Section 106 Template for Build to Rent (Fast Track Route) Viability Reviews (Formulas 1a and 6) and Clawback Mechanism

Notes

Overview

1. This template may be used for planning applications for Build to Rent developments that qualify for the Build to Rent route under the Mayor of London's Affordable Housing and Viability SPG by meeting the criteria in paragraph 4.9 of the SPG. Schemes that do not meet these criteria will be treated as build for sale developments for the purposes of determining affordable housing delivery and the provisions of the Fast Track Route or Viability Tested Route (build for sale) section 106 template should be used.

2. Where a planning application is for a mix of homes for market sale and Build to Rent homes, the provisions of this template are only suitable for the Build to Rent element. The provisions of the Fast Track Route or Viability Tested Route (build for sale) template should be used for the market sale element.

3. In addition, this template applies only to planning applications that meet the criteria for the Fast Track Route, i.e. they would:

    a. deliver 35 per cent on-site affordable housing (calculated by habitable rooms) without public subsidy;
    b. provide 30 per cent of the Discounted Market Rented homes at an equivalent rent to London Living Rent, with the remaining 70 per cent at a range of genuinely affordable rents; and
    c. meet other planning requirements and obligations to the satisfaction of the local planning authority and, where relevant, the Mayor of London.

4. This template assumes that the affordable housing units will be owned, let and managed directly by the developer or a future purchaser other than a Registered Provider. Additional drafting may be required if it is intended for a Registered Provider to own, let and manage these units.

5. Applications in respect of land in public ownership, in public use or in Strategic Industrial Locations, Locally Significant Industrial Sites and Non-Designated Industrial Sites appropriate for residential uses will be expected to deliver at least 50 per cent affordable housing without grant to benefit from the Fast Track Route.

Covenant and clawback

6. Planning permission for a Build to Rent scheme should only be granted if there is a covenant in the section 106 agreement to keep the Build to Rent homes in single ownership as Build to Rent homes for a fixed period together with a clawback mechanism if the covenant is broken. The Mayor expects that this period should be at least 15 years. To ensure that the construction of units would be VAT zero-rated, the Mayor's approach is that buildings or units can be sold out of the long-term PRS market but this will be subject to a clawback payment as set out below.

7. The appropriate clawback amount will be the difference between the total value of the market rent units at application stage and those units valued on a "for sale" basis at the point of sale. The local planning authority should be notified of the sale price of the units that are sold and this should inform the market value of remaining units to determine the clawback.

8. The clawback amount will be payable to the local planning authority for the provision of affordable housing in the event that market rented units are sold within the covenant period, which would break the covenant. For larger phased schemes the local planning authority should consider whether the clawback amount should be disaggregated to the relevant block in which units are sold. This template is drafted on the basis of a single covenant in respect of all the Build to Rent units in the development.

9. The clawback amount should not reduce over time to ensure that the covenant remains effective for the full period.

10. In the event that a share of rented units are sold, and the remaining units are retained within the rental market, a local planning authority may determine that the clawback is calculated based on the units sold. The other units will remain under covenant and the clawback will apply at the point of sale if disposed of within the covenant period.

Viability review

11. To ensure that an applicant fully intends to build out the permitted development, an Early Stage Viability Review will be triggered if an agreed level of progress on implementation is not made within two years of the permission being granted or as agreed with the local planning authority.[1]

12. Where the Early Stage Viability Review is triggered, it will take place at the point that the agreed level of progress is reached. It is expected that in most cases any uplift in affordable accommodation at this early stage will be accommodated on-site. Plans should identify which homes would switch to affordable accommodation in the event of an improvement in viability at this early stage.

13. Where a review identifies a surplus that is insufficient to augment on-site affordable housing then the surplus should be paid to the local planning authority as a financial sum prior to occupation of the development.

14. The Early Stage Viability Review involves the submission of specified viability information to the local planning authority, such information to be inputted into Formulas 1a and 6.

15. Formula 1a calculates the surplus profit available for additional on-site affordable housing. This is obtained by subtracting the difference in build costs for the private residential component (and the commercial component (if any)) of the scheme between the date of the planning permission and the date of the review from the difference in the value of those components between the date of the planning permission and the date of the review.

16. Formula 6 calculates the amount of on-site affordable housing to be provided where a surplus profit is identified under Formula 1a.

17. In respect of applications which are required to deliver a minimum of 35 per cent on-site affordable housing, the total affordable housing provision should be capped at 50 per cent or the borough strategic affordable housing target at the relevant affordability criteria.

18. The review should not be used to reduce the base level of affordable housing contributions which are required as part of the planning permission.

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[1] For longer-term phased schemes, consideration should be given to requirements for an updated early stage review, in the event a scheme stalls for a period of at least two years following an early stage review.

19. Local planning authorities should not restrict, or allow restrictions on, the conversion of private rented units to affordable housing units.

20. For schemes that were approved under the Fast Track Route, any subsequent applications to vary the consent via section 73 and any subsequent modification of the section 106 agreement by agreement under section 106A(1)(a) will not require submission of viability information, provided that the resulting development continues to meet the relevant threshold and affordability criteria, and does not otherwise result in a reduction in affordable housing or housing affordability.

"Additional Affordable Housing Scheme" means a scheme or schemes to be prepared by the Developer and submitted to the Council in accordance with schedule [2] detailing the Additional Affordable Housing Units to be provided and which:

(a) confirms which Market Housing Units are to be converted into Additional Affordable Housing Units;

(b) confirms which Discounted Market Rent Housing Units (if any) are to be let at lower rents including at London Living Rent Levels to achieve a greater level of affordability for Eligible Renters (and, the level of the rents);

(c) contains 1:50 plans showing the location, size and internal layout of each Additional Affordable Housing Unit;

(d) provides a timetable for construction and delivery of the Additional Affordable Housing Units;

(e) sets out the amount (if any) of any financial contribution also payable towards offsite Affordable Housing if paragraph [5.6] or [9.7] of schedule [2] applies;

(f) [ensures that no [block/phase] will comprise solely or substantially of Market Housing Units]; and

(g) [●][2]

"Additional Affordable Housing Units" means the Market Housing Units to be converted to Affordable Housing pursuant to an Additional Affordable Housing Scheme approved under paragraph [5.4] or [5.5] of schedule [2]

"Affordable Housing" means housing including Discounted Market Rent Housing provided to eligible renters whose needs are not met by the market and which housing should (a) meet the needs of eligible renters including availability at a cost low enough for them to afford, determined with regard to local incomes and local housing prices, and (b) include provision for the home to remain at an affordable rent for future eligible renters, or, if these restrictions are lifted, for the subsidy to be recycled for alternative affordable housing provision

[2] Insert any other requirements that the Council requires in respect of the Affordable Housing Units.

"Affordable Housing Units"	means the [●][3] Residential Units to be provided as Affordable Housing [as shown on Plan [●]][4] comprising [●] Habitable Rooms comprising not less than [35/50][5] per cent (by Habitable Room) of the Residential Units
"Application"	means [●]
"Average Discounted Market Rent Housing Value"[6]	means the average value per square metre of the total floorspace of the Discounted Market Rent Housing Units at the required level of discount determined by the Council on the Site at the Review Date based on the relevant information provided to establish the Estimated GDV to be assessed by the Council and the Developer
"Average Market Housing Value"[7]	means the average value of Market Housing Unit floorspace per square metre at the Review Date based on the relevant information provided to establish the Estimated GDV to be assessed by the Council and the Developer
"Build Costs"	means the build costs comprising construction of the Development attributable to the Market Housing Units [and the Commercial Floorspace][8] supported by evidence of these costs to the Council's reasonable satisfaction including but not limited to: (a) details of payments made or agreed to be paid in the relevant building contract; (b) receipted invoices; (c) costs certified by the Developer's quantity surveyor, costs consultant or agent but for the avoidance of doubt build costs exclude: (i) professional, finance, legal and marketing

3 Insert number of units. Delete if not known.

4 Delete if plan unavailable, e.g. for outline developments with long development timetables.

5 This should be the level of affordable housing at application stage, which is to be not less than 35% of the Residential Units or 50% for public or industrial land (in both cases with 30% of the affordable housing units being provided as Discounted Market Rented housing at London Living Rent levels and the remaining affordable housing units being provided as Discounted Market Rented housing at genuinely affordable rents).

6 This is "C" in Formula 6.

7 This is "B" in Formula 6.

8 Delete if not applicable. The Build Costs should relate only to the elements to which the Estimated GDV relates.

costs;

(ii) all internal costs of the Developer including but not limited to project management costs, overheads and administration expenses; and

(iii) any costs arising from Fraudulent Transactions.

"Clawback Amount" means a sum of money (A) to be paid prior to a Clawback Disposal and to be determined by the Council under paragraphs [2.3] to [2.6] of schedule [1] using the following formula:

$$A = B - C$$

where:

B is the value of the Market Housing Units to be valued on the assumption that such units are to be sold free of the restrictions in schedule [1] and based on the consideration to be paid under that Clawback Disposal for each Market Housing Unit which is intended to be Disposed; and

C is the value of the Market Housing Units as at the date of the Planning Permission to be valued on the assumption that such units are subject to the restrictions in schedule [1] such valuation to be agreed with the Council [and the GLA]) and as adjusted by the percentage change in the average rental values for the Council's administrative area as identified (under "all categories") in the schedule of average rents by borough issued by the Valuation Office Agency (or any successor in function)

"Clawback Disposal" means a Disposal of one or more Market Housing Units during the Covenant Period other than:

(a) a letting of a Market Housing Unit in accordance with the Approved Residential Management Plan; or

(b) a Disposal that is part of a Disposal of the entirety of the Residential Units to a single purchaser provided that the Market Housing Units remain in rented tenure

["Commercial Floorspace" means [●]][9]

"Component" means a part of the Development including but not limited to:

(a) Market Housing Units;

(b) Affordable Housing Units;

(c) Additional Affordable Housing Units;

(d) commercial units;

(e) any other floorspace;

(f) property; and

(g) land

"Council" means [●]

"Covenant Period" means 15 years starting from (and including) the latter of the Occupation Date of the Market Housing Units or the date on which all of the Market Housing Units are available for occupation

"Developer" means [●]

"Development" means [●]

"Development Viability Information" means the information required by Formula 1a and Formula 6 being:

(a) Estimated GDV;

(b) Estimated Build Costs;

(c) Average Market Housing Value; and

(d) Average Discounted Market Rent Housing Value

and including in each case supporting evidence to the Council's reasonable satisfaction

"Discounted Market Rent Housing" means housing offered to Eligible Renters

(a) at a rent that is not more than 80 per cent of market rent[10] and, in respect of the following

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9 Insert description of any commercial floorspace/uses permitted under the Planning Permission. Delete if not applicable.

sizes of units, not more than the following:

(i) one bedroom: [●] per cent of market rent;

(ii) two-bedroom: [●] per cent of market rent;

(iii) three-bedroom: [●] per cent of market rent; and

(iv) four-bedroom: [●] per cent of market rent; and

(b) on the basis that annual housing costs, including rent and Service Charges:

(i) must not exceed 28 per cent of the relevant annual gross income upper limit (such 28 per cent being equivalent to 40 per cent of net income, with net income being assumed to be 70 per cent of gross income) specified in the London Plan Annual Monitoring Report; and

(ii) in respect of the following sizes of units, must not exceed 28 per cent of the corresponding annual gross income upper limit specified below (such 28 per cent being equivalent to 40 per cent of net income, with net income being assumed to be 70 per cent of gross income):

(A) one-bedroom: £[●];

(B) two-bedroom: £[●];

(C) three-bedroom: £[●]; and

(D) four-bedroom: £[●][11]

"Discounted Market Rent Housing Units" means the [●] Affordable Housing Units as shown on Plan [●] comprising [●] Habitable Rooms to be made available for Discounted Market Rent Housing in

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10 The Mayor's preference is that Discounted Market Rent Housing is provided at London Living Rent Levels.

11 Specify annual gross income maximum amount below the AMR upper limit to provide intermediate housing for households with a range of incomes below the upper limit set out in the London Plan AMR and a mix of unit sizes (measured by number of bedrooms). Income caps below the AMR upper limit should cascade out to the London-wide eligibility criteria within three months to ensure that units are not left vacant. Re-lets should be available to households meeting the AMR upper limit. Homes should be made available through the Homes for Londoners online portal.

accordance with [●] of this Agreement together with any Additional Affordable Housing Units which are to be delivered as Discounted Market Rent Housing

"Disposal" means:

(a) the Sale of a Component(s) of the Development;

(b) the grant of a lease of a term of less than 125 years of a Component of the Development; or

(c) the grant of an assured shorthold tenancy agreement or a short term let in respect of a Component of the Development

ALWAYS excluding Fraudulent Transactions and **"Dispose"**, **"Disposals"** and **"Disposed"** shall be construed accordingly

"Eligible Renter" means an existing private or social tenant or tenants without sufficient combined current savings to purchase a home in the local area and whose Household Income at the date of renting the relevant Discounted Market Rent Housing Unit does not exceed the relevant upper limit specified in the latest London Plan Annual Monitoring Report such amount at the date of this Agreement being £[60,000] and who meets the other criteria (if any) specified in the latest London Plan Annual Monitoring Report and the following locally defined eligibility criteria:

[●][12]

"Estimated Build Costs"[13] means the sum of:

(a) the estimated Build Costs remaining to be incurred at the Review Date; and

(b) the actual Build Costs incurred at the Review Date

"Estimated GDV"[14] means the price at which a sale of the Market Housing Units [and the Commercial Floorspace][15]

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12 Specify locally defined eligibility criteria if applicable. Where the LPA has an intermediate or DMR waiting list they should agree with the applicant a process for providing priority access to the DMR units for those on the waiting list.

13 This is "D" in Formula 1a

14 This is "A" in Formula 1a.

would have been completed unconditionally for cash consideration on the date of the submission of the Development Viability Information pursuant to paragraph [5] of schedule [2] based on detailed comparable market evidence, including evidence of rental values for the Market Housing Units which have been let, a valuation of the remaining Market Housing Units and evidence of the rental yield of the Market Housing Units, to be assessed by the Council and assuming:

(a) a willing seller and a willing buyer;

(b) that, prior to the date of valuation, there has been a reasonable period of not less than six months for the proper marketing of the interest (having regard to the nature of the property and the state of the market) for the agreement of the price and terms and for the completion of the sale;

(c) that no account is taken of any additional bid by a prospective purchaser with a special interest;

(d) that both parties to the transaction have acted knowledgeably, prudently and without compulsion; and

(e) that the restrictions in schedule [1] would continue to apply

"External Consultant" means the external consultant(s) appointed by the Council to assess the information submitted pursuant to paragraph [5] of schedule [2]

"Formula 1a" means the formula identified as "Formula 1a" within the annex to schedule [2]

"Formula 6" means the formula identified as "Formula 6" within the annex to schedule [2]

"Fraudulent Transaction" means:

(a) a transaction the purpose or effect of which is to artificially reduce the Estimated GDV and/or artificially increase the Estimated

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15 Delete if not applicable.

Build Costs; or

(b) a Disposal that is not an arm's length third party bona fide transaction

"GLA" means the Greater London Authority or any successor in statutory function

"Habitable Room"[16] means any room within a Residential Unit the primary use of which is for living, sleeping or dining and which expressly includes kitchens of 13 square metres or more, living rooms, dining rooms and bedrooms but expressly excludes kitchens with a floor area of less than 13 square metres, bathrooms, toilets, corridors and halls

"Household" means, in relation to a person "A", A and all other persons who would, after renting a Discounted Market Rent Housing Unit, share that Discounted Market Rent Housing Unit with A and one another as the only or main residence of both A and such other persons;

"Household Income" means:

(a) in relation to a single Eligible Renter, the gross annual income of that Eligible Renter's Household; and

(b) in relation to joint Eligible Renters, the combined gross annual incomes of those Eligible Renters' Households

"London Living Rent Levels " means rents which:

(a) do not exceed the latest maximum London Living Rents for the relevant ward published by the GLA annually and

(b) together with other annual housing costs including Service Charges, do not exceed 28 per cent of the relevant annual gross income upper limit (such 28 per cent being

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16 The percentage of affordable housing in a scheme should be measured by habitable rooms. Where habitable rooms in affordable and market elements of a scheme are not of comparable size when averaged across the whole development, it may be more appropriate to assess the provision of affordable housing using habitable floorspace. Where this is the case, affordable housing should still be recorded by habitable rooms in the section 106 agreement to ensure consistency in monitoring. Applicants should present affordable housing figures as a percentage of total residential provision by habitable rooms, by units and by floorspace to enable comparison.

equivalent to 40 per cent of net income, with net income being assumed to be 70 per cent of gross income) specified in the London Plan Annual Monitoring Report

"London Living Rent Level Housing Units"	means the [●] Discounted Market Rent Housing Units as shown on Plan [●] comprising [●] Habitable Rooms to be made available at London Living Rent Levels in accordance with [●] of this Agreement together with any additional Discounted Market Rent Housing Units let as London Living Rent Levels under an Additional Affordable Housing Scheme
"London Plan"	means the London Plan published in [March 2016] as revised from time to time
"London Plan Annual Monitoring Report"	means the monitoring report published annually by the Mayor of London reviewing the progress being made in implementing the policies and addressing the objectives of the London Plan or any replacement GLA guidance or policy
"Market Housing Units"	means the Residential Units comprising [●] Habitable Rooms which are to be let on the Market and which are not Affordable Housing Units
"Occupation Date"	[means the date on which any part of the Development (or any part or phase) is first occupied for the purposes set out in the Planning Permission excluding occupation for the purposes of fitting out or marketing the Development (or any part or phase) and the terms **"Occupy"**, **"Occupied"**, **"Occupier"** and **"Occupation"** shall be construed accordingly][17]
"Planning Permission"	means [●]
"Public Subsidy"	means funding from the Council and/or the GLA together with any additional public subsidy secured by the Developer or Affordable Housing Provider to support the delivery of the Development
"Residential Management Plan"	means a plan setting out management principles for the Residential Units and which shall include the following requirements unless otherwise agreed in writing with the Council: (a) each Residential Unit shall be self-contained and let separately for residential

17 Amend as appropriate.

use;

(b) the length of each lease of each Residential Unit shall be offered at a minimum term of three years unless a shorter term is requested by the prospective tenant;

(c) each lease of each Residential Unit shall contain a break clause allowing the tenant to end the lease any time after the first six months of the lease with one month's notice;

(d) the Residential Units shall be managed as a whole by a single professional property manager which:

(i) provides a consistent and quality level of housing management;

(ii) has some daily on-site presence;

(iii) is part of an accredited ombudsman scheme;

(iv) is a member of the British Property Federation and/or regulated by the Royal Institute of Chartered Surveyors;

(v) complies with the Royal Institute of Chartered Surveyors Private Rented Sector Code (as revised from time to time);

(vi) has a complaints procedure; and

(vii) must not charge up-front fees of any kind to tenants or prospective tenants other than deposits and rent paid in advance; and

(e) all rent increases within the term of each lease of each Residential Unit shall be calculated by reference to an index which shall be made clear to the tenant before the start of each tenancy

"Residential Units" means the [●] units of residential accommodation comprising [●] Habitable Rooms to be provided as part of the Development comprising the Market Housing Units and the Affordable Housing Units

"Review Date" means the date of the submission of the Development Viability Information pursuant to paragraph [5] of schedule [2]

"Sale"	means: (a) the sale of the freehold of a Component; or (b) the grant of a lease of a Component with a term of 125 years or more and subject to nominal rent and **"Sold"** shall be construed accordingly
"Service Charges"	means all amounts payable by a tenant of the relevant Discounted Market Rent Housing Unit or London Living Rent Level Housing Unit as part of or in addition to the rent and directly or indirectly for services, repairs, maintenance, improvements, insurance and/or the landlord's costs of management in relation to that Discounted Market Rent Housing Unit or London Living Rent Level Housing Unit
"Site"	means [●]
"Substantial Implementation"	means the occurrence of the following in respect of the Development: (a) completion of all ground preparation works [for a phase/block] and all site-wide enabling works; (b) completion of the foundations for the core of [●][18]; (c) construction [of the ground floor slab][to the first floor][19] of [●][20]; (d) letting of a contract for the construction of [●][21]; and (e) practical completion of [●]][22]
"Substantial Implementation	means the date 24 months from but excluding the date of grant of the Planning Permission

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18 Specify which building(s).

19 Delete as appropriate.

20 Specify which building(s).

21 Specify which building(s)/phase(s).

22 Delete as appropriate or insert additional requirements depending on what is agreed between the Council and the Developer. The Developer should be required to demonstrate that an amount of works will be delivered within 24 months of grant which gives the Council sufficient comfort that the Developer is committed to delivering the Development.

Target Date"	
"Working Day"	means any day except Saturday, Sunday and any bank or public holiday

Schedule [1]
Build to Rent Provision and Covenant

1 BUILD TO RENT PROVISION

The Developer shall:

(a) construct the Residential Units;

(b) submit to the Council the Residential Management Plan for approval (as approved, the **"Approved Residential Management Plan"**);

(c) not Occupy or cause or permit the Occupation of any Residential Unit until the Residential Management Plan has been submitted to and approved by the Council;

(d) provide the Residential Units in accordance with the Approved Residential Management Plan (subject to any minor amendments agreed in writing with the Council);

(e) not Occupy or cause or permit the Occupation of the Residential Units except in accordance with the Approved Residential Management Plan (subject to any minor amendments agreed in writing with the Council); and

(f) upon reasonable notice from the Council and no more frequently than every six months, provide to the Council such evidence as the Council reasonably requires to demonstrate the Developer's compliance with the Approved Residential Management Plan

PROVIDED THAT this paragraph [1] shall cease to apply in respect of the Market Housing Units upon a Clawback Disposal (PROVIDED THAT the Developer has paid the Clawback Amount).

2 BUILD TO RENT COVENANT[23]

2.1 Subject to paragraph [2.8] of this schedule [1], the Developer shall not cause or permit a Clawback Disposal unless and until the Clawback Amount has been paid to the Council.

2.2 Not less than [30] Working Days before the anticipated date of a Clawback Disposal, the Developer shall give notice in writing to the Council of such Clawback Disposal including the following information:

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23 The clawback amount will be payable to the local planning authority for the provision of affordable housing in the event that market rented units are sold within the covenant period, which would break the covenant. For larger phased schemes the local planning authority should consider whether the clawback amount should be disaggregated to the relevant block in which units are sold. This template is drafted on the basis of a single covenant in respect of all the Build to Rent units in the development. In the event that a share of rented units are sold, and the remaining units are retained within the rental market, a local planning authority may determine that the clawback is calculated based on the units sold. The other units will remain under covenant and the clawback will apply at the point of sale if disposed of within the covenant period. If this is the case, this draft will need to be amended.

(a) the anticipated date of that Clawback Disposal;

(b) the Market Housing Unit(s) which are intended to be Disposed and its size in m^2 and number of Habitable Rooms;

(c) the amount of consideration to be paid under that Clawback Disposal for each Market Housing Unit which is intended to be Disposed (including documentary evidence);

(d) the Developer's calculation of the Clawback Amount; and

(e) the identity and address of the person(s) to whom the Market Housing Unit(s) are intended to be Disposed.

2.3 The Council shall assess the information submitted under paragraph [2.2] of this schedule [1] to determine the Clawback Amount.

2.4 The Council may appoint an external consultant to assess the information submitted under paragraph [2.2] of this schedule [1] and to determine the Clawback Amount.

2.5 If the Council and/or its external consultant requests from the Developer further information or evidence to determine the Clawback Amount, the Developer shall provide any reasonably required information to the Council and/or the external consultant (as applicable and with a copy to the other party) within 10 Working Days of receiving the relevant request and this process may be repeated until the Council and/or its external consultant has all the information it reasonably requires to determine the Clawback Amount.

2.6 The Council shall notify the Developer in writing of the Clawback Amount and shall use reasonable endeavours to do so no later than [20] Working Days after receipt of the information submitted under paragraph [2.2] of this schedule [1].

2.7 The Developer shall pay the Council's costs which are reasonably and properly incurred in assessing the information submitted under paragraph [2.2] of this schedule [1] and in determining the Clawback Amount including those of any external consultant appointed under paragraph [2.4] of this schedule [1] within 20 Working Days of receipt of a written request for payment.

2.8 If the Council has not notified the Developer in writing of the Clawback Amount within 30 Working Days of receipt of the information submitted under paragraph [2.2] of this schedule [1], the Developer may cause or permit a Clawback Disposal once it has paid to the Council an amount that the Developer reasonably estimates to be the Clawback Amount (the **"Estimated Clawback Amount"**) PROVIDED THAT no later than 10 Working Days after the Council notifies the Developer in writing of the Clawback Amount (or, if a dispute relating to the Clawback Amount is referred to dispute resolution in accordance with clause [●], no later than 10 Working Days after the final determination of the Clawback Amount), the Developer shall pay to the Council the difference between the Clawback Amount and the Estimated Clawback Amount (unless the difference is less than or equal to zero) together with interest accrued on such difference from the date of the payment of the Estimated Clawback Amount to the date of payment of the difference calculated in accordance with clause [●].

2.9 The Council shall use the Clawback Amount to provide Affordable Housing in its administrative area.

2.10 The Developer shall notify the Council in writing promptly upon the completion of a Clawback Disposal.

Schedule [2]

Affordable Housing and Viability Review

Part 1 – Affordable Housing

1 AFFORDABLE HOUSING MINIMUM AND MAXIMUM PROVISION

1.1 The Developer shall provide the Affordable Housing Units in accordance with the remaining paragraphs of this schedule [2].

1.2 The Developer shall provide not less than 30 per cent of the Affordable Housing Units at London Living Rent Levels and the remaining Affordable Housing Units as Discounted Market Rent Housing.

1.3 The Affordable Housing Units and Additional Affordable Housing Units shall together not exceed [50][24] per cent (by Habitable Room) of the Residential Units PROVIDED THAT not less than 30 per cent of the Affordable Housing Units and the Additional Affordable Housing Units are provided at London Living Rent Levels and the remaining Affordable Housing Units and Additional Affordable Housing Units are provided as Discounted Market Rent Housing.

2 AFFORDABLE HOUSING PROVISION

2.1 [ ][25]

Part 2 – Submission of Viability Review and Use of Surplus Profit

3 VIABILITY REVIEW TRIGGER

3.1 The Developer shall notify the Council in writing of the date on which it considers that Substantial Implementation has been achieved no later than 10 Working Days after such date and such notice shall be accompanied by full documentary evidence on an open

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24 A higher cap should apply to be determined by the Council (or the Mayor where relevant) if the application is required to deliver 50% or more on-site affordable housing (schemes which: are on public or industrial land; involve the redevelopment of affordable housing including estate regeneration (as relevant); provide 75% or more affordable housing within a single tenure – see paragraph 2.42 of the Affordable Housing and Viability SPG).

25 Insert obligations relating to delivery of the Affordable Housing Units (and occupation restrictions) and retention of the Affordable Housing Units as Affordable Housing in perpetuity. In respect of the Discounted Market Rent Housing Units (including those let at London Living Rent Levels), this should include provision that rent rises are limited to CPI within each tenancy. Units secured at London Living Rent Levels should be re-let at the latest London Living Rents published by the GLA at the start of each new tenancy. Alternatively the discount to market should be fixed at a rate that makes the rent equivalent to London Living Rent Levels for the initial letting, with this discount then being applied to the current market rate for the development at the start of each new letting. In either case, all subsequent lettings of units secured at London Living Rent Levels must meet the requirements set out in limb (b) of the definition of "London Living Rent Levels", i.e. the rents, together with other annual housing costs including Service Charges, must not exceed 28 per cent of the relevant annual gross income upper limit (such 28 per cent being equivalent to 40 per cent of net income, with net income being assumed to be 70 per cent of gross income) specified in the London Plan Annual Monitoring Report.

book basis to enable the Council to independently assess whether Substantial Implementation has been achieved and whether it was achieved on or before the Substantial Implementation Target Date.

3.2 No later than five Working Days after receiving a written request from the Council, the Developer shall provide to the Council any additional documentary evidence reasonably requested by the Council to enable it to determine whether Substantial Implementation has been achieved on or before the Substantial Implementation Target Date.

3.3 Following the Developer's notification pursuant to paragraph [3.1] of this schedule [2], the Developer shall afford the Council access to the Site to inspect and assess whether or not the works which have been undertaken achieve Substantial Implementation PROVIDED ALWAYS THAT the Council shall:

(a) provide the Developer with reasonable written notice of its intention to carry out such an inspection;

(b) comply with relevant health and safety legislation; and

(c) at all times be accompanied by the Developer or its agent.

3.4 No later than 20 Working Days after the Council receives

(a) notice pursuant to paragraph [3.1] of this schedule [2]; or

(b) if the Council makes a request under paragraph [3.2] of this schedule [2], the additional documentary evidence,

the Council shall inspect the Site and thereafter provide written confirmation to the Developer within 10 Working Days of the inspection date as to whether or not the Council considers that Substantial Implementation has been achieved and whether it was achieved on or before the Substantial Implementation Target Date.

3.5 If the Council notifies the Developer that the Council considers that Substantial Implementation has not been achieved then this paragraph [3] shall continue to apply mutatis mutandis until the Council has notified the Developer pursuant to paragraph [3.4] of this schedule [2] that Substantial Implementation has been achieved.[26]

3.6 The Developer shall not Occupy the Development or any part thereof until:

(a) the Council has notified the Developer pursuant to paragraph [3.4] of this schedule [2] that Substantial Implementation has been achieved on or before the Substantial Implementation Target Date;

(b) the Council has notified the Developer pursuant to paragraph [5.4] of this schedule [2] that no Additional Affordable Housing Units are required; or

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[26] This allows the Council to determine when Substantial Implementation occurs and therefore when the review takes place.

(c) If the Council notifies the Developer pursuant to paragraph [5.4] of this schedule [2] that Additional Affordable Housing Units are required, an Additional Affordable Housing Scheme has been approved pursuant to paragraph [5.4] or [5.5] of this schedule [2].

4 SUBMISSION OF DEVELOPMENT VIABILITY INFORMATION AND OTHER INFORMATION

Where Substantial Implementation has not occurred before the Substantial Implementation Target Date (as determined by the Council under paragraph [3.4] of this schedule [2]):

(a) the Developer shall submit the following information no later than 20 Working Days after the date on which the Developer is notified pursuant to paragraph [3.4] or [3.6] of this schedule [2] that Substantial Implementation has been achieved, on the basis that the Council may make such information publicly available:

(i) the Development Viability Information;

(ii) a written statement that applies the applicable Development Viability Information to Formula 1a (PROVIDED ALWAYS THAT if the result produced by Formula 1a is less than zero it shall be deemed to be zero) and Formula 6 thereby confirming whether in the Developer's view any Additional Affordable Housing Units can be provided; and

(iii) where such written statement confirms that Additional Affordable Housing Units can be provided, an Additional Affordable Housing Scheme; and

(b) paragraphs [5] and [6] of this schedule [2] shall apply.

5 ASSESSMENT OF DEVELOPMENT VIABILITY INFORMATION AND OTHER INFORMATION

5.1 The Council shall assess the information submitted pursuant to paragraph [4] of this schedule [2] and assess whether in its view Additional Affordable Housing Units are required to be delivered in accordance with Formula 1a and Formula 6 and for the avoidance of doubt the Council will be entitled to rely on its own evidence in determining inputs into Formula 1a and Formula 6 subject to such evidence also being provided to the Developer.

5.2 The Council may appoint an External Consultant to assess the information submitted pursuant to paragraph [4] of this schedule [2].

5.3 In the event that the Council and/or an External Consultant requires further Development Viability Information or supporting evidence of the same then the Developer shall provide any reasonably required information to the Council or the External Consultant (as applicable and with copies to the other parties) within 10 Working Days of receiving the relevant request and this process may be repeated until the Council and/or the External Consultant (as applicable) has all the information it reasonably requires to assess whether in their view Additional Affordable Housing Units are required to be delivered in accordance with Formula 1a and Formula 6.

5.4 When the Council or its External Consultant has completed its assessment of the information submitted pursuant to paragraph [4] of this schedule [2], the Council shall notify the Developer in writing of the Council's decision as to whether any Additional Affordable Housing Units are required and whether the submitted Additional Affordable Housing Scheme is approved.

5.5 Where the Council concludes that Additional Affordable Housing Units are required but the Developer's initial submission concluded otherwise, the Developer shall provide an Additional Affordable Housing Scheme to the Council for approval (such approval not to be unreasonably withheld or delayed) within 10 Working Days of the date on which it receives the Council's notice pursuant to paragraph [5.4] of this schedule [2].

5.6 If the Council's assessment pursuant to paragraph [5.4] of this schedule [2] concludes that

(a) a surplus profit arises following the application of Formula 1a but such surplus profit is insufficient to provide any Additional Affordable Housing Units pursuant to Formula 6; or

(b) a surplus profit arises following the application of Formula 1a but such surplus profit cannot deliver a whole number of Additional Affordable Housing Units pursuant to Formula 6;

then in either scenario the Developer shall pay any such surplus profit allocable to any incomplete Additional Affordable Housing Unit to the Council as a financial contribution towards offsite Affordable Housing.

5.7 The Developer shall pay the Council's costs which are reasonably and properly incurred in assessing the information submitted pursuant to paragraph [4] of this schedule [2] including those of the External Consultant within 20 Working Days of receipt of a written request for payment.

6 DELIVERY OF ADDITIONAL AFFORDABLE HOUSING

6.1 Where it is determined pursuant to paragraph [5.4] of this schedule [2] that one or more Additional Affordable Housing Units are required the Developer shall not Occupy [more than [●] Market Housing Units][27] unless and until it has:

(a) practically completed all of the Additional Affordable Housing Units in accordance with the Additional Affordable Housing Scheme approved by the Council and made them available for Occupation; and

(b) paid any remaining surplus profit pursuant to paragraph [6.6] of this schedule [●] to the Council towards the delivery of offsite Affordable Housing within the Council's administrative area.

[27] Amend as appropriate. In the case of developments under outline planning permissions with long development timetables, it may not be possible to specify the number of units in the occupation restriction. Consider restricting occupation of phases or blocks instead and whether phased reviews would be appropriate.

6.2 The Parties agree that the terms of paragraphs [2] and [3] of this schedule [●] shall apply mutatis mutandis to the provision of any Additional Affordable Housing Units.

6.3 Any Additional Affordable Housing Units provided pursuant to this paragraph [6] shall cease to be Market Housing Units.

Part 3 – Miscellaneous

7 PUBLIC SUBSIDY

Nothing in this Agreement shall prejudice any contractual obligation on the Developer to repay or reimburse any Public Subsidy using any surplus profit that is to be retained by the Developer following the application of Formula 6.

8 MONITORING

8.1 The parties acknowledge and agree that as soon as reasonably practicable following completion of this Agreement the Council shall report to the GLA through the London Development Database the following information:

(a) the number and tenure of the Affordable Housing Units by units and Habitable Room, including the number of Discounted Market Rent Housing Units provided at London Living Rent Levels; and

(b) for each size (by number of bedrooms) of the Discounted Market Rent Housing Units, the average discount to market rent and the annual gross income upper limit (as set out in the definition of "Discounted Market Rent Housing" in this Agreement).

8.2 The parties acknowledge and agree that as soon as reasonably practicable after the approval of an Additional Affordable Housing Scheme pursuant to paragraph [5.4] or [5.5] of this schedule [2] or, if an Additional Affordable Housing Scheme is not required by the Council, the conclusion of the assessment under paragraph [5.4] of this schedule [2], the Council shall report to the GLA through the London Development Database the following information (to the extent applicable):[28]

(a) the number and tenure of the Additional Affordable Housing Units (if any) including the number of Additional Affordable Housing Units at London Living Rent Levels, by unit and Habitable Room;

(b) for each size (by number of bedrooms) of the Discounted Market Rent Housing Units, the average discount to market rent and the annual gross income upper limit (as set out in the definition of "Discounted Market Rent Housing" in this Agreement);

[28] This information should also inform monitoring of additional affordable housing, changes in tenure, improved affordability and financial contributions secured through viability review mechanisms (and otherwise) published annually in line with Draft London Plan policy H8.

(c) any changes in the affordability of the Affordable Housing Units including the provision of the Discounted Market Rent Housing Units at London Living Rent Levels by unit and Habitable Room; and

(d) the amount of any financial contribution payable towards offsite Affordable Housing pursuant to paragraph [5.6] of this schedule [2].

ANNEX TO SCHEDULE [2]

FORMULA 1a (Surplus profit available for additional on-site affordable housing**)**[29]

"Surplus profit" = ((A – B) – (D – E)) – P

Where:

A = Estimated GDV (£)

B = A ÷ (C + 1)[30]

C = Percentage change in the [***insert appropriate index***] for the Council's administrative area from grant of Planning Permission to Review Date (using the latest index figures publicly available) (%)[31]

D = Estimated Build Costs (£)

E = D ÷ (F + 1)[32]

F = Percentage change in the BCIS All in Tender Index ("BCIS TPI") from grant of Planning Permission to Review Date (using the latest index figures publicly available) (%)[33]

P = (A – B) * Y[34]

- **Y** = [ ]%, being developer profit as a percentage of GDV for the private residential component [and the Commercial Floorspace][35] as determined as part of the review (%)

Notes:

(A – B) represents the change in GDV of the private residential component [and the Commercial Floorspace] of the development from the date of planning permission to the date of review.

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29 Formula 1a uses an index to derive an assumed application stage GDV and the BCIS TPI to derive assumed application stage build costs. The former index should be chosen by the Council, should be an appropriate basis on which to track changing rental values and might be, for example, the VOA's statistics on the private rental market in London, the ONS index of private housing rental prices in London or the Homelet Rental Index. Where there is Commercial Floorspace, it may be appropriate to consider changes in the value and build costs of the Commercial Floorspace with reference to an appropriate market-tracking index or other relevant information sources. The formula should be adapted accordingly.

30 Being the assumed application stage GDV for the private residential component and, if relevant, the Commercial Floorspace at the date of planning permission.

31 Being an approximation of the percentage change in the value of the private residential component and, if relevant, the Commercial Floorspace of the development.

32 Being the assumed application stage build costs for the private residential component and, if relevant, the Commercial Floorspace at the date of planning permission.

33 Being an approximation of the percentage change in the value of the build costs for the private residential component and, if relevant, the Commercial Floorspace.

34 Being developer profit on change in GDV of private residential component and, if relevant, the Commercial Floorspace.

35 Delete if not applicable.

(D – E) represents the change in build costs of the private residential component [and the Commercial Floorspace] from the date of the planning permission to the date of the review.

FORMULA 6 (Additional on-site affordable housing)

X = Additional Discounted Market Rent Housing (Habitable Rooms)

X = A ÷ (B – C) ÷ D

Where:

A = Surplus profit available for Additional Affordable Housing Units as determined in Formula 1a (£)

B = Average Market Housing Value (£ per m²)

C = Average Discounted Market Rent Housing Value (£ per m²)

D = Average Habitable Room size for the Development being [●][36] m²

Notes:

(B - C) represents the difference in average value of market housing per m² and average value of Discounted Market Rent Housing and London Living Rent Housing per m² (£).

A ÷ (B - C) represents the additional affordable housing requirement by floorspace (m²).

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[36] Insert figure.