confirmation of the CPO the Council shall exercise its powers under the CPO and proceed to acquire all Third Party Interests in the Town Hall Parade CPO Land and/or the Olive Morris House CPO Land as the case may be.

4.14 As soon any Third Party Interests shall become vested in the Council the Council shall apply to register the same at Land Registry or shall otherwise deal with the properties so acquired in accordance with the terms of this Development Agreement.

5. **CPO Covenants by the Developer**

5.1 The Developer shall at the cost of the Developer²⁹ co-operate with and support the Council in the preparation for and the making confirmation and implementation of the CPO and (without prejudice to the generality of the foregoing) the Developer shall at the Council's reasonable request:

5.1.1 provide reasonable information and assistance to the Council (or as the Council may direct) in relation to the Council's obligations in this Agreement;

5.1.2 provide reasonable information and assistance to the Council (and/or as the Council may direct) and make such reasonable attendances and/or appearances and make available such suitably qualified witnesses as the Council may reasonably require in connection with the CPO (including any Inquiry and any Proceedings and including any reference to the Upper Tribunal); and

5.1.3 assist the Council in any and all negotiations with any party or parties who object(s) to the CPO so as to secure the withdrawal of such objections as expeditiously as possible on terms approved by the Council

6. **The Appropriation Condition**

6.1 The Council shall use reasonable endeavours to secure an Appropriation Resolution and the satisfaction of any internal procedures required in connection therewith.

²⁹~~This must be at Developers cost~~ Cooperation is needed to make the CPO

- 6.2 Subject to there being no bar on such disclosure (whether as a matter of law or under the Council's internal procedures) the Council shall provide a copy of any draft report seeking an Appropriation Resolution to the Developer.
- 6.3 The Council shall, within 5 Working Days of a resolution or decision being made following such report provide to the Developer a copy of the resolution or decision in question so that the Developer may consider whether the Appropriation Condition is satisfied PROVIDED THAT if an Appropriation Resolution is passed which is effective to appropriate the Site (or, as the case may be relevant part(s) thereof) and such Appropriation Resolution is Immune from Challenge, then the Appropriation Condition shall be deemed to be satisfied.
- 6.4 The Developer alone may at its discretion by serving notice in writing on the Council waive the Appropriation Condition so that the Appropriation Condition may be treated as satisfied prior to the Appropriation Resolution being Immune from Challenge.
- 6.5 On the service of a notice under paragraph 6.4 the Appropriation Condition will be treated as satisfied.
- 6.6 Where an Appropriation requires the consent of the Secretary of State, the Council shall proceed expeditiously and shall use all reasonable endeavours to obtain the consent of the Secretary of State to the Appropriation and shall keep the Developer informed of any such application for consent and progress therewith.
- 6.7 The time limit for satisfaction of the Appropriation Condition is the date 4 months prior to the Longstop Date²¹⁸.
- 6.8 Subject to paragraph 6.8 below the Developer agrees to indemnify the Council against all Section 237 Costs arising from the Appropriation of any Section 237 Interests in the Surplus Properties.
- 6.9 The Developer shall (subject to the provision by the Council to the Developer of appropriate evidence thereof) pay any Section 237 Costs referred to in clause 6.8 to the Council (or as the Council may reasonably direct) by cleared funds within 14 Working Days of written demand by the Council from time to time

²¹⁸ ~~We might only complete~~⁸ The Developer considers that site assembly after this and appropriation can only take place once Council owns and appropriation need to take place at least 4 months before the Longstop Date so that there is time for (a) the Funding to be completed (b) the Developer Viability test to be run and (c) the Council Viability test to be run. Under paragraph 3.4 the property Site Assembly Condition must be satisfied 6 months before the Unconditional Date.

7. **Payment of CPO and Acquisition Costs**

7.1 The Council shall pay all costs arising from or in connection with the acquisition of Outstanding Interests (other than those [costs payable by the Developer pursuant to **paragraph 5**]) whether such acquisition is by private treaty or pursuant to the CPO.

8. **Payment of Appropriation Costs**

8.1 For the avoidance of doubt the Council shall pay any compensation payable to third parties in order to enable the SW2 Enterprise Centre Development to progress following the making of the Appropriation Resolution.

8.2 The Developer shall pay any compensation payable to third parties in order to enable the Surplus Sites Development to progress following the making of the Appropriation Resolution.

SCHEDULE 3

Funding Condition

1. Definitions

In this Schedule the following words and expressions have the following meanings:

“Developer Funding” means such funding (being either debt or equity or a combination of debt and equity) as the Developer reasonably believes the Developer requires to properly comply with its obligations pursuant to this Agreement in connection with the development of the and Surplus Properties Development to be made available to the Developer on the terms of the Developer Funding Agreement

“Developer Funding Agreement” means such funding agreement or agreements relating to the Developer Funding on such terms and in such form or forms as shall be acceptable to the Developer (acting reasonably)

2. Developer Funding Condition

The Developer Funding Condition is the:

- 2.1 Developer entering into the Developer Funding Agreement; and
- 2.2 the Developer Funding Agreement becoming unconditional upon its own terms save for any condition relating to the requirement for this Agreement to become unconditional.

3. The Developer’s Obligations

- 3.1 The Developer shall use reasonable endeavours to negotiate and agree both the quantum of Developer Funding and the terms and conditions of the Developer Funding Agreement as soon as reasonably practicable after the satisfaction of the balance of the Overarching Conditions.
- 3.2 The Developer will send to the Council a copy of the term sheet for a proposed Developer Funding Agreement within ten working days of agreement of the same and will take due account of the Council's suggestions as to how finance might be obtained more cost effectively.

- 3.3 The Developer shall enter into and exchange the Developer Funding Agreement as soon as reasonably practicable after the quantum of Developer Funding and the terms and conditions of the Developer Funding Agreement have been agreed pursuant to **paragraph 3.1**.
- 3.4 The Developer will send to the Council a copy of the Developer Funding Agreement (redacted for commercially sensitive information (save that financial provisions will not be commercially sensitive)) promptly following completion of the same.
- 3.5 The Developer shall ensure that any Developer funding obtained from a Connected Party will be provided on terms no less advantageous than it reasonably considers would be available in the open market for equivalent funding.

4. **The Council's Obligations**

The Council shall promptly on request from the Developer enter into a Step-In Agreement with any Investor subject to the Council first approving the Step-In Agreement (such approval not to be unreasonably withheld or delayed).

5. **Waiver**

The Developer (but not the Council) may waive the Developer Funding Condition by written notice to the Council by serving written notice to that effect upon the Council and the Developer Funding Condition will be deemed to be satisfied on the date of such notice.

6. **Time Limit**

The time limit for satisfying the Developer Funding Condition is the Longstop Date.

SCHEDULE 4

Viability

1. Definitions

In this Schedule the following words and expressions have the following meanings:

“Appraisal” means a financial appraisal for the SW2 Enterprise Centre Development Works and the Surplus Property Development Works to be prepared in accordance with development industry norms and to be in the same form as the appraisal annexed to this agreement

“Developer's Profit” an amount equal to the Gross Development Value less Eligible Development Costs

“Developer's Return” the return on value percentage calculated in accordance with the following formula:

$$\frac{\text{Developer's Profit}}{\text{GDV}} \times 100\%$$

“Development Management Fee” means an amount equal to 2 per cent. of the aggregate of the “Contract Sums” under the Building Contracts (including any equivalent sums incurred prior to the letting of the Building Contract, to include consultants' and subcontractors' fees and 7 per cent. of preliminaries and subcontract costs by way of mark up for overheads and profit)⁹ (which amount the Developer shall be entitled to retain)

“Eligible Development Costs” the aggregate of the items listed in Part 2 of this Schedule estimated to be incurred in relation to the development of the Site and/or the Surplus Sites in accordance with the Acceptable Planning Permissions as at the date of submission of the Appraisal to the Council

⁹ It is not clear yet how the works will be procured. There may be development costs incurred before the Building Contract is let and these will need to be treated in the same way as Building Contract costs.

"Gross Development Value" the aggregate Market Value of the Private Units within the Surplus Property Development

"IRR" means the annual internal rate of return (expressed as a percentage) which when applied as a discount rate to the specified set of cashflows gives the net present value of that set of cashflows as zero on the basis that:

- (a) each of those cashflows is regarded as arising at the end of the calendar month in which the cashflow in question occurs or is deemed to occur; and
- (b) rate of return is treated as compounding annually at the end of each calendar year;

Calculated using the XIRR function in Microsoft Excel (or such other accounting software as the Developer may from time to time elect)

"Market Value" means

- (a) in relation to a private residential unit the definition given to it in RICS Valuation – Professional Standards 2012 (eighth edition) (known as the **"Red Book"**) or in the most recent replacement published by RICS Valuation Professional Group from time to time, [assuming that:

- (i) the single private residential unit is available on a lease term of 250 years or greater commencing on the date which is one month after the relevant Date of Sectional Completion (which date shall be estimated, if necessary, whenever Market Value is being calculated);

~~(ii) the private residential units~~

~~are fitted out to the standard expected of the market in this location;~~

~~(iii) the buyer will have the benefit of all rights and easements required for the beneficial occupation of the private residential unit;]~~

~~(b) [Note: definition will be needed for commercial units]]~~

(ii) the private residential units are fitted out to the standard expected of the market in this location;

(iii) the buyer will have the benefit of all rights and easements required for the beneficial occupation of the private residential unit;]

(b) in relation to a private commercial unit the definition given to it in RICS Valuation – Professional Standards 2012 (eighth edition) (known as the "Red Book") or in the most recent replacement published by RICS Valuation Professional Group from time to time

Private Units"

together private residential units and commercial units

"Purchase Price"

[the Residual Land Value shown in the Appraisal]

"Required Profit on GDV"

a Developer's Return of not less than 20 per cent. on the Gross Development Value of the Private Units within the Surplus Property Development Works comprising residential development for private sale and private

commercial development

"Required Return"

means that amount which is required to deliver to the Developer an IRR of not less than twenty per cent. on the equity cashflow for the Development (including all equity injections, equity returns, profits to equity providers and risk premia) an example calculation of which is contained in the appraisal annexed at [Annexure [●]]

"Viable"

the Development is Viable for the Developer where the relevant Appraisal shows that the Developer would receive:

- (a) the Required Return; and
- (b) the Required Profit on GDV,

if it were to carry out the ~~Surplus-Property~~ Development¹⁰

"Developer Viability Condition"

has the meaning ascribed to it in paragraph 2.1

"Council Viability Condition"

has the meaning ascribed to it in paragraph 2.2

2. The Condition

2.1 The Developer Viability Condition is the Appraisal current at the date of satisfaction or waiver of the balance of the Development Conditions showing the ~~Surplus-Property~~ Works²²¹¹ to be Viable.

2.2 The Council Viability Condition is the Council (acting reasonably) confirming to the Developer:

- 2.2.1 the Purchase Price shown in the relevant Appraisal exceeds or will exceed the Commitment and enable it to comply with its obligations in this Agreement; or

¹⁰ The Viability Test covers the scheme as a whole – see the 29/8/13 note of UH's meeting with the Council's advisors on 28/8/13: bullet point relating to "Viability" under the heading "Conditions Precedent", which refers to appraising "the Council accommodation and the surplus sites". Note that the Commitment is assumed to be paid (paragraph 2.3.2.4) so the Appraisal will be unduly positive if the relevant costs are excluded

²² ~~This should only be surplus property works – see definition~~¹¹ The Viability Test covers the scheme as a whole – see the 29/8/13 note of "Viable" UH's meeting with the Council's advisors on 28/8/13: bullet point relating to "Viability" under the heading "Conditions Precedent", which refers to appraising "the Council accommodation and the surplus sites". Note that the Commitment is assumed to be paid (paragraph 2.3.2.4) so the Appraisal will be unduly positive if the relevant costs are excluded

2.2.2 the Purchase Price shown in the relevant Appraisal does not or will not exceed the Commitment and enable it to comply with its obligations in this agreement, confirmation from the Council that the Council has sufficient other additional financial resources available to fund Development Costs up to the Commitment and enable it to comply with its obligations in this Agreement.

2.3 **Interim Viability Assessments**

2.3.1 At any time before the Unconditional Date the Developer may carry out an Appraisal.

2.3.2 Whenever an Appraisal is carried out the Developer shall:

2.3.2.1 do so in a fair and reasonable manner;

2.3.2.2 estimate the future Eligible Development Costs on a fair and reasonable basis and as accurately as practicable it being acknowledged that in relation to the Eligible Development Costs it will be reasonable for the Building Contractor to be paid no more than 7% of the preliminaries and sub contract costs forming part of the contract sum as defined in the Building Contract by way of mark up for overhead and profit and otherwise to conduct the Building Contract on an open book basis;

2.3.2.3 measure the incurred Eligible Development Costs as accurately as reasonably possible;

2.3.2.4 provide for the Council's estimated payment to the Developer pursuant to clause 11 to be no greater than the Commitment.

2.3.3 In estimating the Gross Development Value the Council may require the Developer to instruct (on behalf of both the Council and the Developer), [Jones Lang LaSalle, Savills and Knight Frank] to provide their estimates (addressed to both the Developer and the Council) of the Market Value of the Private Units within the Surplus Property Development and the Market Value of the Private Units within the Surplus Property Development shall then be taken for the purposes of the Appraisal as the total Market Value of the three estimates divided by a factor of three. The Developer shall be responsible for the costs (if any) of the said valuers.

2.3.4 Forthwith following the carrying out of an Appraisal the Developer shall provide the Council with full details as to how the Appraisal has been

carried out, which shall include (without limitation) full details of the incurred Eligible Development Costs and the estimated Eligible Development Costs and a copy of the Appraisal as run.

2.4 Interim Viability Assessment

2.4.1 Immediately prior to submission of the Planning Applications the Developer shall conduct an Appraisal and supply a copy of the Appraisal to the Council together with confirmation of whether or not the Developer considers that there is a reasonable prospect of satisfying the Developer Viability Condition.

2.4.2 Following receipt of the Developer's Appraisal pursuant to clause 2.2.1 the Council shall confirm whether or not the Council Viability Condition is anticipated to be met on the basis of the Purchase Price indicated in the Developer's Appraisal.

[Note: We need to ensure that the timings for this work together with the timings for submission of the planning applications]

2.4.3 If either the Developer determines that there is no reasonable prospect of satisfying the Developer Viability Condition or the Council determines that there is no reasonable prospect of satisfying the Council Viability Condition then the Developer or Council may within [10] Working Days of such determination determine this Agreement by notice on the other²³¹².

2.5 Final Viability Appraisal

As soon as reasonably practicable following satisfaction of all Overarching Conditions apart from the Developer Viability Condition and the Council Viability Condition:

2.5.1 the Developer shall conduct an Appraisal; and

2.5.2 following receipt of the Developer's Appraisal the Council shall confirm whether or not the Council's Viability Condition is satisfied,

and the provisions of paragraph 2.1 and 2.2 shall apply mutatis mutandis to the Final Viability Appraisal.

3. WAIVER

²³¹² Presumably with no cost consequences to the Council? [Not in the case of the Council Viability Condition - see the 29/8/13 note of UH's meeting with the Council's advisors on 28/8/13: bullet point relating to "Viability" under the heading "Conditions Precedent".](#)

- 3.1 The Developer (but not the Council) may waive the Developer Viability Condition by written notice in which case the Developer Viability Condition shall be deemed satisfied.²⁴
- 3.2 The Council (but not the Developer) may waive the Council Viability Condition by written notice in which case the Council Viability Condition shall be deemed satisfied.

PART 2: ELIGIBLE DEVELOPMENT COSTS

4. All costs payments expenses sums and liabilities reasonably and properly incurred by the Developer in respect of the Development in connection with the following:
- 4.1.1 the satisfaction of the Overarching Conditions;
 - 4.1.2 any stamp duty land tax CIL tariff development land tax (or equivalent) and Land Registry fees or other fees or taxes related to the Development payable by the Developer or reimbursed by the Developer ~~in connection with the Surplus Sites~~;
 - 4.1.3 the obtaining of all approvals pursuant to the Satisfactory Planning Permissions and in obtaining all Statutory Consents and in entering into any Planning Agreement required in connection with the carrying out of the ~~Surplus Properties~~¹³ Development or any part thereof or for the use of the ~~Surplus Properties~~ Development or any part thereof for any permitted purpose and of complying therewith or performing the same including any payments made pursuant to the Satisfactory Planning Permissions the Statutory Consents and such agreements including sums suffered or incurred in relation to the provision of affordable housing;
 - 4.1.4
 - 4.1.4.1 the diversion of services necessary for the purpose of facilitating the ~~Surplus Properties~~ Development;
 - 4.1.4.2 the acquisition diversion variation or abrogation of any rights of way rights of light or air or other rights easements or covenants whatsoever and any compensation payments relating to the loss of such rights easements or covenants;
 - 4.1.4.3 securing the ~~Surplus Properties~~ Development

²⁴ ~~Cannot have the Developer being able to commit the Council to the scheme if not viable for the Council~~

¹³ See comments above: the Appraisal includes all Development Costs (but assumes the Commitment is paid)

- 4.1.5 costs and expenses incurred including legal fees and the costs of selling and letting agents in connection with:
 - 4.1.5.1 the grant or proposed grant of any lease or leases;
 - 4.1.5.2 the entering into or proposed entering into of any agreement or agreements for any lease or leases and/or planning agreements and/or any other agreement or agreements in connection with the carrying out of the ~~Surplus Properties~~ Development;
 - 4.1.5.3 the sale of any interest in the ~~Surplus Properties~~ Development or any part thereof;
 - 4.1.5.4 the completion of any lease and/or sale and/or agreement referred to in **paragraph 1.1.5.1** and **1.1.5.2** above;
 - 4.1.5.5 the cost of any inducement or reverse premium offered to any tenant;
 - 4.1.5.6 the payment of tenant and/or purchaser costs (where reasonable to do so) in connection with a letting or disposal;
 - 4.1.5.7 the payment of any damages or compensation (whether liquidated or otherwise) which the Developer is legally required to pay to the extent the Developer has not (despite having used reasonable endeavours to do so) been able to recover the same from a third party save where to the extent that such damages or compensation arise as a result of the Developer's default;
- 4.1.6 the design construction and completion of the ~~Surplus Properties~~ Development including (without prejudice to the generality of the foregoing):
 - 4.1.6.1 the total construction cost of the ~~Surplus Properties~~ Development incurred by the Developer including the costs payable pursuant to the Building Contract and any subcontracts;
 - 4.1.6.2 the costs of all site works site excavations demolition works or site preparations or bore hole test site surveys and structural surveys (including testing and monitoring);
 - 4.1.6.3 the costs of all accommodation works drainage works and road works;

- 4.1.6.4 road sewer drain or water services and maintenance charges, and inspection fees
- 4.1.6.5 the fees and disbursements of the Professional Team and any other consultants or professional advisers necessary to be appointed in connection with the ~~Surplus Properties~~ Development;
- 4.1.6.6 all planning and building regulation charges and fees and the costs of any required performance bond;
- 4.1.6.7 the cost of obtaining any energy performance certificates
- 4.1.7 financing the acquisition and carrying out of the ~~Surplus Properties~~ Development [**Note: Schedule 3 11.5 requires this to be on commercial terms**] including (without prejudice to the generality of the foregoing) all payments to the Developer's funder and/or any Investor such as interest (including rolled up interest) commission and lenders charges disbursements commitment and arrangement fees, legal costs, valuation costs and the costs incurred by the Developer in connection with the giving or proposed giving of any security in connection therewith;
- 4.1.8 advertising and promotion connected with any acquisition sale and/or letting of part of the ~~Surplus Properties~~ Development;
- 4.1.9 Value Added Tax on any of the above items insofar as repayment or credit in respect thereof is not obtained by the Developer (the Developer to use all reasonable and commercially prudent endeavours to recover such Value Added Tax);
- 4.1.10 all other tax payable by the Developer in connection with the ~~Surplus Properties~~ Development (other than tax payable on profits made by the Developer);
- 4.1.11 where any item of Eligible Development Costs is financed by the Developer or the Guarantor from their own resources a notional sum calculated from the date of payment upon such item of Eligible Development Costs as if it were interest at the same interest rate as that charged by the Developer's funder or Investor provided that the same is a market rate for development finance at the time;
- 4.1.12 reasonable and proper fees and disbursements paid to the Professional Team;

- 4.1.13 legal and other advisors and professional fees incurred by the Developer in connection with the initial proposals for the ~~Surplus Properties~~—Development the negotiation and completion of any documents entered into pursuant to this agreement and any Planning Agreement or any other agreement relating to the ~~Surplus Properties~~ Development;
- 4.1.14 any action or proceedings brought by or against the Developer (or to prevent any such action or proceedings being brought against the Developer) in respect of the ~~Surplus Properties~~—Development for the protection or preservation of the Site and/or Surplus Sites or any part thereof or any rights benefiting the Site and/or Surplus Sites (including but not limited to the expulsion of trespassers and the effecting of security arrangements);
- 4.1.15 the extinguishment or variation of any interest or rights in over or against the Site and/or Surplus Sites held by a person who by lawful exercise of his powers could prevent or impede the carrying out or the progress of the ~~Surplus Properties~~—Development or its use and enjoyment;
- 4.1.16 environmental audit services site/soil investigations, measured surveys, site surveys, archaeological investigations and monitoring services;
- 4.1.17 any sums payable by the Developer to the Council pursuant to this Agreement excluding any sums payable due to the Developer's or the Guarantor's default;
- 4.1.18 costs and expenses of managing agents connected with the setting up, management and provision of services to the ~~Surplus Properties~~ Development;
- 4.1.19 insurance costs and all rates and outgoings in respect of the Site and/or the Surplus Sites for the period up to the date of practical completion of the ~~Surplus Property~~—Development;
- 4.1.20 the Development Management Fee;

PROVIDED THAT

- 4.1.21 all of the above costs shall be reasonably and properly incurred or expended and/or properly payable;

- 4.1.22 for the avoidance of doubt any item of Eligible Development Costs counted under any one head of expenditure shall not to that extent be counted under another;
- 4.1.23 no item of expenditure shall be included to the extent that proceeds of insurance or damages (less the cost of recovery) are received in respect of such expenditure;
- 4.1.24 any item of expenditure, costs incurred or compensation costs or damages payable by the Developer to any third party or parties or to the Council as a result of the negligence or breach of contract by the Developer or the Building Contractor which would not have occurred but for such negligence or breach shall not be included in the Eligible Development Costs;¹⁴
- 4.1.25 no ~~Enterprise Centre Development Costs~~costs which are not incurred or to be incurred by or on behalf of the Developer the Building Contractor and / or any subcontractors or consultants of the Developer shall be included in the Eligible Development Costs;¹⁵
- 4.1.26 the costs incurred by the Developer in remedying any breach by the Developer of this Agreement (save as a result of a breach by the Council) are excluded;
- 4.1.27 any interest payable by the Developer to a third party as a result of the Developer breaching an obligation to that third party (save as a result of a breach by the Council) are excluded;
- 4.1.28 any costs which the Developer subsequently recovers from a third party (the Developer being obliged to use all reasonable and commercially prudent endeavours to pursue its remedies for such costs against such third parties) less the properly incurred costs of such recovery are excluded;
- 4.1.29 any interest payments, fines, penalties, fees or other payments arising out of the Developer's own negligence or default (save to the extent such default is as a result of a breach by the Council of this Agreement) are excluded;

¹⁴ See comments above: this needs to be included as the Commitment is debited

¹⁵ This is intended to make it clear that the SW2 Enterprise Centre Costs being covered directly by the Council (e.g. the CPO compensation) are not counted

~~4.10.30~~ Costs incurred in bidding during the competitive dialogue process or incurred prior to the date of this Agreement shall be included.¹⁶

~~2517~~

¹⁶ Clarification may be needed here. Bid costs (e.g. legal) are excluded from the viability calculation but costs of designs which are later used will be included. Please note that the Council will not be charged for any pre-exchange design costs in the Commitment

~~2517~~ Deletion of internal overheads and admin expenses only agreed if they are shown in the model as part of the bid

SCHEDULE 5

Appointments of Building Contractor and Professional Team

PART 1: GENERAL PROVISIONS

1. Basis of Appointments

1.1 If it has not already done so, the Developer is as soon as practicable following the Unconditional Date to:

1.1.1 appoint the Building Contractor;

1.1.2 (subject to paragraph 1.1.3) appoint each member of the Professional Team; and

1.1.3 procure that each Principal Sub-Contractor and each member of the Professional Team to the extent not appointed under paragraph 1.1.2 is appointed by the Building Contractor.

1.2 Each appointment is to be made in accordance with the procedure set out in this Schedule.

1.3 Any Building Contractor, Principal Sub-Contractors and members of the Professional Team named in this Agreement are approved by the Council.

1.4 Before appointing any Building Contractor, Principal Sub-Contractor or member of the Professional Team not named in this Agreement, the Developer is to make due enquiry as to their repute, competence and suitability with respect to the Relevant Works.

1.5 The Developer is to appoint the Building Contractor separately for the following elements of the Development Works and the provisions of this Schedule will apply to each appointment:

1.5.1 the SW2 Enterprise Centre Works; and

1.5.2 the Surplus Property Works.

2. Terms of Appointments

2.1 Each Appointment of a member of the Professional Team is to be executed as a deed in a form as may be agreed between the Developer the Building Contractor and the relevant member of the Professional Team and approved by the Council, such approval to be subject to the provisions of **paragraph 2.4** and otherwise not to be unreasonably withheld or delayed.

- 2.2 The Building Contracts are to be executed as a deed in the JCT Design and Build 2011 edition form of building contract together with such amendments as are approved by the Council, such approval to be subject to the provisions of **paragraph 2.4** and otherwise not to be unreasonably withheld or delayed.
- 2.3 The Principal Sub-Contracts are to be executed as a deed in a form approved by the Council such approval to be subject to the provisions of **paragraph 2.4** and otherwise not to be unreasonably withheld or delayed.
- 2.4 The Council will not be obliged to approve any amendments to the Appointments, Building Contract or the Principal Sub-Contracts that:
- 2.4.1 remove or substantially restrict step-in rights for the Council;
 - 2.4.2 affect the Council's rights and remedies under the Warranties;
 - 2.4.3 mean the relevant document is no longer institutionally acceptable.
- 2.5 The Developer is to provide the Council with:
- 2.5.1 a certified copy of each Appointment, Building Contract and Principal Sub-Contract together with a further copy in secure electronic format within 20 working days of receipt by the Developer of the relevant signed counterpart; and
 - 2.5.2 approvals by the professional indemnity insurers of the person appointed of the forms of Building Contract, Appointments, Principal Sub-Contracts and Warranties.
- 2.6 Where a member of the Professional Team has been appointed by the Developer, that Appointment may be novated to the Building Contractor.

3. **Additional provisions relating to Building Contracts**

- 3.1 Before appointing a Building Contractor that is not named in this Agreement and is not a Connected Party of the Developer the Developer is to:
- 3.1.1 invite tenders from at least three prospective contractors who have been approved in writing by the Council; and
 - 3.1.2 analyse each response to the tender process and submit its recommendations for the appointment of the Building Contractor to the Council for its approval, such approval not to be unreasonably withheld or delayed.
- 3.2 Where the Building Contractor is United House Limited or a Connected Party of the Developer the Developer shall ensure that:

- 3.2.1 [the Building Contract shall include no more than 7% of the preliminaries and sub contract costs forming part of the contract sum as defined in the Building Contract by way of contractor margin for overhead and profit;
- 3.2.2 the Council is supplied with details of the anticipated preliminaries and sub contract costs forming part of the contract sum as defined in the Building Contract and is afforded a reasonable opportunity to make representations in relation to the same prior to the Building Contract being entered into and the Developer will ensure that the Council's representations are taken into account.
- 3.3 If the Building Contractor is to be responsible for appointing members of the Professional Team under the terms of the Building Contract, the Developer is to procure that the Building Contractor does not make any appointments until the provisions of this Schedule have been complied with in relation to the Appointments.
- 3.4 The Developer is to procure that in relation to the Building Contract for the SW2 Enterprise Centre Works where the Building Contractor is not United House Limited or a Connected Party of the Developer the Building Contractor provides the Performance Bond to the Council simultaneously with the exchange of the Building Contract for the SW2 Enterprise Centre Works. The Performance Bond is:
 - 3.4.1.1 to be in a form approved by the Council approve, such approval not to be unreasonably withheld or delayed;
 - 3.4.1.2 to be given by a bank or other financial institution acceptable to the Council acting reasonably; and
 - 3.4.1.3 to be in an amount of 10% of the contract sum;
- 3.5 The Developer is to procure that in relation to each Building Contract:
 - 3.5.1 the Building Contract contains a Defects Liability Period;
 - 3.5.2 the Building Contractor is registered with HM Revenue & Customs for the purposes of section 63 Finance Act 2004 for gross payment; and
 - 3.5.3 the Building Contractor operates the deduction scheme for sub-contractors contained in Chapter 3 Part 3 Finance Act 2004 and the Income Tax (Construction Scheme) Regulations 2005.

4. **Warranties**

4.1 The Developer is to procure that each Building Contractor, Principal Sub-Contractor, each member of the Professional Team and the Employer's Agent:

4.1.1 unconditionally delivers Warranties to the Council as soon as practicable after the date of their appointment and in any event:

4.1.1.1 (in the case of the Building Contractor and Professional Team) prior to the Developer commencing the Relevant Works to which their appointment relates; and

4.1.1.2 (in the case of the Principal Sub Contractors) by the Date of Practical Completion;

4.1.2 is under an obligation to provide Warranties to any first tenant of any part of the SW2 Enterprise Centre Development within 6 years of Sectional Completion of the relevant part of the SW2 Enterprise Centre Development at nil cost to the Council.

4.2 The Warranties are to be in such form as the Council may approve, such approval not to be unreasonably withheld or delayed.

5. **Insurance**

5.1 The Developer is to use all reasonable and commercially sensible endeavours to agree provisions in the relevant Building Contract requiring that professional indemnity insurance is maintained throughout the period of the SW2 Enterprise Centre Development Works or the Surplus Property Development Works (as the case may be) and for twelve years after the Date of Sectional Completion for such works with reputable insurers:

5.1.1 by each member of the Professional Team for at least £10,000,000 in respect of each claim that may be made;

5.1.2 the Building Contractor for at least £10,000,000 in respect of each claim that may be made; and

5.1.3 by each Principal Sub-Contractor which has design responsibility for at least £5,000,000 in respect of each claim that may be made.

5.2 The obligations in **paragraph 5.1** will apply in respect of each member of the Professional Team, the Building Contractor and each Principal Sub-Contractor for so long as professional indemnity insurance is generally available in the insurance market to those persons at a reasonable cost. Payment of any increased or additional premiums required by insurers by reason of those persons' own claim records or other acts or omissions or things peculiar to those

persons are to be disregarded in determining whether such insurance is available at a reasonable cost.

6. **Copyright**

6.1 The Developer is to use all reasonable and commercially sensible endeavours to procure that the Building Contractor and each Principal Sub-Contractor and member of the Professional Team:

6.1.1 grants to the Council an irrevocable, royalty-free licence to use and reproduce the Design Documents prepared by them or in which they have copyright;

6.1.2 waives all moral rights to the Design Documents under the Copyright, Design and Patents Act 1988; and

6.1.3 provides to the Council without charge a complete set of the Design Documents prepared by them or in which they have copyright at Practical Completion.

7. **Developer's obligations**

7.1 The Developer is to:

7.1.1 give written notice to each person appointed under this Schedule that the SW2 Enterprise Centre Development Works are being carried out for the Council; and

7.1.2 use all reasonable endeavours to procure that:

7.1.2.1 each member of the Professional Team complies with the terms of its Appointment;

7.1.2.2 the Building Contractor complies with the terms of the Building Contract; and

7.1.2.3 the Building Contractor and each Principal Sub-Contractor comply with the terms of their Principal Sub-Contracts.

7.2 The Developer is not without the prior written consent of the Council such consent not to be unreasonably withheld or delayed, to:

7.2.1 dismiss any member of the Professional Team, or the Building Contractor without first notifying the Council of its intention to do so and discussing with the Council the appointment of a suitable substitute Building Contractor or consultant approved by the Council such approval not to be unreasonably withheld or delayed;

- 7.2.2 make or agree any material variations or amendments to the terms of any Appointment, Building Contract or Principal Sub-Contract which would affect the SW2 Enterprise Centre Development Works;
 - 7.2.3 permit the Building Contractor to sub-contract its responsibilities under the Building Contract to any person who is not a Principal Sub Contractor (unless the Building Contractor retains liability as against the Developer and the Council for such sub-~~contractual~~contracted responsibilities);
 - 7.2.4 permit any member of the Professional Team to sub contract its responsibilities under its Appointment (unless the Building Contractor retains liability as against the Developer and the Council for such sub-~~contractual~~contracted responsibilities);
 - 7.2.5 permit a Principal Sub-Contractor to sub-contract its responsibilities under its Principal Sub-Contract (unless the Building Contractor retains liability as against the Developer and the Council for such sub-~~contractual~~contracted responsibilities);
 - 7.2.6 permit any assignment of the Appointments, the Building Contract or the Principal Sub-Contracts.
- 7.3 The Developer is not to:
- 7.3.1 waive, release nor stop itself from enforcing or seeking redress for any breach of the Appointments, the Building Contract or the Principal Sub-Contracts; or
 - 7.3.2 do or omit to do any act or thing which would entitle:
 - 7.3.2.1 any member of the Professional Team to treat its Appointment as terminated by breach;
 - 7.3.2.2 the Building Contractor to treat the Building Contract as terminated by breach; or
 - 7.3.2.3 a Principal Sub-Contractor to treat a Principal Sub-Contract as terminated by breach; or
 - 7.3.3 receive any illegal commissions, inducements, or pecuniary or other advantages at any time arising from the appointment of the members of the Professional Team, the Building Contractor or any Principal Sub-Contractor.

8. **Appointment Default**

8.1 If there is an Appointment Default, the Developer is immediately to notify the Council in writing of the Appointment Default and the reasons for it.

8.2 Following an Appointment Default:

8.2.1 where the Developer was responsible for the original appointment, the Developer is to use all reasonable endeavours to appoint another person on the terms of this Schedule in substitution for the person whose appointment was terminated; and

8.2.2 where the Building Contractor was responsible for the original appointment, the Developer is to use all reasonable endeavours to procure that the Building Contractor appoints another person on the terms of this Schedule in substitution for the person whose appointment was terminated.

8.3 The Council will not be obliged to approve the terms of a substitute's appointment under **paragraph 8.2** if the terms of the appointment impose less onerous obligations on the person to be appointed than those contained in the appointment that was terminated and the terms of paragraph 2 of this schedule shall apply mutatis mutandis to the Council's approval of the appointment in such cases.

9. **Ownership of goods, materials and insurance monies**

9.1 Where the Building Contract provides for the ownership of unfixed materials and goods to become the property of the employer under the Building Contract under certain circumstances then, as between the Developer and the Council, the Developer is to hold them on trust for the Council absolutely to the extent that the Council has paid for the same.

9.2 Any interest which the Developer may have in any insurance moneys received or receivable under the Building Contract, and any moneys received or receivable under the Performance Bond, are to be held on trust by the Developer for the Council absolutely and are to be paid when and how the Council directs (save in each case to the extent that they relate to a loss suffered by the Developer but not by the Council)

10. **Proceedings**

10.1 If the Building Contractor, any Principal Sub Contractor or any member of the Professional Team is in default or has committed a breach of their obligations in relation to the SW2 Enterprise Centre Development or any part of it, the Developer will enforce its rights and remedies in respect of that breach.

10.2 Any sums recovered by the Developer consequent upon any action taken pursuant to **paragraph 10.1** are to be held on trust by the Developer for the Council absolutely and are to be paid when and how the Council directs (save in each case to the extent that they relate to a loss suffered by the Developer but not by the Council).

11. **Assignment of rights**

11.1 Following an Event of Default, the Council may, but without being under an obligation to do so, and subject always to any Step-In Deed serve written notice on the Developer and any Building Contractor to elect that the Council is to act and to be treated as the employer under the Building Contract. If the Council serves notice under this **paragraph 11.1**:

11.1.1 the Developer will enter into a deed of novation of the Building Contract in a form to be agreed between the parties (acting reasonably); and

11.1.2 the Developer will remain liable for any act or default of the Building Contractor prior to the Event of Default as if no notice had been served²⁶.

11.2 The provisions of **paragraph 11.1** will apply equally to the Appointments and the Professional Team.

PART 2: EXISTING APPOINTMENTS

Professional	Name and Address	Date of Appointment
[DESCRIPTION]	[NAME] of [ADDRESS]	[DATE]

[DN: will there be any by exchange? Bidders to confirm]

²⁶~~Council not comfortable with your amendment.~~

SCHEDULE 6

Specification, Development Plans and Programme of Works

1. Preparation and approval of Development Plans

- 1.1 As soon as reasonably practicable after the Unconditional Date and in any event within ~~[²⁷]~~ 6 months of the Unconditional Date the Developer is to prepare the SW2 Enterprise Centre Specification and the SW2 Enterprise Centre Development Plans to RIBA Work Stage H and to a level to secure BREEAM "Excellent" (save in relation to the Town Hall in relation to which BREEAM "Very Good" a least is required at least and provide them to the Council for the Council's approval. The Developer shall liaise regularly with the Council in relation to such preparation and may (but shall not be obliged to) submit elements of the proposed specifications and plans prior to submission to the Council of the SW2 Enterprise Centre Specification and SW2 Enterprise Centre Development Plans.
- 1.2 The Council is not unreasonably to withhold or delay its approval of the SW2 Enterprise Centre Specification and SW2 Enterprise Centre Development Plans where they have been produced in accordance with the Employer's Requirements and do not contain any of the Adverse Matters.
- 1.3 The Council shall either approve or refuse with reasons the SW2 Enterprise Centre Specification and SW2 Enterprise Centre Development Plans and all submissions made pursuant to **paragraph 1.1** within [20] working days of submission.
- 1.4 Where the SW2 Enterprise Centre Works are to be carried out pursuant to a design and build contract references to the SW2 Enterprise Centre Specification and SW2 Enterprise Centre Development Plans will include:
- 1.4.1 all employer's requirements submitted to the Building Contractor under the Building Contract, and the Developer will not submit the employer's requirements unless and until they have been approved by the Council under **paragraph 1.1** (to the extent that approval is required under **paragraph 1.2**); and
- 1.4.2 all contractor's proposals produced by the Building Contractor under the Building Contract, and the Developer will not approve the contractor's proposals under the Building Contract unless and until they have been approved by the Council under **paragraph 1.1** (to the extent that approval is required under **paragraph 1.2**).

²⁷ ~~What timescales please?~~

- 1.5 Once approved by the Council, no changes to those parts of the SW2 Enterprise Centre Specification and SW2 Enterprise Centre Development Plans which require the Council's approval under **paragraph 1.2** may be made except in accordance with **paragraphs 3 and 4 of Schedule 5** or **paragraph 3 of Schedule 6**.
- 1.6 The Developer is not to start the SW2 Enterprise Centre Works until the SW2 Enterprise Centre Specification and SW2 Enterprise Centre Plans have been approved under this Schedule.
- 1.7 No inspection or approval by the Council of the Relevant Specification and Relevant Development Plans is to lessen the obligations of the Developer, the Building Contractor, any member of the Professional Team or any Principal Sub-Contractor in relation to the design and construction of the Relevant Works, whether under this Agreement or otherwise.

2. Programme of Works

- 2.1 Within ~~28~~ **6** weeks of satisfaction or waiver of the Funding Condition, the Developer is to produce and provide the Council with an initial Programme of Works for its approval (such approval not unreasonably to be withheld and to be granted or refused with reasons within 20 working days of submission) which shall materially follow (to the extent reasonably possible) the programme annexed to this Agreement giving details of:
- 2.1.1 the anticipated date on which the SW2 Enterprise Centre Development Works will begin; and
 - 2.1.2 the likely timetable for the carrying out of the SW2 Enterprise Centre Development Works showing the estimated duration of each Section of the SW2 Enterprise Centre Development Works and the anticipated date on which it is intended that Practical Completion of each such Section will be achieved.
 - 2.1.3 the anticipated date on which the Surplus Property Development Works will begin; and
 - 2.1.4 the likely timetable for the carrying out of the Surplus Property Development Works showing the estimated duration of each Section of the Surplus Property Development Works and the anticipated date on which it is intended that Practical Completion of each such Section will be achieved

²⁸ ~~What timescales please?~~

2.2 Once approved by the Council, the Developer is not to vary the Programme of Works referred to in **clause 2.1** except in accordance with **paragraph 2.3**.

2.3 As soon as reasonably practicable following the Unconditional Date the Developer is to provide the Council with a final Programme of Works for its approval (such approval not unreasonably to be withheld and to be granted or refused with reasons within [20] working days of submission) giving details of:

2.3.1 the date on which the SW2 Enterprise Centre Development Works will begin; and

2.3.2 the time taken for the carrying out of the SW2 Enterprise Centre Development Works showing the estimated duration of each Section of the Enterprise Development Works and the date on which it is intended that Practical Completion of each such Section will be achieved ;

2.3.3 the date on which the Surplus Property Development Works will begin; and

2.3.4 the time taken for the carrying out of the Surplus Property Development Works showing the estimated duration of each Section of the Surplus Property Development Works and the date on which it is intended that Practical Completion of each such Section will be achieved;

in each case having regard to the timetables incorporated in and approved under **paragraph 2.1**.

2.4 Once approved by the Council, the Developer is not to vary the Programme of Works approved under **paragraph 2.3** except in accordance with paragraph 2 of **Schedule 5** or **paragraph 2** of **Schedule 6**.

SCHEDULE 7

Pre- Development Obligations

1. Statutory Consents

- 1.1 As soon as reasonably practicable after the [Satisfaction Date] the Developer is to make applications for and use all reasonable endeavours to obtain the Statutory Consents or obtain lawful relaxations or waivers of them. The terms of each application relating to the SW2 Enterprise Centre Development Works are to be first approved in writing by the Council, such approval not to be unreasonably withheld or and to be granted or refused with reasons within 20 working days of submission.
- 1.2 The Developer is to keep the Council properly informed as to the progress of each application for the Statutory Consents relating to the SW2 Enterprise Centre Development Works and of all negotiations relating to those applications and is to provide to the Council copies of all applications, correspondence and notes of meeting relating to those application and negotiations.
- 1.3 If any of the Statutory Consents (excluding here Planning Permission or reserved matters) are refused, the Developer is to appeal against the refusal and use all reasonable endeavours to obtain the relevant Statutory Consents.
- 1.4 The Developer is to provide copies of the Statutory Consents relating to the SW2 Enterprise Centre Development Works obtained to the Council and is not to start the SW2 Enterprise Centre Works until the Council has approved them. The Council is not unreasonably to withhold or delay its approval to the Statutory Consents unless they contain Adverse Matters.
- 1.5 The Developer is to use all reasonable and commercially sensible endeavours to ensure that all Statutory Consents obtained remain valid and unrevoked and use its reasonable endeavours to renew any that become invalid or revoked.

2. CDM Regulations

- 2.1 By entering into this Agreement, the Developer elects, for the purposes of regulation 8 of the CDM Regulations, to be treated as the only client in respect of the Relevant Works. The Council agrees to the Developer's election to be treated as the only client.
- 2.2 The Developer is to appoint the CDM Co-ordinator as the CDM Co-ordinator in accordance with regulation 14(1) of the CDM Regulations and the Building Contractor as the principal contractor for the Relevant Works in accordance with regulation 14(2) of the CDM Regulations.

- 2.3 The Developer is:
- 2.3.1 to comply with its obligations as the client under the CDM Regulations;
 - 2.3.2 to procure that the persons appointed under **paragraph 2.2** comply with their obligations under the CDM Regulations;
 - 2.3.3 to procure that designers and contractors for the purposes of the CDM Regulations comply with their obligations in the CDM Regulations; and
 - 2.3.4 in conjunction with the CDM Co-ordinator to procure that:
 - 2.3.4.1 full details of the Relevant Works are given to the Health and Safety Executive in accordance with regulation 21 of the CDM Regulations; and
 - 2.3.4.2 a Construction Phase Plan is prepared in accordance with regulation 23 of the CDM Regulations.
 - 2.3.5 not to start the Relevant Works until the provisions of this **paragraph 2** have been complied with.

SCHEDULE 8

SW2 Enterprise Centre Development Obligations

1. Carrying out the SW2 Enterprise Centre Development Works

1.1 The Developer is to proceed diligently with and carry out and complete the SW2 Enterprise Centre Development Works:

1.1.1 in a good, proper and workmanlike manner and using good quality and suitable materials;

1.1.2 in accordance with:

1.1.2.1 the SW2 Enterprise Centre Specification and SW2 Enterprise Centre Development Plans;

1.1.2.2 the Programme of Works;

1.1.2.3 the terms of the Building Contract;

1.1.2.4 the Planning Permission for the SW2 Enterprise Centre Development Works;

1.1.2.5 the Statutory Consents;

1.1.2.6 all Statutory Requirements, including the CDM Regulations;

1.1.2.7 the Construction Phase Plan;

1.1.2.8 the Phasing Plan;

1.1.2.9 the requirements, if any, of the insurers of the Site; and

1.1.2.10 British and European standards and any applicable codes of practice;

1.1.3 without using or specifying the use of any Prohibited Materials.

1.1.4 to an Internal Area equal to the Target Area.

1.1.5 to obtain a BREEAM rating of at least "Excellent", save in relation to the Town Hall in relation to which the Developer shall obtain a BREEAM rating of at least "Very Good".

1.2 Subject to **paragraph 2.1**, the Developer is to procure that:

- 1.2.1 the SW2 Enterprise Centre Development Works are begun by the SW2 Enterprise Centre Start Date;
 - 1.2.2 whole of the SW2 Enterprise Centre Development Works are carried out and completed by the Estimated Date of Practical Completion and in any event by the Termination Date.
- 1.3 The Developer is to procure that:
- 1.3.1 no material or equipment is brought onto the Site except that required for the SW2 Enterprise Centre Development Works;
 - 1.3.2 proper provision is made for the security of the Site during the carrying out of the SW2 Enterprise Centre Development Works and for the protection of any materials, plant and equipment in or on it;
 - 1.3.3 all surplus material is removed from the Site when it is no longer required;
 - 1.3.4 the Site is maintained in a tidy condition and free from rubbish;
 - 1.3.5 there is no excavation of the Site or extraction of soil or minerals except as required for the SW2 Enterprise Centre Development Works;
 - 1.3.6 proper precautions are taken for the safety of all persons upon or in the vicinity of the Site including maintaining such hoardings, fences, security patrols, safeguards and arrangements of lighting the SW2 Enterprise Centre Development Works as may be necessary or desirable in the interest of public safety or as may reasonably be required by the Council;
 - 1.3.7 there are no advertisements or signs on the Site except for:
 - 1.3.7.1 those identifying the Council or otherwise required to be displayed by the Council;
 - 1.3.7.2 with the prior written approval of the Council which shall not be unreasonably withheld or delayed in relation to all parties connected with the SW2 Enterprise Centre Development;
 - 1.3.8 all reasonable and commercially sensible steps are taken to ensure that the SW2 Enterprise Centre Development Works are carried out in a manner which minimises nuisance, annoyance, inconvenience, injury, loss or danger to or interference with the public or any owners or occupiers of adjoining or neighbouring property;

- 1.3.9 proper provision is made for the support of land, buildings and boundaries adjoining the Site and for the protection of all services benefiting land adjoining or near to the Site;
- 1.3.10 any adjoining highways, road and pavements are cleansed as often as may be necessary and are kept unobstructed; and
- 1.3.11 proper arrangements are made with the requisite authorities for the provision of water, gas, electricity, telephone and other services required for the carrying out of the SW2 Enterprise Centre Development Works.

1.4 The Developer is to:

- 1.4.1 procure that the rights and interests of third parties disclosed to the Developer or ascertainable from inspection or searches a prudent developer would carry out prior to the Unconditional Date are not infringed by the carrying out of the SW2 Enterprise Centre Development Works;
- 1.4.2 comply with any agreements, deeds, documents, rights, easements, exceptions, reservations and covenants, restrictive or otherwise, affecting the Site or the title to it and disclosed to the Developer prior to the Unconditional Date or ascertainable from inspection or searches a prudent developer would carry out;
- 1.4.3 not permit any encroachment or easement to be made or acquired against or over the Site and shall notify the Council immediately upon becoming aware of any encroachment or easement being made or attempted;
- 1.4.4 apply for and use all reasonable endeavours to obtain any orders which may be required for the temporary stopping-up or temporary diversion of any highways, footpaths or public rights of way to the extent that these may be required to enable the SW2 Enterprise Centre Development Works to be carried out.

1.5

- 1.5.1 The Developer is (and the Council is to the extent required) to enter into any Infrastructure Agreement that may be required in relation to the SW2 Enterprise Centre Development subject to the following conditions being satisfied:

- 1.5.1.1 the Infrastructure Agreement does not contain terms which take effect before the date of the Planning Permission;
- 1.5.1.2 the Infrastructure Agreement is to be conditional on the SW2 Enterprise Centre Development being implemented;
- 1.5.2 Where any works are to be carried out pursuant to a Infrastructure Agreement the Developer is to:
 - 1.5.2.1 carry out the works in accordance with the relevant Infrastructure Agreement and is to indemnify the Council against any breach of their terms;
 - 1.5.2.2 where required by the Infrastructure Agreement, complete the works on or before the Date of Practical Completion;
 - 1.5.2.3 obtain the approval of the Council, such approval not to be unreasonably withheld and to be granted or refused with reasons within 20 working days, to any plans, drawings, specifications or other matters which are subject to approval under the Infrastructure Agreement;
 - 1.5.2.4 procure that the terms of any bond to be taken out under the Infrastructure Agreement are first approved by the Council, such approval not to be unreasonably withheld and to be granted or refused with reasons within 20 working days;
 - 1.5.2.5 following completion of the relevant works, repair, maintain and remedy any defects in them pursuant to the terms of the Infrastructure Agreement;
 - 1.5.2.6 use reasonable endeavours to procure that where the works or any part of them are to be adopted by the local authority, the works are so adopted on the terms of the Infrastructure Agreement; and
 - 1.5.2.7 take out and maintain in the joint names of the Developer and the Council such public liability insurance as the Council reasonably requires.
- 1.6 Subject to the provisions of the Ancient Monuments and Archaeological Areas Act 1979:

- 1.6.1 any article of value or antiquity or any remains of geological, historical or archaeological interest on the SW2 Enterprise Centre will, as between the Developer and the Council, belong to the Council;
 - 1.6.2 if any such articles or remains are discovered, the Developer is promptly to inform the Council and comply with the Council's directions as to the inspection, protection and disposal of them; and
 - 1.6.3 the Developer is to take all reasonable precautions to prevent all fossils, coins, articles of value and structures and other remains or things of geological, historical or archaeological interest discovered on the Site from being removed, damaged or destroyed.
- 1.7 In carrying out the Services Works the Developer is to:
- 1.7.1 take such steps as are necessary to divert all pipes, wires, cables or other conduits in, under or over the Site or any adjoining or neighbouring Site which need to be diverted as a result of the SW2 Enterprise Centre Development;
 - 1.7.2 install the Services Works and procure that they connect to the public mains without crossing land not within the ownership of the Council unless legal easements in terms satisfactory to the Council acting reasonably are obtained; and
 - 1.7.3 negotiate such agreements with statutory undertakers, utilities companies and others as may be required to secure for the SW2 Enterprise Centre Development all services required and the diversion in a satisfactory manner of all services which are located in a position which would interfere with the SW2 Enterprise Centre Development Works.

2. **Extensions of time**

- 2.1 If any extension of time is granted under the Building Contract that does not result from the act, omission or default of the Developer, the period or periods of time for carrying out and completing the SW2 Enterprise Centre Development Works is to be extended by the extension of time granted to the Building Contractor under the Building Contract.
- 2.2 If there is any delay in commencing and/or completing the SW2 Enterprise Centre Development Works arising from:
 - 2.2.1 Force Majeure, to the extent not covered under **paragraph 2.1**;
 - 2.2.2 any loss or damage caused by any of the Insured Risks;

2.2.3 any variation, additional works and specification upgrades instructed by the Council pursuant to **paragraph 4** of this Schedule; and/or

2.2.4 any unreasonable whole or partial withholding of any consent, approval or instruction by the Council which the Developer has reasonably and properly requested in accordance with this Agreement;²⁹

the period or periods of time for carrying out and completing the SW2 Enterprise Centre Development Works is to be extended by such period as the Employer's Agent certifies as being reasonable and proper in the light of the reasons for the delay which shall not be less than any extension of time, if any, granted pursuant to **paragraph 2.1** (but not so as to duplicate any extension of time).

2.3 Nothing in this **paragraph 2** permits any variation of the Termination Date.³⁰

3. **Developer Variations**

3.1 If any of the materials, plant or equipment required for the SW2 Enterprise Centre Development Works cannot be obtained within a reasonable time or at a reasonable cost, the Developer will be entitled to use alternative materials, plant or equipment in their place with the prior written consent of the Council. Consent will not be unreasonably withheld or delayed so long as the alternative materials, plant or equipment are of no lesser quality than the materials, plant or equipment which they replace.

3.2 Subject to paragraph 3.5 the Developer may make changes to the Specification and SW2 Enterprise Centre Development Plans with the prior written consent of the Council, which shall not be unreasonably withheld or delayed.

3.3 The following changes to the SW2 Enterprise Centre Development Plans may be made without the consent of the Council:

3.3.1 any variation which is required to comply with any of the Statutory Consents or the Statutory Requirements [or the requirements of any insurers of the SW2 Enterprise Centre;] or

3.3.2 any variation which is not material and which does not save to a de minimis extent:

3.3.2.1 adversely affect the standard of the Relevant Works;

3.3.2.2 result in inferior performance characteristics to those set out in the Specification;

²⁹~~The Council are not prepared to agree any further grounds. You should rely on Force Majeure.~~

³⁰~~This must be non-extendable~~

- 3.3.2.3 materially and adversely affect the appearance, size and configuration of the SW2 Enterprise Centre and/or the external appearance of the SW2 Enterprise Centre;
 - 3.3.2.4 materially adversely affect the value of the SW2 Enterprise Centre;
 - 3.3.2.5 adversely affect the sustainability rating of the SW2 Enterprise Centre; or
 - 3.3.2.6 delay the completion of the SW2 Enterprise Centre.
- 3.4 Without prejudice to **paragraphs 3.1, 3.2 and 3.3**, the Developer may not make any changes to the appearance and content of the SW2 Enterprise Centre unless authorised by planning consent.
- 3.5 The Developer is to provide the Council with written details of any proposed changes to be made under this **paragraph 3**, together with copies of any plans, drawings and specifications showing those changes.
- 3.6 The Developer is to provide the Council with monthly written reports containing full details of any changes to the SW2 Enterprise Centre Development Works actually carried out except for any that are minor in the context of the SW2 Enterprise Centre Development Works taken as a whole.
- 4. Council Variations**
- 4.1 The Council may request in writing that the Developer makes changes to the Specification and Development Plans ("**Council Variation**") which comprise CAT B or FF and E.
- 4.2 The Developer shall be entitled to refuse to implement a Council Variation where it:
- 4.2.1 would materially adversely affect the interest of the Developer in the remainder of the Development;
 - 4.2.2 would involve obtaining a further Planning Permission, Statutory Consent(s) or Infrastructure Agreement(s) which is required would delay the carrying out of the SW2 Enterprise Centre Development Works.
- 4.3 Subject to paragraph 4.2, where the Council has requested to incorporate a Council Variation in the Specification and Development Plans, the Developer shall use all reasonable and commercially sensible endeavours to furnish the Council within 20 Working Days following receipt of the request with estimates of the cost of the work in question, the costs and expenses (including funding costs

arising from delay to the Development as a whole) which the Developer is likely to incur if the Council Variation is implemented, and any consequential delay in the completion of the SW2 Enterprise Centre Development Works.

4.4 Within 20 Working Days following receipt of such estimates, the Council will either:

4.4.1 accept the estimates, in which case the Developer shall proceed to implement the Council Variation and the estimates will be binding on the parties; or

4.4.2 agree revised estimates with the Developer, in which case the Developer shall proceed to implement the Council Variation and the estimates as revised shall be binding on the parties; or

4.4.3 withdraw the request for the Council Variation, in which case the Council shall compensate the Developer against any abortive costs incurred by the Developer in considering and costing the request.

In the event that the Council does not respond within the time period specified in this **paragraph 4.3**, the request for a Council Variation shall be deemed to have been withdrawn.

4.5 The Council is to pay the costs and incidental expenses of Council Variations as they are incurred as to which:

4.5.1 payment in relation to costs payable to the Building Contractor or members of the Professional Team is to be made against certificates of the Employers Agent as to the costs and incidental expenses within [10] working days of delivery of the certificates to the Council;

4.5.2 payment of other costs and expenses is to be made within [10] working days of written demand and interest shall be payable at the Contract Rate on such sums in relation to the period on and from the next day after the expiry of such period until and including the date of actual payment in the case of late payment;

4.5.3 the Council is to be entitled to a credit against the costs and incidental expenses of the Council's Variations of the aggregate amount of any consequential saving in the cost of the SW2 Enterprise Centre Development Works

4.6 The remaining provisions of this Schedule apply to any Council Variations incorporated into the SW2 Enterprise Centre Development Works as they do to the other SW2 Enterprise Centre Development Works.

4.7 Any dispute between the parties in relation to Council Variations may be referred to fast track determination by either party.

5. **Inspection by the Council**

5.1 During the carrying out of the SW2 Enterprise Centre Development Works, the Council and the Council's Representative may enter the Site to view the state and progress of the SW2 Enterprise Centre Development Works, to inspect the workmanship and the materials used and to carry out tests to any of the materials used in the SW2 Enterprise Centre Development Works.

5.2 The Council and the Council's Representative will:

5.2.1 give reasonable prior notice to the Developer before exercising these rights unless prior arrangements have been made with the Developer for regular visits;

5.2.2 exercise the rights at reasonable times and at reasonable intervals;

5.2.3 be accompanied by the Employer's Agent if the Developer so requires;

5.2.4 comply with the reasonable requirements of the Building Contractor;

5.2.5 comply with any health and safety requirements in the Construction Phase Plan; and

5.2.6 refer all matters arising to the Developer and not to the Building Contractor or its agents, workmen or sub-contractors.

5.3 The Developer is, without the need for any request by the Council, to give the Council full written details and copies of the results of any inspection of the SW2 Enterprise Centre Development Works or tests to any of the materials used in the SW2 Enterprise Centre Development Works carried out, in either case, by or on behalf of the Developer.

5.4 If the Council gives written notice to the Developer that any works or materials are not in accordance with the Specification and SW2 Enterprise Centre Development Plans or are not otherwise to the standard or quality required under this Agreement, the Developer is promptly to take such action as the Developer acting reasonably considers appropriate to remove the defective works or materials and make good the defects. Any notice served under this **paragraph 5.4** is to include proper and detailed reasoning of the complaint or defect referred to.

6. **Property Meetings**

6.1 The Developer is to hold site meetings not less than once every month (or as the parties shall agree) and procure that the Building Contractor, the Employer's Agent, members of the Professional Team and any relevant Principal Sub-Contractors attend such meetings to review or plan progress or deal with any other matter relating to the carrying out of the SW2 Enterprise Centre Development Works.

6.2 The Developer is to:

6.2.1 give the Council not less than five working days' written notice of any Site meetings called under **paragraph 6.1** unless it has been agreed that site meetings will be held at regular intervals on dates and at times agreed in advance;

6.2.2 permit the Council and the Council's Representative, if they so desire, to attend and participate in those site meetings;

6.2.3 permit the Council and the Council's Representative to make representations in connection with the SW2 Enterprise Centre Development Works;

6.2.4 supply the Council and the Council's Representative with copies of full minutes of the site meetings, whether or not they attend.

6.3 In respect of any representations made by the Council or the Council's Representative under **paragraph 6.2**:

6.3.1 the Developer is to take proper account of them;

6.3.2 the Developer is to procure that the members of the Professional Team, the Building Contractor and any Principal Sub-Contractors take proper account of those representations; and

6.3.3 the Developer is to notify the Council and the Council's Representative of any observations made by the members of the Professional Team, the Building Contractor or the Principal Sub-Contractors on representations made by the Council or the Council's Representative.

7. **Provision of information**

7.1 The Developer is:

7.1.1 regularly to inform, consult with, report to and liaise with the Council and comply with the proper instructions of the Council consistent with the provisions of this Agreement;

- 7.1.2 promptly to supply to the Council copies of all written material forthwith after it is received or produced by or on behalf of the Developer.
- 7.2 The following illustrate, but do not limit, the types of information to be supplied to the Council in accordance with **paragraph 7.1:**
- 7.2.1 all plans, drawings, specifications, structural calculations and other material from time to time comprising the Specification and SW2 Enterprise Centre Development Plans;
 - 7.2.2 applications for and correspondence relating to the Statutory Consents and the outcome of such applications;
 - 7.2.3 the Appointments;
 - 7.2.4 Warranties to be provided by the Consultants, Building Contractor and Principal Sub-Contractors;
 - 7.2.5 the Building Contract, Principal Sub-Contracts and any other sub-contracts;
 - 7.2.6 lists of the Principal Sub-Contractors and any other sub-contractors and suppliers;
 - 7.2.7 test certificates and specialist reports and surveys;
 - 7.2.8 each application for interim payment made pursuant to the Building Contract and all other invoices against which payments are to be made;
 - 7.2.9 minutes of all meetings including site meetings, design team meetings, working party or project meetings;
 - 7.2.10 requests for variations in the SW2 Enterprise Centre Development Works;
 - 7.2.11 monthly financial statements showing actual costs and updated forecasts of costs and cashflow;
 - 7.2.12 all instructions and variation orders given by the Employer's Agent under the Building Contract; and
 - 7.2.13 all certificates issued under the Building Contract.

8. Certificates of Sectional Completion and Practical Completion

8.1

8.1.1 The Developer will give not less than 10 Working Days notice of the date on which the Employer's Agent proposes to issue a Certificate of Sectional Completion or the Certificate of Practical Completion

8.1.2 Following the giving of such notice the Employer's Agent will inspect the SW2 Enterprise Centre Development Works at weekly intervals to identify any outstanding works which must be completed before a Certificate of Sectional Completion or the Certificate of Practical Completion may properly be issued

8.1.3 The Council shall be entitled to attend at each inspection pursuant to **paragraph 8.1.2** and to make representations to the Employer's Agent as to the outstanding works required before Certificate of Sectional Completion or the Certificate of Practical Completion may properly be issued. The Developer is to require that the Employer's Agent takes proper account of any representations made by the Council.

8.2 The Developer is to procure that the Employer's Agent inspects each Section and the SW2 Enterprise Centre Development Works with a view to the issue of a Certificate of Sectional Completion or the Certificate of Practical Completion (as relevant) in accordance with the terms of the Building Contract. The Developer is to give the Council's Representative not less than ten working days' prior written notice of the date and time, being a working day during the hours of daylight, when the Employer's Agent will carry out this inspection.

8.3 The Council and the Council's Representative will be entitled to accompany the Employer's Agent on the inspection of the Section and the SW2 Enterprise Centre Development Works (as relevant) and to make representations on the proposal to issue a Certificate of Sectional Completion or the Certificate of Practical Completion and the Developer is to procure that the Employer's Agent takes proper account of any representations made by them.

8.4 If there are any defects in the Section or the SW2 Enterprise Centre Development Works, other than defects in the nature of minor snagging items which would not be an impediment to the issue of a Certificate of Sectional Completion or the Certificate of Practical Completion in accordance with the terms of the Building Contract, the Developer is to require that the Employer's Agent does not issue a Certificate of Sectional Completion or the Certificate of Practical Completion until those defects have been made good.

8.5 Subject to **paragraph 8.3**, the Developer is to serve a copy of a Certificate of Sectional Completion or the Certificate of Practical Completion on the Council and the Council's Representative as soon as reasonably practicable after the date of the inspection of the SW2 Enterprise Centre Development Works.

9. **Commissioning of plant and equipment and Acceptance Tests**

9.1 Subject to **paragraph 9.4**, before but as close as reasonably possible to a Certificate of Sectional Completion or the Date of Practical Completion the Developer will carry out the Acceptance Tests and will give reasonable notice to the Council of the proposed tests, allowing the Council to attend all Acceptance Tests and make representations and the Developer is to require that the Employer's Agent takes proper account of any representations made by the Council.

9.2 In relation to each item of mechanical and electrical plant subjected to the Acceptance Tests the Developer will supply the Council with copies of:

9.2.1 the design specification and performance specification; and

9.2.2 the results of the Acceptance Tests,

as soon as practicable after their carrying out.

9.3 Subject to **paragraph 9.4**, the Developer will ensure that any failings identified in the results of the Acceptance Tests are remedied prior to Practical Completion and will ensure all written guarantees and warranties obtained by the Developer in respect of the mechanical and electrical plant are in the name of or enforceable by the Council.

9.4 Notwithstanding the foregoing the Council acknowledges that seasonal testing may be required to take place after the Date of Sectional Completion or the Date of Practical Completion and the requirements to carry out tests and remedial works prior to such dates shall not apply to such seasonal tests.

10. **Sustainability**

10.1 The Developer shall procure and provide to the Council:

10.1.1 the original BREEAM Design Certificate on or before the Date of Practical Completion

10.1.2 the original BREEAM Post Construction Certificate as soon as practicable after the Date of Practical Completion

10.1.3 the original EPC on or before the Date of Practical Completion

11. **Following Sectional Completion and Practical Completion**

11.1 As soon as reasonably practicable following Practical Completion (and if appropriate, Sectional Completion), the Developer is to:

11.1.1 use reasonable endeavours to obtain any Statutory Consents that are required on the completion of the SW2 Enterprise Centre Development Works and provide copies of them to the Council;

11.1.2 procure that the Building Contractor carries out any further works that are required to make good any defects, omissions and snagging items identified in the Certificate of Sectional or Certificate of Practical Completion;

11.1.3 carry out and complete in the next planting season any landscaping works which it was not possible to complete by the Date of Practical Completion because of the planting season in which the Date of Practical Completion fell and, if any plants, trees, shrubs, or grass die or do not take hold within one year of the Date of Practical Completion, the Developer is to replace them to the reasonable satisfaction of the Council;

11.1.4 (if relevant) prepare and provide the Council with copies of the following documents:

11.1.4.1 the Health and Safety File;

11.1.4.2 three sets of as-built plans together with one set of as-built plans stored as CAD files on computer disk and PDF copies;

11.1.4.3 the commissioning reports, Acceptance Test Certificates and operating manuals for all plant and machinery (including mechanical and electrical equipment) and lifts installed as part of the SW2 Enterprise Centre Development Works;

11.1.4.4 such confirmation as the Council may reasonably require that no Prohibited Materials have been used in the SW2 Enterprise Centre Development;

11.1.4.5 all product guarantees, indemnities or warranties relating to the SW2 Enterprise Centre Development;

11.1.4.6 meter readings which will have been taken;

- 11.1.4.7 such spare parts and specialist tools necessary to maintain the SW2 Enterprise Centre Development as are agreed between the Council and Developer to be required once the Specification is agreed;
- 11.1.4.8 the drainage survey and CCTV record of all below ground drainage installations free from blockages;
- 11.1.4.9 the test certificate for steelwork and steel fabrication drawings (drawings in CD Format);
- 11.1.4.10 a book for maintenance records and tender log;
- 11.1.4.11 the gas soundness certificate issued;
- 11.1.4.12 the boiler safety certificate issued;
- 11.1.4.13 the water tank and system chlorination certificate issued;
- 11.1.4.14 air leakage results;
- 11.1.4.15 the building regulations control certificate issued;
- 11.1.4.16 any town planning sign offs regarding planning conditions in the Planning Permission;
- 11.1.4.17 all Energy Performance Certificates;
- 11.1.4.18 where buildings have been refurbished or renovated, originals of all surveys relating to asbestos together with originals of the asbestos registers and asbestos management plans;
- 11.1.4.19 all information relating to utilities;
- 11.1.4.20 party wall awards; and
- 11.1.5 leave the SW2 Enterprise Centre (or the relevant part of it) in a clean and tidy condition, cleared of all unused building materials, plant and equipment used in the carrying out of the SW2 Enterprise Centre Development Works and temporary structures.

11.2 On and from the Transfer of Risk Date the Council is to:

- 11.2.1 become exclusively responsible for the management of the SW2 Enterprise Centre Development;

- 11.2.2 be responsible for the maintenance of the SW2 Enterprise Centre Development; and
 - 11.2.3 pay all rates, insurance premiums and other outgoings, taxes and liabilities in relation to the SW2 Enterprise Centre Development.
- 11.3 In the event of Sectional Completion and the Council taking occupation of the relevant Section, the Developer is to use all reasonable endeavours when carrying out the remainder of the SW2 Enterprise Centre Works to ensure that it does not cause any noise, nuisance or disturbance which prevents the Council from being able to carry out its day to day business in the Section that the Council has occupied.

12. Defects

12.1 Urgent Defects

- 12.1.1 If an Urgent Defect becomes apparent in the Defects Liability Period then the Council shall be entitled to issue a notice (an "**Urgent Defects Notice**") to the Developer. The Urgent Defects Notice shall specify the nature of the Urgent Defect and shall give a timeframe for attending and commencing the necessary rectification works which shall (subject to **paragraph 12.12**) not be less than 24 hours from the date of receipt by the Developer of the Urgent Defects Notice (the "**Urgent Defects Rectification Response Timeframe**").
- 12.1.2 Where the Urgent Defects Notice is received by the Developer during the Developer's standard office hours of 8.30 a.m. to 5.30 p.m., Monday to Friday excluding bank holidays, the Urgent Defects Rectification Response Timetable shall run from the time when it is received by the Developer. Where the Urgent Defects Notice is received by the Developer outside of the Developer's standard office hours, the Urgent Defects Rectification Response Timetable shall run from the start of the next working day. A worked example is set out below:
 - 12.1.2.1 Urgent Defects Notice received 9.30 a.m. Monday morning
- Developer must attend on or before 9.30 a.m. Tuesday morning;
 - 12.1.2.2 Urgent Defects Notice received 6.00 p.m. Monday evening
- Urgent Defects Notice is effective at start of next working day - Developer must attend on or before 8.30 a.m. Wednesday morning;

- 12.1.2.3 Urgent Defects Notice received 5.00 p.m. Friday evening - Developer must attend on or before 5.00 p.m. on Monday;
- 12.1.2.4 Urgent Defects Notice received 6.00 p.m. Friday evening - Urgent Defects Notice is effective at start of next working day - Developer must attend on or before 8.30 a.m. Tuesday morning;
- 12.1.3 The Developer shall commence rectification of all Urgent Defects within the timeframe given within the Urgent Defects Rectification Response Timetable and thereafter the rectification shall be carried out with diligence using all reasonable endeavours to minimise disruption to the Council's or other occupiers' business operations subject only to instructions from the Council (acting reasonably) as to the time at which the necessary work can be carried out allowing for the shutdown of relevant parts of the Council's or other occupiers' operations or similar measures to mitigate any loss which the Council or other occupiers may suffer during the carrying out of the necessary remedial works;
- 12.1.4 If an Urgent Defect becomes apparent outside of the Developer's standard hours or at such other time as the Council could not reasonably serve an Urgent Defects Notice on the Developer within the Developer's standard hours of business and the nature of the Urgent Defect makes it impractical to delay commencement of rectification of the Urgent Defect in accordance with the Urgent Rectification Response Timetable the Council may employ its own contractor to undertake the works necessary to rectify the Urgent Defect or as may be required to make the Site safe and minimise the effect of the Urgent Defect and otherwise enable commencement of the rectification to be delayed until commenced in accordance with the Urgent Defects Rectification Response Timetable and the Developer will reimburse the Council for the properly incurred cost of such contractor's work upon receipt of a valid VAT invoice or copy thereof in respect of such work.

12.2 **Other defects**

- 12.2.1 The Developer is to procure that all defects in the SW2 Enterprise Centre Development Works for which the Building Contractor is responsible under the Building Contract that arise within each Defects Liability Period are made good to the reasonable satisfaction of the Council.
- 12.2.2 Not less than one month before the end of each Defects Liability Period, the Developer is to inspect the SW2 Enterprise Centre

Development and prepare a schedule of defects, omissions and snagging items and other faults due to materials or workmanship not being in accordance with the terms of the Building Contract.

12.3 The Developer is to:

12.3.1 serve a copy of the schedule of defects on the Council as reasonably practicable after the inspection under **paragraph 12.2**; and

12.3.2 include in the schedule of defects any additional defects notified by the Council or the Council's Representative.

12.4 The Developer is to:

12.4.1 procure that all defects in the SW2 Enterprise Centre Development Works identified under this **paragraph 12** are made good in accordance with the Building Contract; and

12.4.2 procure that the original of the Certificate of Completion of Making Good Defects (SW2 Enterprise Centre) is provided to the Council as soon as reasonably practicable after its issue.

12.5 **Measurement of Internal Area**

12.5.1 As soon as practicable after the date 6 weeks before the anticipated date of Sectional Completion or Date of Practical Completion (SW2 Enterprise Centre) the Developer and the Council will carry out a joint measurement of the Net Internal Area of the relevant part of the SW2 Enterprise Centre Development.

12.5.2 If the Developer and the Council shall agree or if it is determined that the Net Internal Area of the relevant part of the SW2 Enterprise Centre Development is less than 97 per cent. of the Target Area for the relevant part of the SW2 Enterprise Centre Development ("**Initial Measurement Default**") the Developer shall have the option of serving a notice on the Council stating that it intends to demolish (whether in whole or in part) such part of the SW2 Enterprise Centre Development to remedy that default ("**Remedy Notice**") and if it does serve such a notice then it shall commence to demolish the relevant part of the SW2 Enterprise Centre Development as soon as reasonably practicable at its own expense and shall commence to construct the part of the SW2 Enterprise Centre Development afresh as soon as reasonably practicable in accordance with this agreement (but shall not be allowed any extension of time pursuant to **paragraph 2 of Schedule 4**) and the procedure in **paragraphs 12.5.1.1 and**

12.5.1.2 of this schedule shall be repeated so often as is requisite at the appropriate time.

12.5.3 Any notice to be served by the Developer under paragraphs **12.5.1.2** and **12.5.1.4** shall be served within the period of 10 Working Days after the joint measurement or determination failing which it shall be deemed that the Developer has not served such a notice.

12.5.4 If the Developer and the Council are unable to agree a figure for the Internal Area, either of them may immediately refer the matter to the decision of a Specialist who will act as an expert.

12.5.5 It shall be a condition of the grant of each Certificate of Practical Completion and Certificate of Sectional Completion that the Net Internal Area of the relevant part of the SW2 Enterprise Centre Works is not less than 95 per cent of the Target Area for such part of the SW2 Enterprise Centre Works.

13. **Liquidated Damages**

If for any reason the Date of Practical Completion for the SW2 Enterprise Centre Development has not occurred by the SW2 Enterprise Centre Target Date the Developer will pay to the Council by way of liquidated and ascertained damages a sum calculated at the rate of £~~31,18~~^{31,18} for each complete week commencing on the SW2 Enterprise Centre Target Date and expiring on the earlier of the Date of Practical Completion for the SW2 Enterprise Centre Development and the date that this agreement shall determine.

~~31,18~~ £21,663 for the first six weeks £75,998 thereafter

SCHEDULE 9

Surplus Property Development Works

1. Carrying out the Surplus Property Development Works

1.1 The Developer is to proceed diligently with and carry out and complete the Surplus Property Development Works:

1.1.1 in a good, proper and workmanlike manner, and using good quality and suitable materials;

1.1.2 in accordance with:

1.1.2.1 the terms of the relevant Building Contract;

1.1.2.2 the Planning Permission for the Surplus Property Development Works;

1.1.2.3 the Programme of Works;

1.1.2.4 the Statutory Consents;

1.1.2.5 all Statutory Requirements, including the CDM Regulations;

1.1.3 without using or specifying the use of any Prohibited Materials;

1.2 Subject to **paragraph 2.1**, the Developer is to procure that the whole of the Surplus Property Development Works are carried out and completed by the Surplus Properties Termination Date.

1.3 The Developer is to procure that:

1.3.1 no material or equipment is brought onto the Surplus Property except that required for the Surplus Property Development Works;

1.3.2 proper provision is made for the security of the Surplus Property during the carrying out of the Surplus Property Development Works and for the protection of any materials, plant and equipment in or on it;

1.3.3 all surplus material is removed from the Surplus Property when it is no longer required;

1.3.4 the Surplus Property is maintained in a tidy condition and free from rubbish;

- 1.3.5 there is no excavation of the Surplus Property or extraction of soil or minerals except as required for the Surplus Property Development Works;
- 1.3.6 proper precautions are taken for the safety of all persons upon or in the vicinity of the Surplus Property including maintaining such hoardings, fences, security patrols, safeguards and arrangements of lighting the Surplus Property Development Works as may be necessary or desirable in the interest of public safety;
- 1.3.7 all reasonable and commercially sensible steps are taken to ensure that the Surplus Property Development Works are carried out in a manner which minimises any nuisance, annoyance, inconvenience, injury, loss or danger to or interference with the public or any owners or occupiers of adjoining or neighbouring property;
- 1.3.8 proper provision is made for the support of land, buildings and boundaries adjoining the Surplus Property and for the protection of all services benefiting land adjoining or near to the Site;
- 1.3.9 any adjoining highways, road and pavements are cleansed as often as may be necessary and are kept unobstructed; and
- 1.3.10 proper arrangements are made with the requisite authorities for the provision of water, gas, electricity, telephone and other services required for the carrying out of the Surplus Property Development Works.

1.4

- 1.4.1 The Developer and (where required) the Council are to enter into any Infrastructure Agreement that may be required in relation to the Surplus Property Development subject to the following conditions being satisfied:
 - 1.4.1.1 the Infrastructure Agreement does not contain terms which take effect before the date of the Planning Permission;
 - 1.4.1.2 the Infrastructure Agreement is to be conditional on the Surplus Property Development being implemented;
- 1.4.2 Where any works are to be carried out pursuant to a Infrastructure Agreement the Developer is to:

- 1.4.2.1 carry out the works in accordance with the relevant Infrastructure Agreement and is to indemnify the Council against any breach of their terms;
 - 1.4.2.2 where required by the Infrastructure Agreement complete the works on or before the Date of Practical Completion;
 - 1.4.2.3 obtain the approval of the Council, such approval not to be unreasonably withheld and to be granted or refused with reasons within 20 working days, to any plans, drawings, specifications or other matters which are subject to approval under the Infrastructure Agreement;
 - 1.4.2.4 procure that the terms of any bond to be taken out under the Infrastructure Agreement are first approved by the Council, such approval not to be unreasonably withheld and to be granted or refused with reasons within 20 working days;
 - 1.4.2.5 following completion of the relevant works, repair, maintain and remedy any defects in them pursuant to the terms of the Infrastructure Agreement; and
 - 1.4.2.6 use reasonable endeavours to procure that where the works or any part of them are to be adopted by the local authority, the works are so adopted on the terms of the Infrastructure Agreement;
- 1.5 Subject to the provisions of the Ancient Monuments and Archaeological Areas Act 1979:
- 1.5.1 any article of value or antiquity or any remains of geological, historical or archaeological interest on the Surplus Property will, as between the Developer and the Council, belong to the Council;
 - 1.5.2 if any such articles or remains are discovered, the Developer is promptly to inform the Council and comply with the Council's directions as to the inspection, protection and disposal of them; and
 - 1.5.3 the Developer is to take all reasonable precautions to prevent all fossils, coins, articles of value and structures and other remains or things of geological, historical or archaeological interest discovered on the Surplus Property from being removed, damaged or destroyed.
- 1.6 In carrying out the Services Works the Developer is to:

- 1.6.1 take such steps as are necessary to divert all pipes, wires, cables or other conduits in, under or over the Surplus Property or any adjoining or neighbouring site which need to be diverted as a result of the Surplus Property Development Works;
- 1.6.2 install the Services Works and procure that they connect to the public mains without crossing land not within the ownership of the Council unless legal easements in terms satisfactory acting reasonably to the Council are obtained; and
- 1.6.3 negotiate such agreements with statutory undertakers, utilities companies and others as may be required to secure for the Surplus Property Development all services required and the diversion in a satisfactory manner of all services which are located in a position which would interfere with the Surplus Property Development Works.

2. **Developer Variations**

- 2.1 The Developer may make any changes to the specification and plans for the Surplus Property Development which are consistent with the Surplus Property Strategic Brief without the consent of the Council.
- 2.2 The Developer may only make any change to the specification and plans for the Surplus Property Development which are not consistent with the Surplus Property Strategic Brief with the consent of the Council (such consent not to be unreasonably withheld and to be granted or refused with reasons within 20 working days)
- 2.3 Without prejudice to **paragraphs 3.1** and **3.2**, the Developer may not make any changes to the appearance and content of the Surplus Property Development unless authorised by planning consent where required.
- 2.4 The Developer is to provide the Council with written details of any material changes to be made under this **paragraph 3**, together with copies of any plans, drawings and specifications showing those changes.

3. **Certificates of Sectional Completion and Practical Completion**

- 3.1 The Developer is to procure that the Employer's Agent inspects each Section and the Surplus Property Development Works with a view to the issue of a Certificate of Sectional Completion or the Certificate of Practical Completion (as relevant) in accordance with the terms of the Building Contract. The Developer is to give the Council's Representative not less than ten working days' prior written notice of the date and time, being a working day during the hours of daylight, when the Employer's Agent will carry out this inspection.

- 3.2 The Council and the Council's Representative will be entitled to accompany the Employer's Agent on the inspection of the Section and the Surplus Property Development Works (as relevant) and to make representations on the proposal to issue a Certificate of Sectional Completion or the Certificate of Practical Completion and the Developer is to procure that the Employer's Agent takes proper account of any representations made by them.
- 3.3 If there are any defects in the Section or the Surplus Property Development Works, other than defects in the nature of minor snagging items which would not be an impediment to the issue of a Certificate of Sectional Completion or the Certificate of Practical Completion in accordance with the terms of the Building Contract, the Developer is to require that the Employer's Agent does not issue a Certificate of Sectional Completion or the Certificate of Practical Completion until those defects have been made good.
- 3.4 Subject to **paragraph 4.3**, the Developer is to serve a copy of a Certificate of Sectional Completion or the Certificate of Practical Completion on the Council and the Council's Representative as soon as reasonably practicable after the date of the inspection of the Surplus Property Development Works.
- 3.5 As soon as reasonably practicable following Practical Completion (and if appropriate, Sectional Completion), the Developer is to:
- 3.5.1 procure that the Building Contractor carries out any further works that are required to make good any defects, omissions and snagging items identified in the Certificate of Sectional Completion or Certification of Practical Completion which materially adversely affect the external appearance of the relevant Surplus Property Development Works;
 - 3.5.2 carry out and complete in the next planting season any landscaping works which it was not possible to complete by the Date of Sectional or Date of Practical Completion because of the planting season in which the date of Sectional or Date of Practical Completion fell and, if any plants, trees, shrubs, or grass die or do not take hold within two years of the Date of Sectional or Date of Practical Completion, the Developer is to replace them to the reasonable satisfaction of the Council.

SCHEDULE 10

Payment³²

PART 1 - DEFINITIONS

"BCIS Index Base Figure"	the most recently published BCIS Index figure as at the date of this Agreement
"BCIS Index Review Figure"	the most recently published BCIS Index figure as at the Unconditional Date
"BCIS Index"	the BCIS All-In Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors ³³
"Cost Consultant"	a cost consultant appointed by the Developer for the purposes of this Agreement (such consultant and the terms of his appointment to be approved by the Council acting reasonably and such consultant to provide a Warranty to the Council)
"Development Account"	the notional accrual maintained by the Developer for SW2 Enterprise Centre Development Costs in accordance with Part 1 of Schedule 10
"Development Category"	a category of the SW2 Enterprise Centre Development Costs as set out in Part 2 of Schedule 10
"Development Management Fee"	³⁴ <u>19 means an amount equal to 2 per cent. of the aggregate of the "Contract Sums" under the Building Contract for the SW2 Enterprise Centre Development (including any equivalent sums relating to the SW2 Enterprise Centre Development incurred prior to the letting of such Building Contract, to include consultants' and subcontractors' fees and 7 per cent. of preliminaries and subcontract costs by way of mark up for overheads and profit)</u>

³² ~~We need to understand how your various Maximum Commitments fit together — it is unclear from the drafting.~~

³³ ~~Index to be discussed~~

³⁴ ~~Definition and mechanism for payment required~~

¹⁹ [Definition and mechanism for payment required. Ashurst: this is covered in SW2 Enterprise Centre Development Costs so is within the Commitment](#)

“SW2 Enterprise Centre Development Costs”	such of the Eligible Development Costs (as set out in Schedule 4 part 2) as relate to (or are certified by the Costs Consultant to relate to) the SW2 Enterprise Centre Development Works subject to the exclusions set out in paragraph 7 of part 2 of Schedule 10
“Post-Unconditional Commitment”	£[●] subject to the provisions of paragraph 9 of part 1 of Schedule 10
“Pre-Unconditional Commitment”	£[●] subject to the provisions of paragraph 9 of part 1 of Schedule 10

PART 2 - OBLIGATIONS

1. Payment obligations

- 1.1 Subject to the provisions of this Schedule, the Council is to pay the Developer for the SW2 Enterprise Centre Development an amount equal to the Commitment in accordance with the terms of this Schedule.
- 1.2 Prior to the Unconditional Date the Council shall be liable to pay an amount equal to the Pre-Unconditional Commitment in accordance with the terms of this Schedule.
- 1.3 Following the Unconditional Date the Council shall be liable to pay an amount equal to the Post-Unconditional Commitment.

[**NOTE:** If the Agreement is terminated before all of the Pre-Unconditional or Post-Unconditional Commitment is spent only the amount spent will be payable, but if Unconditional is reached/PC achieved then the full Commitment will be paid.]

2. Conditions for payments

- 2.1 The Council will not be obliged to pay any item of the SW2 Enterprise Centre Development Costs if and to the extent that by doing so the Pre-Unconditional Commitment or the Post-Unconditional Commitment as appropriate would be exceeded.
- 2.2 Subject to **paragraph 2.4**, the Developer is not to make a request for payment of the SW2 Enterprise Centre Development Costs under this Schedule more frequently than once a month.
- 2.3 Where a failure by the Developer to make a payment due to a third party would create a breach of the Developer’s obligations to that third party which would

entitle the third party to terminate any agreement with the Developer, the Developer may make a request at any time for payment of the SW2 Enterprise Centre Development Costs to meet its liabilities to the third party.

2.4 The Council will not be obliged to make payments under this Schedule if at the due date for payment:

2.4.1 there is a subsisting material breach of this Agreement by the Developer which is not the result of a default or omission of the Council;

2.4.2 the Development Cost the subject of the payment has not been incurred in accordance with this Agreement;

2.4.3 certified copies of the Building Contract and Appointments have not been provided to the Council; or

2.4.4 all Warranties (except from the Principal Sub-Contractors) have not been provided to the Council with evidence of professional indemnity insurance for the required amounts,

provided that in each such case payment shall be made forthwith of any payments withheld pursuant to this **paragraph 2.4** upon the defect in question being rectified.

3. **Procedure for payments**

3.1 Except where SW2 Enterprise Centre Development Costs have been incurred by or on behalf of the Council, the Developer is to check all applications and invoices for payment to ensure they are correct and due and payable as part of the SW2 Enterprise Centre Development Costs.

3.2 The Developer shall procure that in each month by a date no later than the date ten days before a request for payment is to be made (save for a request made in accordance with paragraph 2.3) that a written estimate is to be given to the Council setting out details of the SW2 Enterprise Centre Development Costs anticipated to be the subject of the request for payment. Such estimate and request to be in accordance with the cashflow statement for the relevant period to be provided under **paragraph 6.1.3**.

3.3 All requests for payment of the SW2 Enterprise Centre Development Costs incurred by or on behalf of the Developer are to be submitted to the Council in writing together with:

3.3.1 written confirmation from the Developer together with a certificate from the Employer's Agent addressed to the Council that the sums

requested are properly due and payable as part of the SW2 Enterprise Centre Development Costs;

- 3.3.2 a statement of the Development Category or Categories to which the SW2 Enterprise Centre Development Costs relate;
 - 3.3.3 a certified (by the Employer's Agent) copy of the relevant invoice or other evidence that the sums requested are due and payable in accordance with this **paragraph 3**;
 - 3.3.4 a valid VAT invoice from the Developer in respect of the SW2 Enterprise Centre Development Costs claimed addressed to the Council or, where the Developer is unable to recover the VAT, a certificate from the Developer addressed to the Council that the Developer has paid the relevant VAT and is unable to recover it.
- 3.4 In relation to payments under the Building Contract, the appropriate evidence for payment for the purpose of **paragraph 3.3.3** will be:
- 3.4.1 a certified (by the Employer's Agent) copy of the relevant interim certificate, certificate of partial practical completion, Certificate of Practical Completion or Certificate of Making Good Defects, as the case may be; and
 - 3.4.2 save in respect of the first payment, the receipt for the previous payment from the Employer's Agent.
- 3.5 In relation to any other SW2 Enterprise Centre Development Costs the appropriate evidence for the purpose of **paragraph 3.3.3** will be the production of the relevant invoice or other documentary evidence that the relevant payment is validly due and payable.
- 3.6 Where any item of cost incurred by the Developer relates in part only to the SW2 Enterprise Centre Development Costs the Costs Consultant shall certify the amount of such cost properly attributable to the SW2 Enterprise Centre Development Costs and the Cost Consultant's determination shall be binding on both parties. In relation to such costs the Cost Consultant's certificate shall be provided to the Council together with the evidence referred to in paragraph 3.4 or 3.5 (as applicable).
- 3.7 SW2 Enterprise Centre Development Costs incurred or payable by or on behalf of the Developer will be paid within [] ³⁵²⁰ working days after the Developer has complied with all of its obligations in **paragraphs 3.1 to 3.6 inclusive** .

³⁵²⁰ Confirmation of period required from Council

3.8 SW2 Enterprise Centre Development Costs incurred or payable by or on behalf of the Developer will be paid direct to the Developer.

3.9 The Developer is to supply the Council with receipts for all payments made by the Council to the Developer within ten working days of receipt of the payment by the Developer.

[**NOTE:** If at Unconditional Date/PC not all of the relevant Commitment has been paid the shortfall will be paid.]

4. **Retentions**

4.1 The Council will not be obliged to pay any sum properly retained under any agreement or contract, including the Building Contract, unless and until it becomes due to be released, and accordingly the sum withheld will not be treated as part of the SW2 Enterprise Centre Development Costs until it is actually paid.

4.2 In respect of any retentions made under the Building Contract:

4.2.1 the amount of each retention will be the amount shown in the relevant interim certificate, certificate of partial completion or Certificate of Practical Completion as the retention; and

4.2.2 the retentions will be released only upon the issue of the relevant certificate under the Building Contract authorising their release.

4.3 In addition to the retentions the Council can retain under **paragraph 4.1** the Council will be entitled to retain from the payment of Development Costs due following Practical Completion the following sums³⁶:

4.3.1 £10,000 in respect of each outstanding Principal Sub Contractor Warranty;

4.3.2 £10,000 in respect of any outstanding Handover Requirements;

4.4 Any sums retained under **paragraph 4.3** will be applied by the Council only for the purposes for which they have been retained and the following provisions will apply:

4.4.1 any retention made in respect of an outstanding Principal Sub Contractor Warranty will be released to the Developer when the relevant warranty has been provided to the Council or in a situation where after the Date of Practical Completion the Principal Sub Contractor is subject to an event of Insolvency;

~~4.4.2~~

4.4.2 any retention made under **paragraph 4.3.3** will be released to the Developer when the final item of outstanding Handover Requirements is provided to the Council;

5. **VAT**

The Maximum Commitment is exclusive of VAT and VAT paid by the Council is not be taken into account in assessing whether the Maximum Commitment has been or will be exceeded at any time and clause 11 shall apply.

6. **Cashflow statement**

6.1 The Developer is to provide to the Council monthly a written cashflow statement showing:

6.1.1 the total of all SW2 Enterprise Centre Development Costs incurred by or on behalf of the Developer including the Development Category in which those SW2 Enterprise Centre Development Costs were incurred;

6.1.2 the SW2 Enterprise Centre Development Costs which the Developer reasonably anticipates will be incurred before the next cashflow statement is produced; and

6.1.3 except in the case of the first cashflow statement, the SW2 Enterprise Centre Development Costs incurred by the Developer since the previous cashflow statement indicating:

6.1.3.1 whether the SW2 Enterprise Centre Development Costs incurred were included in the anticipated expenditure shown in the previous cashflow statement; and

6.1.3.2 any variations between the sums anticipated and the sums actually incurred.

6.1.4 (prior to the Unconditional Date) the current Pre-Unconditional Maximum Commitment;

6.1.5 (following the Unconditional Date) the current Post-Unconditional Commitment.

7. **Development Account**

~~³⁶ These retentions will not be covered by the building contract retention — that covers making good defects only. These retentions will need back to backing with the contractor~~

- 7.1 The Developer is to operate and maintain the Development Account until the date of the final payment due to be made by the Council under paragraph 1.5 of this schedule.
- 7.2 The Developer is to pay and debit directly to the Development Account all SW2 Enterprise Centre Development Costs paid or incurred by the Developer under this Schedule.
- 7.3 The Developer is to credit to the Development Account:
- 7.3.1 on receipt, a sum or sums equal to any
 - 7.3.1.1 income from or in respect of the SW2 Enterprise Centre; or
 - 7.3.1.2 insurance proceeds, capital receipts, licence fees, damages, compensation and mesne profits in relation to the SW2 Enterprise Centre which are received in respect of a period or on a date prior to the date of issue of the Certificate of Making Good Defects;
 - [7.3.2 on receipt, any VAT recovered from HM Revenue and Customs where the corresponding amount of VAT has already been debited to the Development Account as a Development Cost.
- 7.4 The Developer is to submit to the Council a statement of the Development Account at monthly intervals.
- 7.5 The Developer shall:
- 7.5.1 adopt an open book approach to all matters of accounting in relation to the SW2 Enterprise Centre Development Costs and keep full and detailed financial and other records information and particulars concerning the SW2 Enterprise Centre Development Costs; and
 - 7.5.2 make the information referred to in paragraph 7.5.1 available for inspection by the Council within a reasonable time of receiving a written request from the Council provided that the Council shall not be entitled to make more than one such request within any quarterly period.
- 8. Disputes**
- 8.1 If the Council acting reasonably disagrees with or objects to the amount certified as due for payment under this schedule or invoice or other supporting information then subject to paragraph 8.2 it may withhold such disputed amount from that payment but shall pay the undisputed part (if any) of that payment.

Following agreement or determination by the Specialist of the disputed amount any appropriate adjustment is to be made to a later payment.

- 8.2 The Council may not object to any amount that has been certified by the Employer's Representative or the Cost Consultant³⁷²¹.
- 8.3 Any dispute about payments due under this Schedule may be referred at the request of either the Developer or the Council to the decision of a Specialist who is to act as an expert.
- 8.4 Pending the decision of the Specialist, the payment is not to be made or deducted from the Development Account.
- 8.5 Any adjustment agreed between the Developer and the Council or determined by the Specialist is either to be reflected in the liability of the Council to make further payments of the SW2 Enterprise Centre Development Costs under this Schedule or, if no further payments are to be made, refunded by the Developer to the Council.
- 8.6 If the Council was adjudged by the Specialist to have acted unreasonably in objecting to any amount then the Council must pay the disputed amount to the Developer forthwith together with interest thereon at the Contract Rate from the date on which (but for this paragraph 8) such payment would have been due until the date of payment.

9. **Post-Unconditional Commitment**

- 9.1 The Post-Unconditional Commitment shall be increased in line with the following formula:

$$MC = A \times \frac{B}{C}$$

Where

MC = the Post-Unconditional Commitment

A = the Commitment specified in the Particulars (and as varied)

B = the BCIS Index Base Figure

C = the BCIS Index Review Figure

- 9.2 The Developer shall as soon as reasonably practicable before the Unconditional Date calculate and give written notice to the Council of the amount of the Interim Maximum Commitment and Final Maximum Commitment as adjusted in

³⁷²¹ Who is this? To be agreed.

accordance with paragraphs 9.1 and 9.2 (supplying reasonable supplying evidence for such calculations).

- 9.3 If the reference base used to compile the BCIS Index changes after the date of this Agreement the figure taken to be shown in the BCIS Index after the change shall be the figure which would have been shown in the BCIS Index if the reference base current at the date of this Agreement had been retained.

[**NOTE:** UH am checking if this is just the Contract Sum that is indexed to BCIS or the whole of the Post-Unconditional Commitment.]³⁸²²

- 9.4 If by reason of any change after the date of this Agreement in the methods used to compile the BCIS Index or for any other reason it becomes impossible to calculate the revised Interim Maximum Commitment and/or Final Maximum Commitment by reference to the BCIS Index or if any dispute arises between the parties about the revised Interim Maximum Commitment and/or Final Maximum Commitment pursuant to this paragraph 9 the determination of the revised Maximum Commitment shall be referred to at the request of either the Developer or the Council to the decision of a Specialist who is to act an expert.

[**NOTE:** Provision needed for the Commitment to increase or decrease to reflect the actual cost of party wall awards/rights of ~~lights~~light (s.237) compensation payments as against the provisional sum in the bid.]

[**NOTE:** Provision needed for the Commitment to increase to reflect Council change instructions, CPO costs.]

- 9.5 For the avoidance of doubt the following costs payable by the Council under this Agreement do not fall within and are in addition to the Pre-Unconditional Commitment and the Post-Unconditional Commitment:

9.5.1 The cost of any Council Variations instructed pursuant to Schedule 9;

9.5.2 [The CPO Costs and the SW2 Enterprise Centre Appropriation Costs;]³⁹²³

9.5.3 [CIL and s106/s111 costs for the Enterprise Centre Works.]

9.6 **VALUE ENGINEERING**

[**Note:** Following agreement of the detailed specification, when the trade packages have been tendered by the main contractor and the total contract sum is known, if the cost of the Council accommodation is less than provided for in

³⁸²² Councils view is it should just be the contract sum

³⁹²³ Might now be covered by the amended definition of Maximum Commitment

the bid (allowing for indexation and other permitted variations) then the saving will be shared as follows:

- For saving up to 2% of the contract sum, 75% of the saving to the Council, 25% to the Developer.
- For saving from 2% up to 4% of the contract sum, 50% of the saving to the Council, 50% to the Developer.
- For saving in excess of 4% of the contract sum, 25% of the saving to the Council, 75% to the Developer.]

PART 2: SW2 ENTERPRISE CENTRE DEVELOPMENT COSTS

1. All costs payments expenses sums and liabilities reasonably and properly incurred by the Developer in respect of the SW2 Enterprise Centre Development in connection with the following:
 - 1.1 the satisfaction of the Overarching Conditions;
 - 1.2 any stamp duty land tax development land tax (or equivalent) and Land Registry fees or other fees or taxes related to the Development payable by the Developer or reimbursed by the Developer in connection with the Enterprise Centre;
 - 1.3 the obtaining of all approvals pursuant to the SW2 Enterprise Centre Satisfactory Planning Permissions and in obtaining all Statutory Consents and in entering into any Planning Agreement required in connection with the carrying out of the SW2 Enterprise Centre Development or any part thereof or for the use of the SW2 Enterprise Centre Development or any part thereof for any permitted purpose and of complying therewith or performing the same;
 - 1.4
 - 1.4.1 the diversion of services necessary for the purpose of facilitating the SW2 Enterprise Centre Development;
 - 1.4.2 the acquisition diversion variation or abrogation of any rights of way rights of light or air or other rights easements or covenants whatsoever and any compensation payments relating to the loss of such rights easements or covenants;
 - 1.4.3 securing the SW2 Enterprise Centre Development.
- 1.5 costs and expenses incurred including legal fees in connection with:
 - 1.5.1 the entering into or proposed entering into of any Planning Agreements and/or any other agreement or agreements required in connection with the carrying out of the SW2 Enterprise Centre Development;
- 1.6 the design construction and completion of the SW2 Enterprise Centre Development including (without prejudice to the generality of the foregoing):
 - 1.6.1 the total construction cost of the SW2 Enterprise Centre Development incurred by the Developer including the costs payable pursuant to the Building Contract and any subcontracts;
 - 1.6.2 the costs of all site works site excavations demolition works or site preparations or bore hole test site surveys and structural surveys (including testing and monitoring);

- 1.6.3 the costs of all accommodation works drainage works and road works;
- 1.6.4 road sewer drain or water services and maintenance charges, and inspection fees
- 1.6.5 the fees and disbursements of the Professional Team and any other consultants or professional advisers necessary to be appointed in connection with the SW2 Enterprise Centre Development;
- 1.6.6 all planning and building regulation charges and fees and the costs of any required performance bond;
- 1.6.7 the cost of obtaining any energy performance certificates
- 1.7 Value Added Tax on any of the above items insofar as repayment or credit in respect thereof is not obtained by the Developer (the Developer to use all reasonable and commercially prudent endeavours to recover such Value Added Tax);
- 1.8 all other tax payable by the Developer in connection with the SW2 Enterprise Centre Development (other than tax payable on profits made by the Developer);
- 1.9 reasonable and proper fees and disbursements paid to the Professional Team;
- 1.10 legal and other advisors and professional fees incurred by the Developer in connection with the initial proposals for the SW2 Enterprise Centre Development the negotiation and completion of any documents entered into pursuant to this agreement and any Planning Agreement or any other agreement relating to the Enterprise Centre Development;
- 1.11 any action or proceedings brought by or against the Developer (or to prevent any such action or proceedings being brought against the Developer) in respect of the Enterprise Centre Development for the protection or preservation of the Site or any part thereof or any rights benefiting the Site (including but not limited to the expulsion of trespassers and the effecting of security arrangements);
- 1.12 environmental audit services site/soil investigations, measured surveys, site surveys, archaeological investigations and monitoring services;
- 1.13 insurance costs and all rates and outgoings in respect of the SW2 Enterprise Centre for the period up to the date of practical completion of the SW2 Enterprise Centre Development;
- 1.14 the [Enterprise Centre](#) Development Management Fee

PROVIDED THAT

- 1.15 all of the above costs shall be reasonably and properly incurred or expended and/or properly payable;
- 1.16 for the avoidance of doubt any item of costs counted under any one head of expenditure shall not to that extent be counted under another;
- 1.17 no item of expenditure shall be included to the extent that proceeds of insurance or damages (less the cost of recovery) are received in respect of such expenditure;
- 1.18 any item of expenditure, costs incurred or compensation costs or damages payable by the Developer to any third party or parties or to the Council as a result of the negligence or breach of contract by the Developer or the Building Contractor which would not have occurred but for such negligence or breach shall not be included;
- 1.19 no Surplus Property Development Costs shall be included;
- 1.20 the costs incurred by the Developer in remedying any breach by the Developer of this Agreement (save as a result of a breach by the Council) are excluded;
- 1.21 any interest payable by the Developer to a third party as a result of the Developer breaching an obligation to that third party (save as a result of a breach by the Council) are excluded;
- 1.22 any costs which the Developer subsequently recovers from a third party (the Developer being obliged to use all reasonable and commercially prudent endeavours to pursue its remedies for such costs against such third parties) less the properly incurred costs of such recovery are excluded;
- 1.23 any interest payments, fines, penalties, fees or other payments arising out of the Developer's own negligence or default (save to the extent such default is as a result of a breach by the Council of this Agreement) are excluded; and
- 1.24 no costs incurred in bidding during the competitive dialogue process or incurred prior to the date of this Agreement shall be included.

SCHEDULE 11

Land Payment and Overage

PART 1: DEFINITIONS

1. Defined terms

In this Schedule, the following words and expressions have the following meanings:

- "1990 Act"** Town and Country Planning Act 1990
- "Act of Circumvention"** any act or omission which is intended or has as its intended effect a diminution in the value of or loss of Overage Payment to the Council of any Overage Payment
- "Actual Developer's Profit"** the Actual Gross Development Value less the Eligible Development Costs:
- "Actual Developer's Return"** the return on value percentage calculated in accordance with the following formula:
- $$\frac{\text{Actual Developer's Profit}}{\text{Actual Gross Development Value}} \times 100\%$$
- "Actual Gross Development Value"** (a) (where all of the Units have been Disposed of prior to the end of Overage Period) an amount equal to the aggregate Sales Proceeds; or
- (b) (where not all of the Units only have been Disposed of prior to the end of the Overage Period the sum of the aggregate Sales Proceeds and the aggregate Market Value of the Units which have not been Disposed of during the Overage Period (as agreed or determined in accordance with this Schedule)
- "Agreed Profit"** a profit that delivers to the Developer both:
- (a) the Required Actual Return; and

	(b) the Required Actual Profit on GDV
"Arms Length Basis"	means a bargain at arm's length with the person not being a Connected Party under which the price rent or other consideration payable to the Developer is the price rent or other consideration reasonably obtainable in the market but where appropriate taking into account the position of the other party as a special purchaser.
"Base Rate"	the base lending rate from time to time of National Westminster Bank PLC or such other clearing bank nominated by the Council at any time or, if the clearing banks cease at any time to publish a base lending rate, such comparable rate of interest as the Council may reasonably determine
"Connected Party"	a person or company in the same group of the Developer as defined in S.42 of the Landlord and Tenant Act 1954
"Contract Rate"	4% per annum above the Base Rate
"Determination Date"	the date, if any, on which the Overage Payment is agreed or determined pursuant to paragraph 2 of Part 3 [<i>Ashurst Note: this is missing</i>]
"Development"	has the meaning given to it in section 55 of the 1990 Act
"Disposition"	one or more of the following in respect of the Surplus Property whether by the registered proprietor of the Surplus Property or by the registered proprietor of any Security: <ul style="list-style-type: none"> (a) the transfer disposal or assent of the whole or any part of Surplus Property, whether or not for valuable consideration; or (b) the disposal by way of a grant of a lease over the whole or any part of the

~~Surplus Property;~~

~~but such expression shall exclude an Excluded Disposition~~

(b) the disposal by way of a grant of a lease over the whole or any part of the Surplus Property;

but such expression shall exclude an Excluded Disposition

"Excluded Disposition"

- (a) a rack rental letting of one or more Units on the open market on an Arms Length Basis for a term of 30 years or less;
- (b) the lease or transfer of one or more Units on the open market on Arms Length Basis for a term of 99 years or more;
- (c) the lease or transfer of the site of any sub-station, gas governor, pumping station, or other facility required by any company or organisation providing any utilities or services for the development of the Property; or
- (d) any other disposal of land required to discharge any obligation or condition imposed in any Planning Permission Planning Agreement or Infrastructure Agreement

"Overage Payment"

the Overage Payment to be calculated in accordance with **paragraph 3.2 of Part 2**

"Overage Period"

the earlier of the date two years after the Date of Practical Completion and the Disposition of the last Unit

"Payment Date"

14 days after the Determination Date.

"Required Actual Profit on GDV"

an Actual Developer's Return of not less than 20 per cent. on the Actual Gross Development

Value of the Surplus Property Development Works []

"Required Actual Return"

that amount which is required to deliver to the Developer an IRR of not less than twenty per cent. on the equity cashflows for the Development (including all equity injections, equity returns, profits to equity providers, risk premia)⁴⁰²⁴

"Retained Interest"

means each and every part of the Surplus Property not subject to an Excluded Disposition

"Sales Proceeds"

where there has been a Disposition or Excluded Disposition, all monies or anything representing monies worth or value in lieu of money of a capital nature received as consideration for a Disposition or Excluded Disposition provided that in the case of rental income received pursuant to an Excluded Disposition this shall only include such rental received by the Developer prior to a Disposition or the date of calculation of Market Value of the relevant rent

"Sales Proceeds Account"

the account to be maintained under **paragraph 1.1** of **part 2** for the purposes of recording Sales Proceeds

"Security"

any legal charge, debenture, mortgage, lien or other form of security granting any legal or equitable charge over the Surplus Property whether fixed or floating

"Unit"

Either:

- (a) a private dwelling house flat maisonette bed-sit or other self-contained dwelling; or
- (b) the whole or any part of commercial office and/or hotel and/or retail and/or leisure premises and/or student accommodation which have been

⁴⁰²⁴ Amended to fit the model

constructed on the Surplus Property or any part thereof.

PART 2: OVERAGE AND PURCHASE PRICE

1. DEVELOPER'S COVENANTS

1.1 Sales Proceeds Account

1.1.1 The Developer shall establish and maintain the Sale Proceeds Account with effect from the date on which each Investor's charge over the Surplus Sites (if any) has been released until the Payment Date.

1.1.2 The Developer shall credit all Sale Proceeds received by the Developer or any Connected Party of the Developer received after the date and which should properly be credited to the Sale Proceeds Account on the day of receipt by the Developer in cleared funds.

1.1.3 VAT will not be credited to the Sale Proceeds Account.

1.2 Use of the Property

The Developer covenants with the Council to bind the Surplus Property that during the Overage Period the Developer:

1.2.1 will not make any Disposition without complying with the provisions of **paragraph 1.2**; and

1.2.2 will not grant any rights or easements over the Surplus Property or enter into any restrictive covenants binding the Surplus Property which would or may prevent the development of the Property for the Surplus Property Development.

1.3 Payment

The Developer covenants with the Council that the Developer:

1.3.1 will pay the Overage Payment to the Council on the terms of this Schedule if and when it becomes due;

1.3.2 will pay the Purchase Price to the Council on or before the Payment Date.

1.4 Dispositions

1.4.1 The Developer may not make a Disposition at any time during the Overage Period without first procuring that the person to whom the Disposition is made has entered a Deed of Covenant

1.5 **Title restriction**

1.5.1 The Developer is to apply to the Land Registrar on form RX1 for a restriction to be entered onto the proprietorship register of the Title Number of the Surplus Properties in the form of the restriction set out in [**Part 4**].

2. **OVERAGE PAYMENT**

2.1 **Notification of Dispositions**

The Developer shall notify the Council in writing within 14 days of the Disposition of the final Unit within the Surplus Property (or (if earlier) the end of the Overage Period) of the Proceeds of Sale that it has received on all Dispositions which have been completed on an open book basis together with a schedule of any Units not Disposed of.

2.2 **Calculation of Overage Payment**

The Overage Payment is to be calculated in accordance with the following formula:

$$A = (B-C) \times 0.55$$

Where:

A = the Overage Payment

B = Actual Developer's Profit

C = Agreed Profit

2.3 **Availability of Accounts**

The Developer shall procure that it shall maintain full accurate and detailed records of all receipts and costs which records shall be made available at the offices of the Developer to the Council and/or its accountants for inspection at all reasonable times and upon reasonable prior notice and the Developer shall use all reasonable endeavours to provide any supporting documents requested by the Council.

2.4 **Arms Length Disposal of Units**

2.4.1 In making or directing an Excluded Disposition, the Developer shall:

2.4.1.1 endeavour to obtain the best consideration reasonably obtainable from the relevant disponee taking into account all relevant circumstances (including without limitation the

number of Units being acquired by the disponent, the status of construction and fit out of the Unit(s) at the time of entering into the agreement for the Disposition, and the time in which the disponent is able to exchange and complete the Disposition); and

2.4.1.2 agree Excluded Dispositions on an Arm's Length Basis as between a willing seller and willing buyer (or, as the case may be, a willing landlord and a willing tenant)

but the Developer may in its discretion determine the manner, timing and method of doing so and the Council is to have no control over or supervision of how the Developer deals with the Surplus Property other than the right of relevant information required to be notified to the Council in accordance with this Agreement

2.5 **Minimum consideration and rounding**

The Overage Payment is to be rounded (ie up or down) to the nearest £100 with the minimum value for the Overage Payment being £0.

2.6 **Market Value**

If all of the Units have not been ~~been~~ Disposed of within the Overage Period then within 28 days of the end of the Overage Period the Developer shall instruct (on behalf of both the Council and the Developer), [Jones Lang LaSalle, Savills and Knight Frank] to provide their estimates (addressed to both the Developer and the Council) of the Market Value of the Units which have not been Disposed of within the Overage Period and the Market Value of such Units shall then be taken for the purposes of the Appraisal as the total Market Value of the three estimates divided by a factor of three. The Developer and the Council shall be responsible for the costs (if any) of the said valuers in equal proportions.

2.7 **Payment Date**

The Overage Payment (if any) and the Purchase Price are to be paid by the Developer to the Council on the Payment Date together with any Value Added Tax payable on them and the Council is to provide the Developer with a valid invoice in respect of any Value Added Tax payable on the Overage Payment (if any) and the Purchase Price.

2.8 **Interest**

If the Overage Payment:

2.8.1 has not been agreed or determined by the date 28 days after the end of the Overage Period, the Overage Payment and the Purchase Price

will bear interest at the Base Rate from and including this date to and including the Payment Date and after the Payment Date will bear interest at the Contract Rate until and including the date of actual payment; or

- 2.8.2 has been agreed or determined by the date 28 days after the end of the Overage Period the Overage Payment and the Purchase Price will bear interest at the Contract Rate from and including the day after the Payment Date to and including the date of actual payment.

2.9 **Anti Avoidance**

The Developer will:

- 2.9.1 not knowingly do or omit to do anything which shall amount to an Act of Circumvention;
- 2.9.2 if the Developer makes a Disposition or Excluded Disposition to a Connected Party deem the Disposition or Excluded Disposition to be at the Open Market Value for the relevant Disposition or Excluded Disposition at the time.

2.10 **Determination of disputes**

Any dispute about the calculation of the Overage Payment may be referred by the Council or the Developer to the decision of a Specialist in accordance with **clause 15**.

- 2.11 The Council hereby irrevocably consents to the Developer applying to the Land Registry for the withdrawal of the Restriction referred to at Part 4 at any time following the date of actual payment of the Overage (if any) and the Purchase Price.

PART 3: PURCHASE PRICE

3.

- 3.1 The Purchase Price will be the sum ~~identical~~identified as such in the Final Viability Appraisal [will be identified for each building].
- 3.2 The relevant part of the Purchase Price will be payable in relation to each building within the Surplus Sites upon Practical Completion of that building (or

~~insert~~earlier with the agreement of the Council⁴¹²⁵). The Purchase Price shall
[NOTE: Indexed from lease completion to PC. ⁴²²⁶

- 3.3 The Purchase Price shall bear interest at the rate of [5.57%] in respect of the period from and including the Completion Date for that Building Lease up to but excluding the date of payment of the Purchase Price calculated on a day to day basis for such period. The interest is payable on the date of Practical Completion of the Building (or earlier date agreed under paragraph 3.2)

PART 4: LAND REGISTRY RESTRICTION

No disposition of the registered estate by the Proprietor of the registered estate, or the proprietor of any registered charge, is to be registered without a certificate signed by a conveyancer that the terms of **Schedule 12** of the Development Agreement dated [date of this Development Agreement] have been complied with do not apply.

⁴¹²⁵ Council would need to agree a different date

⁴²²⁶ Please clarify indexing

SCHEDULE 11

Insolvency Defaults

1. Defined terms

1.1 In this Schedule, the following words and expressions have the following meanings:

"1986 Act"	Insolvency Act 1986
"1994 Order"	Insolvent Partnerships Order 1994
"LPA"	Law of Property Act 1925

2. Insolvency Default

2.1 Insolvency occurs if:

2.1.1 a person is a company and:

2.1.1.1 it enters into a voluntary arrangement under Part I of the 1986 Act or it enters into a scheme of arrangement with its creditors in satisfaction or composition of its debt;

2.1.1.2 an administrator is appointed under Part II of the 1986 Act;

2.1.1.3 a receiver or manager, including an administrative receiver, is appointed whether under Part III of the 1986 Act, under the LPA or otherwise;

2.1.1.4 a resolution to wind-up is passed or a provisional liquidator is appointed or a winding-up order is made under Part IV of the 1986 Act unless for the purpose of a solvent amalgamation or reconstruction of the company;

2.1.1.5 a scheme of arrangement is made under Part 26 Companies Act 2006;

2.1.1.6 it changes its status from unlimited to limited; or

2.1.1.7 it is struck off the register of companies or otherwise ceases to exist;

2.1.2 a person is an individual and:

- 2.1.2.1 an interim order or voluntary arrangement is made under Part VIII of the 1986 Act;
- 2.1.2.2 a trustee in bankruptcy is appointed or the individual is otherwise declared to be bankrupt;
- 2.1.2.3 the individual enters into a deed of arrangement or composition with his or her creditors;
- 2.1.2.4 a receiver is appointed under the Mental Health Act 1983 or the individual becomes incapable of managing his or her affairs; or
- 2.1.2.5 the individual dies;
- 2.1.3 two or more people are in partnership and:
 - 2.1.3.1 they enter into a voluntary arrangement under Part II of the 1994 Order;
 - 2.1.3.2 an administration order is made under Part III of the 1994 Order; or
 - 2.1.3.3 a winding up order is made under Parts IV or V of the 1994 Order; or
- 2.1.4 a person is incorporated or resident in a jurisdiction outside England and Wales and any event or circumstance occurs which under the laws of that jurisdiction has an analogous or equivalent effect to any of the events in this **paragraph 2.1.**

SCHEDULE 12

Early Access

1. The Council may enter into the SW2 Enterprise Centre prior to Sectional Completion or Practical Completion (as appropriate) to carry out the Council's Works.
- 1.1 If it does so the Council will and will instructs contractors to:
 - 1.1.1 co-operate with the Developer and the Building Contractor to ensure that any remaining SW2 Enterprise Centre Development Works and the Council's Works can be carried out simultaneously; and
 - 1.1.2 comply with the proper and reasonable directions of the Building Contractor;

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SCHEDULE 13

Sale of Relevant Property

1. Agreement for sale

1.1 Part 1 of the Standard Commercial Property Conditions (2nd Edition) (the "**Commercial Conditions**") apply to the sale of the Relevant Property so far as they are applicable and are consistent with the express terms of this Agreement but:

1.1.1 Commercial Conditions 2.2, 2.3, 3.2, 4, 5, 6.3 and 11 do not apply;

1.1.2 in Commercial Condition 1.3, all references to service by e-mail are deleted;

1.1.3 Commercial Condition 1.4.1 reads "An obligation to pay money includes an obligation to pay any value added tax validly chargeable in respect of that payment on receipt of a valid VAT invoice."; and

1.1.4 Commercial Condition 8.3.2 reads "Apportionment is to be made with effect from the date of actual completion."

1.2 Neither party will be under any obligation to complete the sale of a Relevant Property on a day that is not a working day or before 9:30 am or after 5:30 pm on a working day, even where time is of the essence for completion.

1.3 The Relevant Property is leased subject to the Substation Leases but otherwise with vacant possession.

2. Title

2.1 The Council has deduced title to the Relevant Property to the Developer ~~[Ashurst Note: awaited]~~ and the Developer is not entitled to raise any requisition or objection to the title except in respect of:

2.1.1 usual pre completion enquiries; and

2.1.2 any matters registered against the Title Number(s) after [●]

2.2 The Council leases with full title guarantee.

3. Title Matters

3.1 The Relevant Property is leased subject to and, to the extent that the Council is able to transfer them, with the benefit of the Title Matters subject to the Substation Leases.

3.2 The Developer's Solicitors have been provided with copies of the Title Matters and the Developer is to be treated as buying the Relevant Property with full knowledge of them and will not raise any requisition or objection to them save for usual pre completion enquiries.

3.3 The Relevant Property is sold subject to:

3.3.1 the matters contained or referred to in Commercial Condition 3.1.2;
~~**[Ashurst Note: Please provide searches]**~~

3.3.2 any registered local land charges and any matter capable of being registered as a local land charge even if not so registered at the Date of Actual Completion;

3.3.3 any notice, order or proposal given or made by a government department or by any public or local authority, statutory undertaker or other competent body or person;

3.3.4 all charges, orders, proposals, restrictions, agreements, notices or other matters arising under the town and country planning or highways legislation which affect or relate to the Relevant Property and to any orders or regulations made under that or any other legislation;

3.3.5 all rates, charges and other outgoings which affect or are charged on the Relevant Property except for any mortgage or legal charge relating to money secured on the Relevant Property;

3.3.6 any unregistered interest that overrides the disposition effected pursuant to this Agreement under Schedules 1, 3 or 12 Land Registration Act 2002;

3.3.7 all public or private rights of way and other rights, easements or quasi-easements and wayleaves affecting the Relevant Property; and

3.3.8 all liability to repair and maintain roads, paths, conduits, fences and other like matters or to contribute to the cost of their repair and maintenance.

4. **The lease**

4.1 The lease of each Surplus Property is to be in the form attached to this Agreement. The lease is to be executed in duplicate and the Developer is to procure that the duplicate is returned to the Council's Solicitors as soon as possible after completion.

4.2 Any party that executes the transfer pursuant to a power of attorney is to provide a copy of that power of attorney in English, certified in accordance with

section 3 Powers of Attorney Act 1971, to the other parties on the Date of Actual Completion.

5. Land Registry Applications

5.1 The Developer is not to send this Agreement or any copy of it to the Land Registry and is not to protect the benefit of this Agreement at the Land Registry except by the registration of a Unilateral Notice against the Relevant Property. The Council agrees not to object to the registration of a Unilateral Notice.

5.2 The Developer is to use reasonable endeavours to register the Lease of the Relevant Property at the Land Registry as soon as reasonably practicable after the Date of Actual Completion and, on completion of that registration, is to provide the Council with official copies of the title to the Relevant Property showing the Developer registered as proprietor together with any title plan produced or updated by the Land Registry as part of that registration.

PART 2: TITLE MATTERS

6. Register entries

The matters contained or referred to in the Property and Charges Registers of the Title Number(s) as at [DATE AND TIME OF OFFICIAL COPIES] [other than [DESCRIPTION]]. A copy of the register entries referred to in this **paragraph 1** is attached to this Agreement.

7. Other deeds and documents

The matters contained or referred to in the following deeds and documents:

Date	Document	Parties
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SCHEDULE 14

Guarantor's obligations

1. Obligations guaranteed

- 1.1 The Developer's Guarantor as primary obligor, and not only as guarantor, guarantees to the Council that the Developer will comply with the terms of this Agreement.
- 1.2 As an independent obligation, the Developer's Guarantor agrees with the Council to comply with the terms of this Agreement if the Developer does not do so and to indemnify the Council against any breach of those terms.
- 1.3 The Developer's Guarantor agrees that the Council may make a claim under this guarantee and indemnity without first making a claim against the Developer.
- 1.4 The Developer's Guarantor is to pay all sums due to the Council under this guarantee and indemnity without any legal or equitable set-off, counterclaim or deduction.

2. Continuation of the guarantee

- 2.1 The obligations of the Developer's Guarantor are not to be released by:
 - 2.1.1 any delay or neglect by the Council in enforcing the terms of this Agreement or any time allowed by the Council for their performance;
 - 2.1.2 any variation of the terms of this Agreement;
 - 2.1.3 any Event of Default;
 - 2.1.4 the disclaimer of this Agreement by the Crown or by a liquidator or trustee in bankruptcy of the Developer;
 - 2.1.5 if the Developer is a company, the Developer being struck off the register of companies or otherwise ceases to exist
 - 2.1.6 the Developer or the Council giving consent to any matter under this Agreement;
 - 2.1.7 any legal limitation, immunity, disability, incapacity or other circumstances relating to the Developer, whether or not known to the Council; or

2.1.8 anything else which would have released the Developer's Guarantor whether by the variation of the obligations guaranteed or by the conduct of the parties.

3. **SW2 Enterprise Centre Development documentation**

3.1 The provisions of this **paragraph 3** will apply:

3.1.1 if the Council validly exercises its right to bring this Agreement to an end following an Event of Default by the Developer;

3.1.2 following the disclaimer of this Agreement by the Crown or by a liquidator or trustee in bankruptcy of the Developer; or

3.1.3 if the Developer is a company, if the Developer is struck off the register of companies or otherwise ceases to exist

and in each case the [Step In Right] is not exercised

3.2 If any of the provisions in **paragraph 3.1** apply and the Council requests the Developer's Guarantor to do so in writing, the Developer's Guarantor is to:

3.2.1 enter into a new agreement with the Council on the terms of this Agreement with the substitution of the Developer's Guarantor for the Developer and with due allowance to be made in the new agreement for any sums paid by the Council or the Developer under this Agreement when calculating any sums due under the new agreement;

3.2.2 take all steps reasonably practicable to become the employer of the Building Contractor and (if applicable) the members of the Professional Team; and

3.2.3 if the Council has already become the employer of the Building Contractor or the members of the Professional Team, act as the agent of the Council in discharging the employers obligations and indemnify the Council against any liability which the Council may have as employer (save for any such arising from any act or default of the Council or anyone (other than the Guarantor) acting on its behalf) until such time as the Developer's Guarantor has become the employer under **paragraph 3.2.2**.

4. **No assignment**

4.1 The Developer's Guarantor is not to take an assignment of this Agreement from the Developer.

4.2 The Developer's Guarantor is not to become the employer of the Building Contractor or the members of the Professional Team except on the terms set out in **paragraph 3**.

5. **Additional provisions**

5.1 The Developer's Guarantor is not to claim any rights of subrogation in respect of the obligations guaranteed by the Developer's Guarantor and is not entitled to participate in any security held by the Council in respect of those obligations unless and until those obligations have been performed or discharged in full.

5.2 The Developer's Guarantor is not to claim in competition with the Council in the insolvency of the Developer and is not to take any security, indemnity or guarantee from that person in respect of those obligations.

5.3 If any payment made to the Council is set aside or avoided under the laws relating to insolvency, the Council may claim under this guarantee and indemnity in respect of that payment and any settlement, release or discharge of the obligations guaranteed by the Developer's Guarantor is to take effect subject to this condition.

5.4 If there is more than one Developer's Guarantor, the obligations which they undertake can be enforced against them all jointly or against each individually.

**THE COMMON SEAL of MAYOR AND
BURGESSES OF THE LONDON
BOROUGH OF LAMBETH**)
was hereunto affixed in the)
presence of:-)

Authorised Signatory

SIGNED as a deed by)
[UNITED HOUSE])
acting by a director and its secretary)
or two directors)

Director

Director / Secretary

SIGNED as a deed by)
[DEVELOPER'S GUARANTOR])
acting by a director and its secretary)
or two directors)

Director

Director / Secretary

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Moved cell	
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