

Section 106 template for Fast Track Route - Early Stage Viability Review (Formulas 1a and 2)

Notes

1. This template may be used for planning applications that:
 - a. deliver 35 per cent on-site affordable housing (calculated by habitable rooms) without public subsidy;
 - b. achieve a policy-compliant tenure mix;
 - c. meet other planning requirements and obligations to the satisfaction of the local planning authority and, where relevant, the Mayor of London; and
 - d. have sought to increase the level of affordable housing beyond 35 per cent by accessing grant.
2. Applications in respect of land in public ownership, in public use or in Strategic Industrial Locations, Locally Significant Industrial Sites or other industrial sites that is used for housing development will be expected to deliver at least 50 per cent affordable housing without grant to benefit from the Fast Track Route. In respect of such applications, the tenure for the affordable homes above the 35 per cent threshold is flexible and should take into account the need to maximise affordable housing provision.
3. 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
4. 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.
5. 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.
6. 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 2.
7. 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.
8. Formula 2 calculates the amount of on-site affordable housing to be provided where a surplus profit is identified under Formula 1a.
9. 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

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.

cent or the borough strategic affordable housing target and the relevant local plan tenure split.

10. The review should not be used to reduce the base level of affordable housing contributions which are required as part of the planning permission.
11. Local planning authorities should not restrict, or allow restrictions on, the conversion of market housing units to affordable housing units.
12. 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 35 per cent threshold and required tenure split, and does not otherwise result in a reduction in affordable housing or housing affordability.
13. All schemes are expected to maximise the delivery of affordable housing and make the most efficient use of available resources to achieve this objective in accordance with the London Plan. All applicants are expected to work with the LPA, the Mayor and Registered Providers (where the applicant is not themselves an RP) to determine whether subsidy is available and ensure affordable housing delivery is maximised. Where grant or other public subsidy is available and would increase the proportion of affordable housing over that which could otherwise have been provided, this should be utilised.

“Additional Affordable Housing Scheme”

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

- (a) confirms which Open Market Housing Units are to be converted into Additional Affordable Housing Units and to which tenure(s);
- (b) contains 1:50 plans showing the location, size and internal layout of each Additional Affordable Housing Unit;
- (c) provides a timetable for construction and delivery of the Additional Affordable Housing Units;
- (d) sets out the amount (if any) of any financial contribution also payable towards offsite Affordable Housing if [paragraph 8.6 of schedule [●]] applies;
- (e) [ensures that no [block/phase] will comprise solely or substantially of Open Market Housing Units;] and
- (f) [●]²

“Additional Affordable Housing Units”

means the Open Market Housing Units to be converted to Affordable Housing pursuant to the Additional Affordable Housing Scheme to be approved under paragraph [9] of schedule [●]

“Affordable Housing”

means housing [including London Affordable Rented Housing, London Living Rent Housing, London Shared Ownership Housing and Social Rented Housing]³ provided to eligible households whose needs are not met by the market and which housing should (a) meet the needs of eligible purchasers or 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 price for future eligible purchasers or renters, or, if these restrictions are lifted, for the subsidy to be recycled for alternative affordable housing provision within Greater London (as defined in section 2 of the London Government Act 1963)

“Affordable Housing Provider”

means:

- (a) a provider of Affordable Housing registered

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

³ Delete as appropriate depending on which tenures are relevant to the development.

under section 111 of the Housing and Regeneration Act 2008 (or such other relevant previous or amended or replacement statutory provision);

- (b) an approved development partner of Homes England (or any successor agency) which is eligible to obtain grant funding; or
- (c) any other body specialising in the provision of Affordable Housing

in each case either nominated or approved by the Council (such approval not to be unreasonably withheld or delayed)

“Affordable Housing Tenure Split”

means:

- (a) a minimum of [30] per cent (by Habitable Room) of the Affordable Housing Units to be provided as Social Rented Housing or London Affordable Rented Housing; and
- (b) a minimum of [30] per cent (by Habitable Room) of the Affordable Housing Units to be provided as London Living Rent Housing or London Shared Ownership Housing

with the tenure(s) of the remaining Affordable Housing Units to be [●]⁴

“Affordable Housing Units”

means the [●]⁵ Residential Units to be provided as Affordable Housing [as shown on Plan [●]]⁶ comprising [●] Habitable Rooms in accordance with the Affordable Housing Tenure Split and comprising not less than [35/50]⁷ per cent (by Habitable Room) of the Residential Units and **“Affordable Housing Unit”** shall be construed accordingly

“Average Intermediate Housing Value”⁸

means the average value of London Living Rent Housing and London Shared Ownership Housing floorspace per square metre at the relevant Review Date based on the relevant information provided to establish the Estimated GDV to be assessed by the

⁴ As determined by the Council taking into account relevant local plan policy.

⁵ Delete if not known.

⁶ Delete if plan unavailable, e.g. for outline developments with long development timetables.

⁷ This should be the level of affordable housing at application stage, which is to be not less than 35% of the Residential Units at a policy-compliant tenure split or 50% for public or industrial land. If grant is available the affordable housing percentage should be higher than the relevant threshold.

⁸ This is “C” in Formula 2.

Council and the Developer

“Average Low Cost Rent Housing Value”⁹

means the average value of London Affordable Rented Housing and London Social Rented Housing 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

“Average Open Market Housing Value”¹⁰

means the average value of Open Market Housing Unit floorspace per square metre 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

“Build Costs”

means the build costs comprising construction of the Development attributable to the Open Market Housing Units [and the Commercial Floorspace]¹¹ 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 costs; and
- (ii) all internal costs of the Developer including but not limited to project management costs, overheads and administration expenses

“Charge”

means a mortgage, charge or other security or loan documentation granting a security interest in the Affordable Housing Units and/or the Additional Affordable Housing Units (or any number of them) in favour of the Chargee

⁹ This is “B” in Formula 2.

¹⁰ This is “A” in Formula 2.

¹¹ Delete if not applicable. The Build Costs should relate only to the elements to which the Estimated GDV relates.

“Chargee”	means any mortgagee or chargee of the Affordable Housing Provider ¹² of the Affordable Housing Units ¹³ or the Additional Affordable Housing Units ¹⁴ (or any number of them) and any receiver (including an administrative receiver) and manager appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator
[“Commercial Floorspace”	means [●] ¹⁵
“Council”	means [●]
“CPI”	means the Consumer Prices Index published monthly by the Office for National Statistics or, if the Consumer Prices Index is no longer maintained, such replacement or alternative index as the Council may determine, acting reasonably
“Date of Deemed Service”	means, in each instance where a Chargee has served a Default Notice under paragraph 4.1(a) of schedule [●]: (a) in the case of service by delivery by hand of the Default Notice to the Council's offices at [<i>insert address</i>] during [<i>specify the Council's office hours</i>], the date on which the Default Notice is so delivered; or (b) in the case of service by using first class registered post to the Council's offices at [<i>insert address</i>], the second Working Day¹⁶ after the date on which the Default Notice is posted (by being placed in a post box or being collected by or delivered to Royal Mail) PROVIDED THAT the Chargee is able to evidence that the Default Notice was actually delivered to the Council (by Royal Mail proof of delivery or otherwise)
“Default Notice”	means a notice in writing served on the Council by the Chargee under paragraph 4.1(a) of schedule [●]

¹² This term will be defined in the agreement.

¹³ This term will be defined in the agreement representing the base level of affordable housing as determined in the planning application.

¹⁴ This term will be defined in the agreement relating to the additional affordable housing units that may be required as a result of an Early or Late Viability Review under the Draft London Plan and the Mayor's Affordable Housing and Viability SPG (as relevant).

¹⁵ Insert description of any commercial floorspace/uses permitted under the Planning Permission. Delete if not applicable.

¹⁶ This term will be defined in the agreement.

of the Chargee's intention to enforce its security over the relevant Affordable Housing Units and/or Additional Affordable Housing Units

“Developer” means [●]

“Development” means [●]

“Development Viability Information” means the information required by Formula 1a and Formula 2 being:

- (a) Estimated GDV;
- (b) Estimated Build Costs;
- (c) Average Open Market Housing Value;
- (d) Average Low Cost Rent Housing Value; and
- (e) Average Intermediate Housing Value

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

“Eligible Purchaser” means a purchaser or purchasers whose Household Income at the date of purchasing the relevant London Shared Ownership 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 £[90,000]¹⁷

“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 London Living 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

“Estimated Build Costs”¹⁸ means the sum of:

- (a) the estimated Build Costs remaining to be

¹⁷ Where the Council specifies lower local income thresholds or other restrictions, providers should only apply these restrictions for the first three months of marketing, after which the London Plan maximum household income should apply.

¹⁸ This is “D” in Formula 1a

incurred at the Review Date; and

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

“Estimated GDV”¹⁹

means the price at which a sale of the Open Market Housing Units [and the Commercial Floorspace]²⁰ would have been completed unconditionally for cash consideration on the date of the submission of the Development Viability Information pursuant to paragraph [7] of schedule [●] based on detailed comparable market evidence 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; and
- (d) that both parties to the transaction have acted knowledgeably, prudently and without compulsion

“External Consultant”

means the external consultant(s) appointed by the Council to assess the information submitted pursuant to paragraph [7] of schedule [●]

“Formula 1a”

means the formula identified as “Formula 1a” within the annex to schedule [●]

“Formula 2”

means the formula identified as “Formula 2” within the annex to schedule [●]

“GLA”

means the Greater London Authority or any successor in statutory function

¹⁹ This is “A” in Formula 1a.

²⁰ Delete if not applicable.

“Habitable Room”²¹

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 purchasing a London Shared Ownership Housing Unit or renting a London Living Rent Housing Unit (as appropriate) share that London Shared Ownership Housing Unit or London Living 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 Purchaser or a single Eligible Renter, the gross annual income of that Eligible Purchaser’s or Eligible Renter’s Household; and
- (b) in relation to joint Eligible Purchasers or joint Eligible Renters, the combined gross annual incomes of those Eligible Purchasers’ or Eligible Renters’ Households

“Intention Notice”

means a notice in writing served on the Chargee by the Council under paragraph 4.2 of schedule [●] that the Council is minded to purchase the relevant Affordable Housing Units and/or Additional Affordable Housing Units

“London Affordable Rented Housing”

means rented housing provided by an Affordable Housing Provider that has the same characteristics as Social Rented Housing except that it is not required to be let at Target Rents but is subject to other rent controls that require it to be offered to eligible households in accordance with Part VI of the Housing Act 1996 at a rent that is:

- (a) including Service Charges, up to 80 per cent

²¹

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.

of local market rents; and

- (b) excluding Service Charges, no higher than the benchmark rents published by the GLA annually in accordance with the Mayor's Funding Guidance²²

“London Affordable Rented Housing Units”

means the [●] Affordable Housing Units shown on Plan [●] comprising [●] Habitable Rooms to be made available for London Affordable Rented Housing in accordance with [●] of this Agreement together with any Additional Affordable Housing Units which are to be delivered as London Affordable Rented Housing

“London Living Rent Housing”

means rented housing provided by an Affordable Housing Provider that is required to be offered to Eligible Renters on a time-limited tenancy:

- (a) with a minimum term of three years unless a shorter term is requested by the prospective tenant;
- (b) with a break clause allowing the tenant to end the tenancy any time after the first six months of the tenancy with one month's notice;
- (c) at rents not exceeding the relevant maximum rents published by the GLA annually; and
- (d) under which rent increases (in percentage terms) within the term of the tenancy in question will not be more than the percentage increase in the CPI for the relevant period PROVIDED THAT initial rents for subsequent lettings will reset in accordance with sub-paragraph (c) above

“London Living Rent Housing Units”

means the [●] Affordable Housing Units as shown on Plan [●] comprising [●] Habitable Rooms to be made available for London Living Rent Housing in accordance with [●] of this Agreement together with any Additional Affordable Housing Units which are to be delivered as London Living Rent Housing

²² If the local planning authority accepts alternative levels of rent to be genuinely affordable, such housing should be defined as “Affordable Rented Housing” rather than “London Affordable Rented Housing” to ensure accurate monitoring. In addition, the rents secured and the average level of discount to market rents should be specified in this agreement. In the absence of alternative guidance from the local planning authority, the London Affordable Rent benchmarks should apply.

“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
“London Shared Ownership Housing”	means housing offered to Eligible Purchasers to be occupied partly for rent and partly by way of owner occupation on shared ownership arrangements as defined in section 70(4) of the Housing and Regeneration Act 2008 (or any amended or replacement provision) where the shared ownership lessee for the time being has the right to carry out Staircasing and dispose of the unit on the open market and on the basis that annual housing costs, including Service Charges and mortgage payments (assuming reasonable interest rates and deposit requirements): (a) 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 (b) in respect of each London Shared Ownership Housing Unit, must not exceed 28 per cent of the relevant annual gross income upper limit 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) PROVIDED THAT this restriction shall apply only to the first letting of each London Shared Ownership Housing Unit and only if such letting is secured by an Eligible Purchaser within the first three months of the London Shared Ownership Housing Unit being marketed: (i) one-bedroom: £[●]; (ii) two-bedroom: £[●]; (iii) three-bedroom: £[●]; and

(iv) four-bedroom: £[●]²³

and **“London Shared Ownership Lease”** and **“London Shared Ownership Lessee”** shall be construed accordingly

“London Shared Ownership Housing Units”

means the [●] Affordable Housing Units as shown on Plan [●] comprising [●] Habitable Rooms to be made available for London Shared Ownership Housing in accordance with [●] of this Agreement together with any Additional Affordable Housing Units which are to be delivered as London Shared Ownership Housing

“Mayor’s Funding Guidance”

means “Homes for Londoners: Affordable Homes Programme 2016-21 Funding Guidance” published by the Mayor of London in November 2016 or any update or replacement guidance

“Moratorium Period”

means, in each instance where a Chargee has served a Default Notice under paragraph 4.1(a) of schedule [●], the period from (and including) the Date of Deemed Service on the Council of the Default Notice to (and including) the date falling three months after such Date of Deemed Service (or such longer period as may be agreed between the Chargee and the Council)

“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]²⁴

“Open Market Housing Units”

means the Residential Units comprising [●] Habitable Rooms which are to be sold or let on the open market and which are not Affordable Housing Units

“Option”

means the option to be granted to the Council (and/or its nominated substitute Affordable Housing

²³ 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-sales and re-lets should be available to households meeting the AMR upper limit. Homes should be made available through the Homes for Londoners online portal.

²⁴ Amend as appropriate.

	Provider) in accordance with paragraph 4.3 of schedule [●] for the purchase of the Affordable Housing Units and/or the Additional Affordable Housing Units
“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
“Purchased LLR Unit”	means any London Living Rent Housing Unit which is acquired by its tenant (or tenants) or by another Eligible Purchaser and subsequently owned by that tenant (or tenants) or Eligible Purchaser as London Shared Ownership Housing in accordance with [paragraph 5 of schedule [●]]
“Rent Guidance”	means the Guidance on Rents for Social Housing and the Direction on the Rent Standard 2014 issued by the Department of Communities and Local Government in May 2014 or such other replacement guidance or direction or legislation
“Rent Standard”	means the standard relating to rent set by the Regulator of Social Housing from time to time having regard to the Welfare Reform and Work Act 2016, the Rent Guidance and the Direction on the Rent Standard 2014 issued by the Department for Communities and Local Government in May 2014 together with the Rent Standard Guidance published by the Department for Communities and Local Government in April 2015 or such other replacement guidance or direction or legislation
“Residential Units”	means the [●] units of residential accommodation comprising [●] Habitable Rooms to be provided as part of the Development comprising the Open Market Housing Units and the Affordable Housing Units
“Review Date”	means the date of the submission of the Development Viability Information pursuant to paragraph [7] of schedule [●]
“Service Charges”	means all amounts payable by a tenant or owner (as appropriate) of the relevant London Affordable Rented Housing Unit, London Living Rent Housing Unit or London Shared Ownership 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 London Affordable Rented Housing Unit, London Living Rent Housing Unit or London Shared Ownership Housing Unit

“Site”

means [●]

“Social Rented Housing”

means rented housing owned and managed by [local authorities or] Affordable Housing Providers and let at Target Rents

“Social Rented Housing Units”

means the [●] Affordable Housing Units as shown on Plan [●] comprising [●] Habitable Rooms to be made available for Social Rented Housing in accordance with [●] of this Agreement together with any Additional Affordable Housing Units which are to be delivered as Social Rented Housing

“Staircasing”

means the acquisition by a London Shared Ownership Lessee of additional equity in a London Shared Ownership Housing Unit up to a maximum of 100 per cent equity and “**Staircased**” shall be construed accordingly

“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 [●]²⁵;
- (c) construction [of the ground floor slab][to the first floor]²⁶ of [●]²⁷;
- (d) letting of a contract for the construction of [●]²⁸; and
- (e) practical completion of [●]²⁹

²⁵ Specify which building(s).

²⁶ Delete as appropriate.

²⁷ Specify which building(s).

²⁸ Specify which building(s)/phase(s).

²⁹ 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

“Substantial Implementation Target Date”	means the date 24 months from but excluding the date of grant of the Planning Permission
“Sums Due”	means all sums due to a Chargee of the Affordable Housing Units and/or the Additional Affordable Housing Units pursuant to the terms of its Charge including (without limitation) all interest and reasonable legal and administrative fees costs and expenses
“Target Rents”	means rents for Social Rented Housing conforming with the pattern produced by the rents formula set out in the Rent Guidance and subject to the limit on rent changes and rent caps set out therein and subject to indexation as permitted by the [Rent Standard or Rent Guidance] ³⁰ from time to time
“Working Day”	means any day except Saturday, Sunday and any bank or public holiday

works will be delivered within 24 months of grant which gives the Council sufficient comfort that the Developer is committed to delivering the Development.

³⁰ Delete as appropriate. The Rent Standard applies to Affordable Housing Providers while the Rent Guidance applies to local authorities.

Schedule [●]

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 Affordable Housing Tenure Split and the remaining paragraphs of this schedule [●].
- 1.2 The Affordable Housing Units and Additional Affordable Housing Units shall together not exceed [50]³¹ per cent (by Habitable Room) of the Residential Units PROVIDED THAT the tenure split of the Affordable Housing Units across the Development accords with the Affordable Housing Tenure Split.

2 AFFORDABLE HOUSING PROVISION

- 2.1 [Subject to [paragraph 5] below,] []³²

3 EXCLUSION OF LIABILITY

- 3.1 []³³

4 CHARGEES IN POSSESSION

- 4.1 In order to benefit from the protection granted by paragraph [3.●], a Chargee must:
- (a) serve a Default Notice on the Council by delivery by hand to the Council's offices at **[insert address]** during **[specify the Council's office hours]** or using first class registered post to the Council's offices at **[insert address]** in either case addressed to [the Head of Planning and Head of Legal Services]³⁴ of the Council prior to seeking to dispose of the relevant Affordable Housing Units and/or Additional Affordable Housing Units;
 - (b) when serving the Default Notice, provide to the Council official copies of the title registers for the relevant Affordable Housing Units and/or Additional Affordable Housing Units; and
 - (c) subject to paragraph 4.6 below, not exercise its power of sale over or otherwise dispose of the relevant Affordable Housing Units and/or Additional Affordable Housing Units before the expiry of the Moratorium Period except in accordance with paragraph 4.3 below.

³¹ 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).

³² 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.

³³ Insert mortgagee protection provisions.

³⁴ The Council may amend as appropriate.

- 4.2 From the first day of the Moratorium Period to (but excluding) the date falling one calendar month later, the Council may serve an Intention Notice on the Chargee.
- 4.3 Not later than 15 Working Days after service of the Intention Notice (or such later date during the Moratorium Period as may be agreed in writing between the Council and the Chargee), the Chargee will grant the Council (and/or the Council's nominated substitute Affordable Housing Provider) an exclusive option to purchase the relevant Affordable Housing Units and/or Additional Affordable Housing Units which shall contain the following terms:
- (a) the sale and purchase will be governed by [the Standard Commercial Property Conditions (Third Edition – 2018 Revision)] (with any variations that may be agreed between the parties to the Option (acting reasonably));
 - (b) the price for the sale and purchase will be agreed in accordance with paragraph 4.4.(b) below or determined in accordance with paragraph 4.5 below;
 - (c) provided that the purchase price has been agreed in accordance with paragraph 4.4(b) below or determined in accordance with paragraph 4.5 below, but subject to paragraph 4.3(d) below, the Council (or its nominated substitute Affordable Housing Provider) may (but is not obliged to) exercise the Option and complete the purchase of the relevant Affordable Housing Units and/or Additional Affordable Housing Units at any time prior to the expiry of the Moratorium Period;
 - (d) the Option will expire upon the earlier of (i) notification in writing by the Council (or its nominated substitute Affordable Housing Provider) that it no longer intends to exercise the Option and (ii) the expiry of the Moratorium Period; and
 - (e) any other terms agreed between the parties to the Option (acting reasonably).
- 4.4 Following the service of the Intention Notice:
- (a) the Chargee shall use reasonable endeavours to reply to enquiries raised by the Council (or its nominated substitute Affordable Housing Provider) in relation to the Affordable Housing Units and/or the Additional Affordable Housing Units as expeditiously as possible having regard to the length of the Moratorium Period; and
 - (b) the Council (or its nominated substitute Affordable Housing Provider) and the Chargee shall use reasonable endeavours to agree the purchase price for the relevant Affordable Housing Units and/or Additional Affordable Housing Units, which shall be the higher of:
 - (i) the price reasonably obtainable in the circumstances having regard to the restrictions as to the use of the relevant Affordable Housing Units and/or Additional Affordable Housing Units contained in this schedule [●]; and
 - (ii) (unless otherwise agreed in writing between the Council (or its nominated substitute Affordable Housing Provider) and the Chargee) the Sums Due.

- 4.5 On the date falling 10 Working Days after service of the Intention Notice, if the Council (or its nominated substitute Affordable Housing Provider) and the Chargee have not agreed the price pursuant to paragraph 4.4(b)(i) above:
- (a) the Council (or its nominated substitute Affordable Housing Provider) and the Chargee shall use reasonable endeavours to agree the identity of an independent surveyor having at least 10 years' experience in the valuation of affordable/social housing within the London area to determine the dispute and, if the identity is agreed, shall appoint such independent surveyor to determine the dispute;
 - (b) if, on the date falling 15 Working Days after service of the Intention Notice, the Council (or its nominated substitute Affordable Housing Provider) and the Chargee have not been able to agree the identity of an independent surveyor, either party may apply to the President for the time being of the Royal Institution of Chartered Surveyors or his deputy to appoint an independent surveyor having at least 10 years' experience in the valuation of affordable/social housing within the London area to determine the dispute;
 - (c) the independent surveyor shall determine the price reasonably obtainable referred to at paragraph 4.4(b)(i) above, due regard being had to all the restrictions imposed upon the relevant Affordable Housing Units and/or Additional Affordable Housing Units by this Agreement;
 - (d) the independent surveyor shall act as an expert and not as an arbitrator;
 - (e) the fees and expenses of the independent surveyor are to be borne equally by the parties;
 - (f) the independent surveyor shall make his/her decision and notify the Council, the Council's nominated substitute Affordable Housing Provider (if any) and the Chargee of that decision no later than 14 days after his/her appointment and in any event within the Moratorium Period; and
 - (g) the independent surveyor's decision will be final and binding (save in the case of manifest error or fraud).
- 4.6 The Chargee may dispose of the relevant Affordable Housing Units and/or Additional Affordable Housing Units free from the obligations and restrictions contained in paragraphs [1] and [2] of this schedule which shall determine absolutely in respect of those Affordable Housing Units and/or Additional Affordable Housing Units (but subject to any existing tenancies) if:
- (a) the Council has not served an Intention Notice before the date falling one calendar month after the first day of the Moratorium Period;
 - (b) the Council (or its nominated substitute Affordable Housing Provider) has not exercised the Option and completed the purchase of the relevant Affordable Housing Units and/or Additional Affordable Housing Units on or before the date on which the Moratorium Period expires; or

- (c) the Council (or its nominated substitute Affordable Housing Provider) has notified the Chargee in writing pursuant to the Option that it no longer intends to exercise the Option.
- 4.7 The Council (and its nominated substitute Affordable Housing Provider, if any) and the Chargee shall act reasonably in fulfilling their respective obligations under paragraphs 4.1 to 4.6 above (inclusive).
- 5 LONDON LIVING RENT HOUSING UNITS³⁵
- 5.1 At any time during a tenancy of each London Living Rent Housing Unit, the tenant (or tenants) at that given time of that unit may elect to acquire that unit as London Shared Ownership Housing if that tenant is (or, in the case of multiple tenants, all of the tenants together comprise) an Eligible Purchaser.
- 5.2 If the tenant (or tenants) of a London Living Rent Housing Unit elects to acquire that unit as London Shared Ownership Housing pursuant to [paragraph 5.1 above], the Developer shall grant a London Shared Ownership Lease of that London Living Rent Housing Unit to the tenant (or tenants) PROVIDED THAT the tenant remains (or the tenants together continue to comprise) an Eligible Purchaser on the date of the grant of the London Shared Ownership Lease.
- 5.3 On the 10th anniversary of the initial letting of each London Living Rent Housing Unit, if the tenant (or tenants) at that given time of that unit has not elected to acquire that unit, the Developer may continue letting that unit as London Living Rent Housing or, at any subsequent time, sell that unit as London Shared Ownership Housing to an Eligible Purchaser PROVIDED THAT the sale shall only complete after the termination of the current tenancy of that unit as a London Living Rent Housing Unit (if one is in place).
- 5.4 On completion of the grant of a London Shared Ownership Lease of a London Living Rent Housing Unit under paragraph 5.2 or 5.3 above, that unit shall cease to be a London Living Rent Housing Unit and shall become a Purchased LLR Unit.
- 5.5 The Developer shall not Occupy or suffer or permit the Occupation of the Purchased LLR Units other than as London Shared Ownership Housing, save in relation to any Purchased LLR Units in respect of which the relevant Shared Ownership Lessee has Staircased to 100 per cent equity.

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

- 6 VIABILITY REVIEW TRIGGER
- 6.1 The Developer shall notify the Council in writing of the date on which it considers that the 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 book basis to enable the Council to independently assess whether the Substantial Implementation has been achieved and whether it was achieved on or before the Substantial Implementation Target Date.

³⁵ These clauses should only be used if the open market value of each unit (free from the affordable housing restrictions) is less than £600,000. Otherwise, the units should be retained as London Living Rent Housing in perpetuity and this paragraph 5 should be deleted.

- 6.2 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 the Substantial Implementation has been achieved on or before the Substantial Implementation Target Date.
- 6.3 Following the Developer's notification pursuant to paragraph [6.1] of this schedule [●], the Developer shall afford the Council access to the Site to inspect and assess whether or not the works which have been undertaken achieve the 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.
- 6.4 No later than 20 Working Days after the Council receives
- (a) notice pursuant to paragraph [6.1] of this schedule [●]; or
 - (b) if the Council makes a request under paragraph [6.2] of this schedule [●], 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 the Substantial Implementation has been achieved and whether it was achieved on or before the Substantial Implementation Target Date.
- 6.5 If the Council notifies the Developer that the Council considers that the Substantial Implementation has not been achieved then this paragraph [6] shall continue to apply mutatis mutandis until the Council has notified the Developer pursuant to paragraph [6.4] of this schedule [●] that the Substantial Implementation has been achieved.³⁶
- 6.6 The Developer shall not Occupy the Development or any part thereof until:
- (a) the Council has notified the Developer pursuant to paragraph [6.4] of this schedule [●] that the Substantial Implementation has been achieved on or before Substantial Implementation Target Date;
 - (b) the Council has notified the Developer pursuant to paragraph [8.4] of this schedule [●] that no Additional Affordable Housing Units are required; or
 - (c) If the Council notifies the Developer pursuant to paragraph [8.4] of this schedule [●] that Additional Affordable Housing Units are required, an Additional Affordable Housing Scheme has been approved pursuant to paragraph 8.4 or 8.5 of this schedule [●].

³⁶ This allows the Council to determine when Substantial Implementation occurs and therefore when the review takes place.

7 SUBMISSION OF DEVELOPMENT VIABILITY INFORMATION AND OTHER INFORMATION

Where the Substantial Implementation has not occurred before the Substantial Implementation Target Date (as determined by the Council under paragraph [6.4] of this schedule [●] or pursuant to dispute resolution in accordance with paragraph [] of this schedule [●]):

- (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 [6.4] or [6.6] of this schedule [●] that the 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 2 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 [8] and [9] of this schedule [●] shall apply.

8 ASSESSMENT OF DEVELOPMENT VIABILITY INFORMATION AND OTHER INFORMATION

- 8.1 The Council shall assess the information submitted pursuant to paragraph [7] of this schedule [●] and assess whether in its view Additional Affordable Housing Units are required to be delivered in accordance with Formula 1a and Formula 2 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 2 subject to such evidence also being provided to the Developer.
- 8.2 The Council may appoint an External Consultant to assess the information submitted pursuant to paragraph [7] of this schedule [●].
- 8.3 In the event that the Council and/or any 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 any 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 any 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 2.
- 8.4 When the Council or its External Consultant has completed its assessment of the information submitted pursuant to paragraph [7] of this schedule [●], 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.

- 8.5 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 [8.4] of this schedule [●].
- 8.6 If the Council's assessment pursuant to paragraph [8.4] of this schedule [●] 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 2; 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 2;

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.

- 8.7 The Developer shall pay the Council's costs which are reasonably and properly incurred in assessing the information submitted pursuant to paragraph [7] of this schedule [●] including those of the External Consultant within 20 Working Days of receipt of a written request for payment.

9 DELIVERY OF ADDITIONAL AFFORDABLE HOUSING

- 9.1 Where it is determined pursuant to paragraph [8.4] of this schedule [●] that one or more Additional Affordable Housing Units are required the Developer shall not Occupy [more than [●] Open Market Housing Units]³⁷ 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 [8.6] of this schedule [●] to the Council towards the delivery of offsite Affordable Housing within the Council's administrative area.
- 9.2 The Parties agree that the terms of paragraphs [2] to [4] (inclusive) of this schedule [●] shall apply mutatis mutandis to the provision of any Additional Affordable Housing Units.

³⁷ 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.

10 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 2.

11 MONITORING

11.1 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 number and tenure of the Affordable Housing Units by units and Habitable Room.

11.2 The Parties acknowledge and agree that the Council shall report the following information³⁸ to the GLA through the London Development Database as soon as reasonably practicable after the approval of the Additional Affordable Housing Scheme pursuant to paragraph 8.4 or 8.5 of this schedule [●] or, if an Additional Affordable Housing Scheme is not required by the Council, the conclusion of the assessment under paragraph 8.4 of this schedule [●]:

- (a) the number and tenure of the Additional Affordable Housing Units by unit numbers and Habitable Room (if any);
- (b) any changes in the tenure or affordability of the Affordable Housing Units by unit numbers and Habitable Room; and
- (c) the amount of any financial contribution payable towards offsite Affordable Housing pursuant to paragraph 8.6 of this schedule [●].

³⁸ 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.

ANNEX TO SCHEDULE [●]

FORMULA 1a (Surplus profit available for additional on-site affordable housing)¹

$$\text{"Surplus profit"} = ((A - B) - (D - E)) - P$$

Where:

A = Estimated GDV (£)

B = $A \div (C + 1)^2$

C = Percentage change in the Land Registry House Price Index for new build properties for the Council's administrative area from grant of Planning Permission to Review Date (using the latest index figures publicly available) (%)³

D = Estimated Build Costs (£)

E = $D \div (F + 1)^4$

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) (%)⁵

P = $(A - B) * Y^6$

Y = []%, being developer profit as a percentage of GDV for the private residential component [and the Commercial Floorspace]⁷ as determined as part of the review (%)

Notes:

¹ Formula 1a uses the Land Registry House Price Index to derive an assumed application stage GDV and the BCIS TPI to derive assumed application stage build costs. 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.

² Being the assumed application stage GDV for the private residential component and, if relevant, the Commercial Floorspace at the date of planning permission.

³ Being an approximation of the percentage change in the value of the private residential component and, if relevant, the Commercial Floorspace of the development. As an example, If HPI is 345 at date of review and HPI was 275 at date of permission:

$$C = (345 - 275) \div 275$$

$$= 70 \div 275$$

$$= 25.45\%$$

⁴ Being the assumed application stage build costs for the private residential component and, if relevant, the Commercial Floorspace at the date of planning permission.

⁵ 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. As an example, if BCIS TPI is 345 at date of review and BCIS TPI was 275 at date of permission:

$$F = (345 - 275) \div 275$$

$$= 70 \div 275$$

$$= 25.45\%$$

⁶ Being developer profit on change in GDV of private residential component and, if relevant, the Commercial Floorspace.

⁷ Delete if not applicable.

(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.

(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 2 (Additional affordable housing)

X = Additional [London Affordable Rented Housing / Social Rented Housing] requirement (Habitable Rooms)

$$X = ((E * F) \div (A - B)) \div D$$

Y = Additional [London Living Rent Housing / London Shared Ownership] requirement (Habitable Rooms)

$$Y = ((E * G) \div (A - C)) \div D$$

Where:

A = Average Open Market Housing Value (£ per m²)

B = Average Low Cost Rent Housing Value (£ per m²)

C = Average Intermediate Housing Value (£ per m²)

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

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

F = Percentage of surplus profit available for Additional Affordable Housing Units to be used for Social Rented Housing or London Affordable Rented Housing (%)⁸

G = Percentage of surplus profit available for Additional Affordable Housing Units to be used for London Living Rent Housing or London Shared Ownership Housing (%)⁹

Notes:

(A – B) represents the difference in average value of market housing per m² and average value of Social Rented Housing and London Affordable Rented Housing per m² (£)

(A – C) represents the difference in average value of market housing and average value of London Living Rent Housing and London Shared Ownership Housing per m² (£)

(E * F) represents the surplus profit to be used for Social Rented Housing or London Affordable Rented Housing (£)

(E * G) represents the surplus profit to be used for London Living Rent Housing or London Shared Ownership Housing (£)

⁸ To be determined with reference to the Council's Local Plan policy tenure split.

⁹ To be determined with reference to the Council's Local Plan policy tenure split.

$(E * F) \div (A - B)$ represents the additional Social Rented Housing and London Affordable Rented Housing requirement (m²)

$(E * G) \div (A - C)$ represents the additional London Living Rent Housing and London Shared Ownership Housing requirement (m²)