

Delegated Report		Analysis sheet	Expiry Date:	28/08/2013
		N/A	Consultation Expiry Date:	24/08/2013
Officer			Application Number(s)	
Jason Traves/David Morrissey			2013/5050/P	
Application Address			Drawing Numbers	
University College Hospital and Odeon Site 235 Euston Road/Tottenham Court Road/Grafton Way (and related former Middlesex Annexe site, 44 Cleveland Street, W1T 4JT)			See draft decision	
PO 3/4	Area Team Signature	C&UD	Authorised Officer Signature	
Proposal(s)				
<p>S106BA application to modify or discharge affordable housing requirements of the s106 planning agreement signed July 2004 which consolidated agreements associated with the following applications: Application PS9604299R2 dated 19.08.1998 for:</p> <p>1) Redevelopment by the erection of a new University College Hospital of approximately 650 beds, including wards, surgical facilities, outpatients, day care, seminar rooms, laboratories, accident department, radiology, ancillary offices, workshops, storage and associated services, and some 1,000 sq m of A1/A3 floorspace; and</p> <p>2) The provision of car parking and 2 community health facilities within the Odeon site (Grafton Way/Tottenham Court Road W1); Application PSX0005046 dated 28.07.2004 for erection of a building for hospital use (C2) comprising 3 basement levels for car parking, ground floor for community health facilities, and 1st to 5th floors as hospital, and related support accommodation and roof top plant.</p> <p>The proposed modification is to delete clause 4 and related definitions of the planning agreement signed in July 2004 to remove entirely the requirement for affordable housing obligations.</p> <p>[NB: A further application (Ref: 2013/5062/P) has been submitted under S106A of the Town and Country Planning Act for modification and discharge of planning obligations of the s106 planning agreement signed July 2004. The proposed modification is again to delete clause 4 and related definitions of the planning agreement signed July 2004 to remove entirely the requirement for affordable housing obligations. This application is yet to be determined.]</p>				
Recommendation(s):		Refuse s106BA variation application		
Application Type:		Section 106BA - Application to discharge planning obligations		

Conditions or Reasons for Refusal:	Refer to Draft Decision Notice					
Informatives:						
Consultations						
Adjoining Occupiers:	No. notified	42	No. of responses	10	No. of objections	10
			No. electronic	07		
Summary of consultation responses:	See Appendix A					
CAAC/Local groups* comments: *Please Specify	See Appendix A					

Site Description

The application relates to a 2004 Section 106 (“the Consolidated Agreement”) linked to planning permission (Application Ref: PS9604299) granted on 19 August 1998 for the development of a new hospital on a site bounded by Euston Road, Tottenham Court Road, Beaumont Place, Grafton Way and Gower Street and a reserved matters approval for health related development (including underground parking and two community health facilities) on the “Odeon site” at Grafton Way/Tottenham Court Road. The main hospital site is built and operating whilst the Odeon site remains vacant. Further sites related to the agreement include the former Middlesex Hospital Annexe, 44 Cleveland Street. The Cleveland Street site was last used for outpatients and medical related uses, but has been vacant since about 2005.

Relevant History

A more detailed summary of the Relevant History is contained at Appendix B.

However, in broad terms, the application relates to provisions in a Section 106 agreement dated 1st July 2004 (“the Consolidated Agreement”) primarily linked to a planning permission (Application Ref: PS9604299) granted on 19 August 1998 for the development of a new hospital on a site bounded by Euston Road, Tottenham Court Road etc. Uncomplied with planning obligations contained in various s106 agreements made in 1999 and linked to PS9604299 were consolidated into the single Consolidated Agreement in 2004 which also contained obligations linked to permission for development on the Odeon site/Grafton Way development granted on 28 July 2004.

The main hospital site is built and operating whilst the Odeon site remains vacant.

The most relevant requirements of the Consolidated Agreement for the purposes of this report are the requirement for a specified level of off-site affordable housing provision on a nominated site (now identified as the Cleveland Street site).

The Agreement provides for the specified level of this affordable housing to either be arrived at based on a formula set out in the s106 tied to a 4 potential residential sites named in the Agreement OR for a minimum backstop of 30 units to be provided. Additionally the Consolidated Agreement requires a further 1,425 sqm of Affordable Housing (arising from the Odeon scheme.) to be provided.

Because the named sites identified in the Agreement were never built out for residential development, the formula for arriving at the specified number of units has fallen away and only the “backstop” requirement for provision of 30 units is still engaged (plus the requirement for the 1,425 sqm of Odeon Affordable housing.)

The s106BA variation application which is the subject of this Report relates specifically to these requirements which have still not been met. Relevant extracts from the Consolidated Agreement (clause 4 plus the related definitions set out under Clause 2) are at Appendix C.

It should also be noted that the Consolidated Agreement contains the following provision at clause 4.2.1:

“...if the All Affordable Housing units are not completed by 1st June 2010 or has not been transferred to a Housing Association in accordance with the requirements set out in Clause 4.1.4 and 4.1.5 the Council may serve notice on the NHS Trust requiring the NHS Trust to offer the

Council a conveyance transfer or lease (as the case may be) of the Interest in the All Affordable Housing Land¹ as a separate parcel, completely cleared of buildings and in a stable, developable and fully decontaminated state for provision of affordable housing, with vacant possession and free from encumbrances, on no unusually onerous terms and together with all relevant ancillary easements, rights and other matters so that the same may be developed for Affordable Housing for a nominal consideration of £1 and the Owner shall comply with such requirements”.

Relevant policies

NPPF 2012

DCLG Guidance: Section 106 affordable housing requirements - Review and appeal (April 2013)

London Plan 2011

LDF Core Strategy and Development Policies

CS1 Distribution of growth

CS3 Other highly accessible areas

CS5 Managing the impact of growth and development

CS6 Providing quality homes

CS9 Achieving a highly successful central London

CS14 Promoting high quality places and conserving our heritage

CS16 Improving Camden's health and well-being

CS19 Delivering and monitoring the Core Strategy

DP1 Mixed use development

DP2 Making full use of Camden's capacity for housing

DP3 Contribution to the supply of Affordable Housing

DP5 Homes of different sizes

DP6 Lifetime homes and wheelchair housing

DP22 Promoting sustainable design and construction

DP24 Securing high quality design

DP25 Conserving Camden's heritage

Camden Planning Guidance 2011

CPG1 Design

CPG2 Housing

CPG3 Sustainability

CPG8 Planning Obligations

Bloomsbury Conservation Area Appraisal and Management Strategy 2011

Fitzrovia Area Action Plan

[NB: The submission version of the Fitzrovia Area Action Plan is under examination and hearings were held from 2 to 4 July 2013. Proposed modifications have been prepared and are due to be published for consultation in September. After the consultation has concluded, the Inspector will consider the comments received and issue a report on the soundness of the Plan. The emerging Plan is a material consideration at present, but will have relatively limited weight until the Inspector's report

¹ This was either the Obstetrics site on Huntley St (now built on) or Cleveland Annexe; which became the nominated site.

is published. The Odeon and Cleveland Street sites are included as opportunity sites (Sites 6 and 2 respectively), along with a number of other sites controlled by UCLH.]

Assessment

Summary

Having regard to the way events have transpired, the relevant provisions of the Consolidated Agreement at Clause 4 can best be summarised as currently requiring the provision of 30 affordable units, plus the further Odeon provision of 1,425 sqm of affordable rented units on the Cleveland Street Annex site. There is also a sanction contained in the Agreement whereby Camden can acquire the Cleveland Street Annexe for £1.00 in the event of non-compliance.

Clause 4 contains a timescales for obtaining planning permission for the Affordable Housing units, for entering into a lease with a Housing Association (April 2007), and for the units to be completed (1st June 2010).

As noted the requirements of Clause 4 have not been met.

In the view of officers, all of the Affordable Housing requirements in Clause 4 remain relevant as they relate to the specific impacts of the hospital scheme and the non-housing delivery on associated *“residential sites”*. The s106 exists so that the Trust can deliver a minimum level of affordable housing on a site in the area, meeting policy objectives and local expectations which formed part of the justification for accepting such an intensive development in this area.

Nature of Application –Legislative and policy framework

The National Planning Policy Framework (NPPF) states that where obligations are being revised, local planning authorities should take account of changes in market conditions over time and, where appropriate, be sufficiently flexible to prevent planned development from being stalled (para 205).

The Growth and Infrastructure Act 2013 inserted new sections 106BA, BB and BC into the Town and Country Planning Act 1990. This introduced a new application and appeal procedure for the review of affordable housing obligations on planning permissions on the grounds of financial viability.

The legislation has introduced the right for developers to apply to the local planning authority to modify affordable housing requirements set out in s106 agreements where the requirements have made development economically unviable. The legislation indicates that a revised proposal should *“deliver the maximum level of affordable housing consistent with viability and the optimum mix of provision”* (DCLG guidance p. 4).

The local planning authority has 28 days in which to make a determination under Section 106BA unless both parties agree, in writing, to extend this period. As the applicant has also made a separate application under s106A of the Act which has an 8 week statutory determination period a request was made to extend the determination period of the s106BA application to enable both to be considered concurrently. However, the applicant was minded to decline to extend.

There are few examples of this kind of application as it is relatively new. It is useful to focus on the legislative framework and intentions of the legislation.

Against this background, officers' comments are provided to show why in their view this application is unacceptable when assessed against that framework and should therefore be refused.

Section 106BA :Main provisions

*“(2)A person against whom the affordable housing requirement is enforceable **may apply to the appropriate authority—***

(a)for the requirement to have effect subject to modifications,

(b)for the requirement to be replaced with a different affordable housing requirement,

(c)for the requirement to be removed from the planning obligation, or

(d)in a case where the planning obligation consists solely of one or more affordable housing requirements, for the planning obligation to be discharged.”

Officer Comment: This application seeks to completely remove the requirement from the obligation under (2)(A)(c). It does not propose to modify or replace the affordable housing requirement with an alternative.

“(3) Where an application is made to an authority under subsection (2) and is the first such application in relation to the planning obligation—

(a)if the affordable housing requirement means that **the development is not economically viable, the authority must deal with the application in accordance with subsection (5) so that the development becomes economically viable, or**

(b)if paragraph (a) does not apply, the authority must determine that the affordable housing requirement is to continue to have effect without modification or replacement.

...

(5)The authority may—

(a)determine that the requirement is to have effect subject to modifications,

(b)determine that the requirement is to be replaced with a different affordable housing requirement,

(c)determine that the planning obligation is to be modified to remove the requirement, or

(d)where the planning obligation consists solely of one or more affordable housing requirements, determine that the planning obligation is to be discharged.”

Officer Comment: There are no modifications or different affordable housing requirements put forward to consider. As it is not considered that development is economically unviable (see key considerations below) it is considered paragraph (3)(a) does not apply, so the Council is obliged to determine that the affordable housing requirement is to continue to have effect without modification or replacement. The local planning authority does not have powers to modify the obligation in another manner other than as proposed in the application.

This does not prevent the Council from separately negotiating modifications or a variation to the requirements outside of this application process.

“(6)A determination under subsection (5)(a), (b) or (c)—

(a) may provide for the planning obligation to be modified in accordance with the application or in some other way,
(b) may not have the effect that the obligation as modified is more onerous in its application to the applicant than in its unmodified form, and
(c) may not have the effect that an obligation is imposed on a person other than the applicant or that the obligation as modified is more onerous in its application to such a person than in its unmodified form.

...

*(8) In making a determination under this section the authority **must have regard to—***

*(a) **guidance issued by the Secretary of State, and***

(b) where the determination relates to an application to which section 106BB applies, any representations made by the Mayor of London in accordance with that section.”

...

(13)

- **“the development”, in relation to a planning obligation, means the development authorised by the planning permission to which the obligation relates;...**”

Officer Comment: This means the guidance issued by Government will be the key material consideration. The definition implies that the development in question is the original planning permission relating to the main hospital development and the Odeon site and the related residential and affordable housing sites. The development does not constitute the Cleveland Street site alone and for which no individual planning permission exists. There is no evidence submitted to show that the development as defined in the Act is unviable.

The application also seeks to justify that an affordable housing requirement for the Cleveland St site alone is unviable in the absence of any scheme or appraisal as required by Government guidance. This is irrelevant given what constitutes development under the Act.

Assessment of the Application -Key Considerations/DCLG Guidance

Section 106BA of the 1990 Act does not direct the determining authority to have regard to the development plan for the purposes of determining an application or appeal in respect of the proposed modification or discharge of a planning obligation. The new provisions say that the determining authority must have regard to guidance issued by the Government.

DCLG Guidance: Section 106 affordable housing requirements-Review and appeal (April 2013)

This provides information for applicants and local planning authorities on the purpose and scope of these new measures. Annex B sets out the procedures for applications to the local planning authority (under s106BA) and for appeals to the Planning Inspectorate (under s106BC). S106BA applications must be determined with regard to this guidance.

The guidance emphasises the role of the NPPF and the need for a planning system to enable sustainable development. The guidance states on p.2 that *“It [the NPPF] also requires that local planning authorities should positively seek to meet the development needs of their area.”*

Officer Comment: This would include seeking mixed and balanced communities, promoting new

housing and seeking contributions to the supply of affordable housing as discussed below.

The DCLG guidance further states:

*“2. Unrealistic Section 106 agreements negotiated in differing economic conditions can be an obstacle to house building. The Government is keen to encourage development to come forward, to provide more homes to meet a growing population and to promote construction and economic growth. Stalled schemes due to economically unviable affordable housing requirements result in no development, no regeneration and no community benefit. **Reviewing such agreements will result in more housing and more affordable housing than would otherwise be the case.**”*

Officer Comment: Removing the requirement here will remove the only existing mechanism that currently ensures the Cleveland Street site delivers any affordable housing and a community benefit in the form of affordable housing. Furthermore, no financial information has been submitted to demonstrate that affordable housing is unviable and that viability is the reason why affordable housing has not been delivered to date in line with the planning obligation entered into, rather than other reasons that may have formed part of UCLH’s decision making process.

“4. The new application and appeal procedures do not, in any way, replace existing powers to renegotiate Section 106 agreements on a voluntary basis. The application and appeal procedure will assess the viability of affordable housing requirements only. It will not reopen any other planning policy considerations or review the merits of the permitted scheme.”

Officer Comment: This section makes clear that it is still open to the parties to negotiate an acceptable and viable scheme for the Cleveland Street site through a future application and/or an agreed variation to the original S106 agreement. It should be noted that there is a pre-application proposal which UCLH is in the very early stages of presenting but it is a long way off from being in an acceptable form or to a level of detail that the council could support. Also, no viability information has been presented to date.

Paragraph 4 makes clear that the s106BA procedure is to consider viability only. It further makes clear that the s106BA procedure is not a means to revisit policy or the scheme merits.

The only consideration for this application is whether or not the affordable housing requirement is unviable. It is considered that the application does not demonstrate (nor does it specifically claim) that the affordable housing requirement is unviable. This is evidenced by the stated intention to establish an acceptable and viable amount of affordable housing through a future application. It is noted again that no financial viability information has been submitted to assess this application.

Instead, this application claims that development is not viable due to the £1 clause preventing the sale of a site. This obligation, which was freely entered into, rests with the Trust. This is a related s106 matter, but is a different and separate matter to the economic viability of the affordable housing requirement. Therefore, the £1 clause is not a matter for the s106BA procedure.

The guidance further states:

*“6. An application may be made to the local planning authority for a revised affordable housing obligation. **This application should contain a revised affordable housing proposal, based on prevailing viability, and should be supported by relevant viability evidence.** The local planning*

authority may prepare its own viability evidence or provide commentary on the evidence submitted in support of the application.”

Officer Comment: There is no revised affordable housing proposal to assess. The stated intention to submit a new planning application is not evidence that any affordable housing will be built. No viability evidence has been submitted, only a letter from BNP Paribas offering an opinion about the effect of the £1 clause on the ability of the Trust to sell the site. Although, this may or may not affect the willingness of some prospective purchasers to buy the site, this does not mean the site is “unmarketable and undevelopable” as claimed, nor does it support the applicant’s assertion that “the affordable housing obligations blight the site”.

The application simply does not provide any viability appraisal evidence to demonstrate that the development and the affordable housing requirement is economically unviable. This is the only test. In the absence of any viability information and in light of UCLH’s activity in the borough, the council is left to conclude that the scheme remains a viable concern and therefore, must determine that the affordable housing requirement is to continue to have effect without modification or replacement and refuse the application.

Evidence and Viability Test

The DCLG guidance does not prescribe a methodology for viability assessment, but says it should reflect the differing approaches used in the industry.

The guidance (paras 11-12 p. 4) says “**[t]he developer will need to demonstrate ... that the affordable housing obligation as currently agreed makes the scheme unviable in current market conditions**” and that “**[a] viable affordable housing provision should be proposed**”.

It further says “**[t]his should deliver the maximum level of affordable housing consistent with viability and the optimum mix of provision. The proposal may consider whether adjustments should be made to the affordable housing tenure and mix and, where relevant, phasing may also be considered. Timing and level of off-site affordable housing contributions may also be considered, as may any other aspect of the affordable housing requirement.**”

Officer Comment: The application does not offer any alternative proposal other than removal of the affordable housing requirement.

The guidance further states:

“13. The developer will need to submit clear, up-to-date and appropriate evidence. Wherever possible, this should take the form of an open book review of the original viability appraisal and should clearly demonstrate, by reference to evidence, that the proposals are not viable in current market conditions. The “original viability appraisal” is that which is the most recently agreed by the local planning authority and developer.

14. In those cases where an original viability appraisal was not prepared prior to planning permission being granted, the developer must clearly demonstrate through evidence why the existing scheme is not viable. A proposal to bring the scheme into viability should be submitted.”

Officer Comment: No such evidence has been submitted to demonstrate the affordable housing requirement is economically unviable. In this case there was no viability appraisal submitted as part of the original application and there is no financial viability justification why this scheme is unviable

in the present day. The application to remove the requirement in its entirety is not supported by an alternative viable proposal.

Form of viability evidence

The guidance sets out how viability appraisals should be prepared and considered. Annex A to the guidance sets out the key variables in reassessing appraisals.

It includes:

“16. In most cases, developers should not be required to provide completely new viability appraisals to support applications and appeals under Sections 106BA and 106BC. The starting point for reassessing viability will be a review of the original viability appraisal (if any) at the time planning permission was granted (and any subsequent appraisals carried out in relation to any modifications of the relevant Section 106 agreement), in whatever form it was carried out.”

“20. The local planning authority may undertake its own viability appraisal with supporting information and submit this as evidence at appeal.”

Officer Comment: No viability appraisal was undertaken or has been submitted for the original permitted development, nor to support a revised proposal. The Trust have not supported their application by any form of appraisal.

In contrast, the council’s Fitzrovia AAP Viability and Deliverability Study (documents FED3 and FED4 of the examination documents) provide an assessment of viability to support the plan and states that opportunity sites, including the Cleveland Street site, are achievable having regard to economic viability.

The Council acknowledges the importance of viability and flexibility in Parts 1 and 7 of the submitted Fitzrovia Area Action Plan. It is a consideration that runs through the entire document in avoiding overly prescriptive solutions and acknowledging that the viability of development will be taken into account when proposals come forward. This flexibility is maintained within the approach to opportunity sites within the Fitzrovia Area Action Plan.

In respect of Cleveland Street site the study summarises viability as follows:

“This site is owned by UCL Hospital Trust. UCLH are understood to be keen to progress a redevelopment scheme on the site, and have commissioned design work for medical uses. Other development options may be under consideration, as reflected by previous planning applications for the site. An indicative viability analysis on the basis of an indicative Masterplan drawn up by LBC indicates that development would be viable and could deliver a £18 million residual value for a residential scheme with 50% affordable housing or the provision of 30 social rented homes, as required under a pre-existing s106 agreement. There are some issues surrounding the Grade II Listed building on part of the site, waste water infrastructure and the opening up of the Bedford Passage, but redevelopment is deemed to be deliverable within the next 5 years and viable subject to agreement over the level of affordable housing provision.”

Therefore, in the absence of any financial viability evidence with which to consider this s106BA application and in light of the activity of UCLH in the borough, the council is left to conclude that the scheme is viable and must determine that the affordable housing requirement is to continue to have effect without modification or replacement and refuse the application.

Guidance Annex B – Procedural Note: applications and appeals

The procedural note states:

“2. In all cases, applicants should submit evidence that the affordable housing element of the existing Section 106 agreement means that the scheme is unviable, and include a proposal for the maximum level of affordable housing consistent with viability and the optimum mix of provision. This should clearly identify the nature and form of the proposed change. Evidence, including that provided for the original Section 106 agreement, should be provided in accordance with this Guidance to support the application.”

Officer Comment: As stated above there is no affordable housing scheme and no evidence that the affordable housing element is unviable. Therefore, pursuant to s106BA, the council must determine that the affordable housing requirement is to continue to have effect without modification or replacement and refuse the application.

Other Considerations

The Trust’s submission states in section 12, p.8:

“This is not a usual viability argument where one can look at the figures for a scheme and decide on the most appropriate level of affordable housing, but it is nonetheless a viability issue.”

It claims that the agreement makes development unviable because the risk of the s106 Clause 4.2 (the £1 buy right for the council) being enforced means that funding cannot be obtained. However, this application does not dispute that the primary purpose of the obligation, the affordable housing, is not viable and could not be delivered.

The Trust has breached the terms of the agreement. This is not a matter of viability. It is a matter of contract and enforceability which is not relevant to the s106BA procedure which is solely concerned with viability.

However, the Trust is seeking to use this s106BA procedure to remove obligations so that they can dispose of the site, not to guarantee that a viable level of affordable housing can be achieved. This is not a relevant or appropriate application of the s106BA procedure. It is further noted that the potential to enforce the agreement and the opportunity to negotiate a variation (as encouraged by Government) to assist delivery would be overridden if this application were successful.

The Trust’s “Revised Offer” (section 13.p.9)

It is proposed by the Trust that clause 4 of the Consolidated Agreement be removed in accordance with Section 106BA of the 1990 Act. The submission says removal is appropriate for following reasons:

Trust’s Reason 1

“1. The obligation to provide the affordable housing by a specified date has been frustrated by the absence of an approved scheme to which its provision was tied and it would be a mistake to repeat that situation by imposing a similar but extended date for the provision of the affordable housing.”

Officer Comment: It should be noted that it took approximately two years before the nominated Cleveland Street site was even confirmed by the Trust. The reasons given for non-delivery would

not have arisen if they had expedited the obligation with more urgency. It is in the Trust's gift to deliver the affordable housing in accordance with the agreement they freely entered into. Economic viability is the only basis on which to consider a revised offer as part of the s106BA procedure. No evidence has been provided that the scheme (i.e. the sites covered by the 2004 planning agreement) is unviable and in light of the activity of UCLH in the borough, the council is left to conclude that the scheme is viable and must determine that the affordable housing requirement is to continue to have effect without modification or replacement and refuse the application.

Trust's Reason 2

"2. In respect of the Odeon Site provision there was never a policy justification for the affordable housing requirement in the first place and in the case of the main Hospital requirement the Residential Sites, which were the basis for the requirement at the time, were subsequently either left undeveloped, developed for hospital use or were built out to provide their own on site affordable housing. In fact it should be noted that 20 affordable units have already been provided on one of the Residential Sites. The obligation to provide 30 units as a minimum should therefore have been amended to take account of the 20 provided at the time."

Officer Comment: As previously stated, section 4 of the DCLG guidance states that the s106BA procedure "...will assess the viability of affordable housing requirements only. It will not reopen any other planning policy considerations or review the merits of the permitted scheme." Therefore, comments about policy justification or otherwise are not a relevant consideration for the s106BA procedure.

However, what is relevant is that the above statement confirms that the Trust have not met their affordable housing obligations. Hence there is a need for the council to have the back stop position on the nominated site to ensure the delivery of affordable housing in accordance with the agreement freely entered into by both parties.

The example the Trust refers to relates to the former nurses home at 1-9 Huntley St. The committee report relating to the main Hospital application stated that, in order to maximise the value from the disposal of the residential sites, the Council agreed that the Affordable Housing requirement for the housing sites would be set at 25% of the total number of *new* residential units provided on these sites, or 30 units, whichever was greater.

The s106 specifically requires the 25%/30 unit calculation to be based on any *net increase* in residential units at Huntley Street, precisely because it was already in housing use (as nurse's flats with lawful C3 use as 54 self-contained units).

1-9 Huntley St was bought by English Partnerships as part of a regional affordable housing scheme, but then sold it on to Barratts. It was previously 54 self-contained nurse's flats, which is key worker housing and falls within the definition of affordable housing in Camden Development Policies 2010. The refurbishment works approved in 2007 resulted either in a decrease in number of units from 54 to 53 or at most 54 units have been refurbished. Therefore, there was no net gain towards fulfilling part of the s106 planning obligation.

No new units were created and no new affordable units. The amount of key worker affordable housing floorspace actually went down through the sale and subsequent conversion by Barratts.

The s106 also requires the 30 affordable units to be of socially rented tenure for nominations. However, the Barratts scheme included only shared ownership units for sale (and not secured via s106). The units created are not net gain and the amount of affordable key worker housing floorspace has gone down through the sale and subsequent conversion by Barratts.

It is incorrect to rely on this particular scheme to revise down or indeed remove entirely the affordable housing obligation.

Therefore, the existing requirements of the s106 obligation are yet to be fulfilled by the Trust.

Trust's Reason 3

“3. Any future affordable housing requirement for the Site should be secured through the application of policy subject to viability considerations and the relevant amount of affordable housing established in that way and set out in a new Section 106 Agreement attached to an approved development.”

Officer Comment: The removal of the obligation does not secure any future affordable housing in the absence of an approved scheme with a related agreement.

Trust's Reason 4

“4. The £1.00 penalty clause at clause 4.2 should not be re-imposed. If a Section 106 Agreement is entered into as part of a future development of the Site (as the Council can require) then its enforceability can be secured in a more industry acceptable fashion which does not deter developers. The provision of affordable housing can then be linked to the provision of private residential units in a way that developers and funders find acceptable and understand.”

Officer Comment: The current £1 clause 4.2.1 has an obvious value to the local planning authority as an enforcement mechanism in the absence of an approved scheme and renegotiated terms, where alternative mechanisms could otherwise be put in place to secure the affordable housing. This application does not seek to modify the obligations or suggest alternatives. It seeks to delete the whole requirement.

What was envisaged by the agreement was that either the housing would be provided by the Trust or the site be sold for £1 to enable the Council or a Housing Association to deliver the obligation. That has not changed, being an obligation freely entered into by the Trust. The listing may affect how the housing could subsequently be provided, but the Trust entered into the 2004 Agreement freely and in full knowledge of its obligations. It is in the gift of the Trust to deliver on its obligations that it freely entered into. However, for whatever reasons, it took approximately two years for the Trust to nominate one of the two alternatives where affordable housing would be provided.

Now, the Trust is in breach of its obligations and the £1 clause is supposedly putting off potential purchasers. But, this does not mean a viable housing development cannot be delivered. It simply affects who might deliver it if it is enforced.

Trust's Reason 5

“5. By removing clause 4 the Council is in no worse a position than it is currently since the Council can apply policy subject to viability thereby obtaining the maximum appropriate level of affordable housing when considering an application for redevelopment of the Site.”

Officer Comment: As stated earlier, there is no approved scheme or alternative mechanism in place to secure any affordable housing outside of the current obligation. No alternatives are offered. If indeed an alternative was provided, there is no viability evidence to justify why the current

obligation should be changed having regard to s106BA. Nevertheless, removal of the obligation places the authority in a worse position.

Trust's Reason 6

“6. If the Council genuinely wants to see the Site redeveloped by the conventional development sector and affordable housing provided on the Site then it is essential that the current Clause 4 is removed and ultimately replaced in the future with an affordable housing obligation tied to a planning permission.”

Officer Comment: As it currently stands and in the absence of any viability information to demonstrate otherwise, the obligations could still deliver the affordable housing. Until delivered the Trust is in breach of its obligations.

The Trust could for example, demonstrate a commitment to the delivery of the housing with a binding requirement forming part of a sales agreement alongside a revised s106 agreement. This would tie a future owner into the obligation by these mechanisms. But this is not offered.

In the absence of evidence to the contrary, the council considers that the obligations could be delivered, albeit with revised timescales given that those previously nominated have been surpassed. Such arrangements could have been separately negotiated through a deed of variation given that this is not possible via the s106BA procedure. This opportunity had been raised with Trust prior to submission of this application.

This approach is considered to offer more certainty for all parties. It should be noted that 3 criteria are important to the council in any renegotiation:

- (a) Enabling a developer to deliver a clearly understood amount of affordable housing on the site;
- (b) Having mechanisms to ensure delivery of the obligation promptly and to clearly nominated deadlines; and
- (c) Retaining an effective mechanism in the form of a sanction to enforce in the event of failure to deliver and that falls away when stages of the obligation are fulfilled.

This is what the current s106 agreement provides for and what both parties freely entered into. Any revised s106 obligation needs to address these key points for the council to be party to it. This application and the *“revised offer”* of removing all affordable housing requirements clearly does not. It does not ensure affordable housing delivery is maximised, it has not been justified on viability grounds and is therefore unacceptable having regard to the provisions of s106BA.

Conclusion

The Trust is seeking by this application to remove all obligations for affordable housing. They are also seeking to remove a further clause that currently enables the council to purchase the site for £1 if the obligations are not met. Whilst the Trust is seeking to consider how this obligation relates to the Cleveland Street site in isolation, this obligation relates to the consolidated UCLH planning agreement of 2004 and which secured the affordable housing obligations.

In seeking to remove entirely the affordable housing obligations, the s106BA procedure only enables affordable housing obligations to be modified if the obligation is unviable. The procedure also effectively creates an expectation that the trust should consider if there is any alternative that is viable and if so, to nominate that alternative. This has not happened. Also, in light of the activity of UCLH in

the borough, delivering other aspects of the original permission, the council is left to assume that the scheme is viable. Therefore, pursuant to the s106BA clauses, the authority must determine that the affordable housing requirement is to continue to have effect without modification or replacement and refuse the application.

In regards to the £1 clause which gives the Council the right to purchase the site if the obligation is not delivered and which the trust is seeking to remove, this is a separate matter. The affordable housing obligation and whether or not it is viable, is the sole, relevant consideration of the s106BA procedure. The £1 clause is not. Nor are the other various comments made in the Trust's case to remove the affordable housing obligation and which do not relate to viability.

The obligation has not prevented the Trust from building the main hospital, progressing with other health related uses on other sites and the sale of surplus sites. It has not stalled the development of the permitted scheme which the obligation relates. The result being that the Trust has received all the benefits of the permission and through the sale of sites which have not delivered any new affordable housing and failed to fulfil this key obligation.

As it stands, there is no viability issue evidenced by the Trust in their application, only the breach of the obligations they freely entered into. This is not a matter relevant to or resolvable by the s106BA procedure.

Instead, it should be noted that the current situation between the parties could be explored by informal discussion ahead of a deed of modification of the 2004 agreement. This is a different and separate process. This offer was made to the Trust before this application was received.

However, in the context of this s106BA application, in the absence of any evidence that the affordable housing is unviable, as well as the absence of an alternative put forward by the Trust that is, the authority must determine that the affordable housing requirement is to continue to have effect without modification or replacement and refuse the application.

Legal Comments:

Legal Comments are incorporated in the Report.

Recommendation: Refuse variation of the s106BA variation

APPENDIX A – CONSULTATION RESPONSES

Site notices were displayed from 09/08/2013 until 22/08/2013

05 letters of objection received with the following comments:

- Support for the preservation of the listed work house on Cleveland Street site;
- Concern that Middlesex Hospital buildings have largely been lost already;
- Reference made to the obligations contained in the 2004 planning agreement between UCLH and the council. In particular, concern that other sites such as the Odeon have been allowed to remain undeveloped whilst the sensitive Cleveland Street site comes forward for redevelopment;
- Reference is made to the application supporting documents which quote the NPPF as stating that planning needs to support sustainable economic growth. The objector is therefore questioning why, conversely, UCLH are keeping suitable sites vacant such as Odeon and Arthur Stanley and instead choosing to develop the more sensitive Cleveland Street site;
- Critical of the proposed justifications for relieving UCLH of its affordable housing obligations namely, that they are not a developer, have exercised poor judgement and have been caught

out by factors such as the recession and the listing of the workhouse;

- Opinion that the original scheme was a gross overdevelopment in a conservation area, that affordable housing provision formed part of the justification why it was approved and now UCLH is seeking to remove this obligation;
- Opinion that the neglected workhouse (Cleveland Street) site has restoration project potential;
- Opinion that were the council to agree to remove the clauses of the agreement, that it would be liable for what happens to the Cleveland street workhouse;
- Opinion that the current s106 provisions are invaluable means to secure the full affordable housing contribution;
- Opinion that a restoration proposal on the Cleveland street site might well accommodate 5-10 affordable dwellings and 30 modern flats could be easily accommodated at the Arthur Stanley House site;
- Concern that the supporting documents are from overseas advisors and that the proposals seek to serve overseas investment interests;
- Suggestion of bringing the existing buildings back into use;
- Opinion that its time call a halt to development in Fitzrovia that is out of scale, intensive and plain ugly; and
- Development of the application site and the neighbour [visually] blights the area.

In addition, 05 letters from local groups were received with the following comments:

Charlotte Street Assoc

- Reference to timescales and obligations imposed in the s106 planning agreement and suggesting that, had they been adhered to by UCLH, the affordable housing would have been delivered before the listing of the workhouse;
- Concerned that the applicant is not serious about honouring their obligations given they are raising issue with the certificate of immunity from listing for wing blocks as a reason why they cannot commence on site;
- Opinion that viability cannot affect the legal agreement as UCLH paid nothing for this site and have already secured all the [development] benefit from the legal agreement;
- Opinion that the need for affordable housing is even more urgent currently;
- Opinion that the listing of the workhouse does not prevent a high quality residential scheme coming forward; and
- Suggest the council presses for a proposal that conforms with the s106 obligations and planning policy. Otherwise, the council should invoke the £1 provision in the planning agreement and acquire the site.

Fitzrovia Trust

- Objects to the removal of affordable housing clauses because:
- No evidence that the scheme is unviable;
- In contrast, the Trust quotes market trends and national figures which they suggest indicates a buoyant market;
- No site marketing evidence has been supplied;
- Opinion that positive value could still be achieved despite the listing of the workhouse;
- Suggestion that the council exercises the £1 provision of the s106;
- Comment that the s106 was signed with the affordable housing requirement in place and that the commitment is now being reneged upon, noting in particular that former and current employees were displaced in the redevelopment of the UCLH portfolio of sites over the last 9 years; and
- No convincing case to release UCLH from its affordable housing obligation.

UCL c/- planning agent representative

- Confirms UCL and UCLH are separate institutions, with separate land ownerships but do work closely on various initiatives;
- Mentions UCL's land interests in the area and involvement in the Fitzrovia Area Action Plan steering group;
- Notes a pre-emptive right over the site was agreed for £1 more than any offer accepted by the Trust. This right expires Dec 2015;
- UCL agrees with the financial viability consultant BNP that no developer will purchase until the £1 clause in the s106 is removed;
- But does not agree with DAC Beecroft assertion that it is unmarketable and undevelopable because of the affordable housing obligation blights the site; and
- Notes UCL is a possible purchaser of the site so as it can further develop the university.

South Bloomsbury Tenants Residents Assoc

- Imperative that the affordable housing obligations are maintained at a time when there is a huge shortage.

Fitzrovia Neighbourhood Association

- For UCLH to suggest that the heritage listing blocks the site from being marketed and not being viable for development is a nonsense. The site is located in an area that has experienced rising land values and high demand;
- UCLH complain about uncertainty and ambiguity, yet it is in their gift to remedy this by securing a planning permission for the Cleveland Street site;
- Socially-rented housing is much needed in Fitzrovia and this section 106 agreement recognises this; and
- If UCLH are not willing to honour the 106 agreement then Camden Council should immediately exercise its right to acquire sufficient land from UCLH.

APPENDIX B - SUMMARY OF SITE HISTORY

The application relates a 2004 Section 106 ("the Consolidated Agreement") linked to planning permission (Application Ref: PS9604299) granted on 19 August 1998 for the development of a new hospital on a site bounded by Euston Road, Tottenham Court Road, Beaumont Place, Grafton Way and Gower Street and a reserved matters approval for health related development (including underground parking and two community health facilities) on the "Odeon site" at Grafton Way/Tottenham Court Road. The main hospital site is built and operating whilst the Odeon site remains vacant.

This permission was subject of three separate agreements relating to:

- (a) Off site affordable housing;
- (b) The two community health facilities and other obligations; and
- (c) A unilateral undertaking for a new community centre.

The main hospital and maternity wing was built in two phases commencing in 2001 and completing in 2008. In the meantime detailed proposals for the Odeon site (Ref: PSX0005046) were submitted in 2001 and approved by committee in February 2002, subject to completion of a s106 agreement.

As the timescales for delivering previous obligations had been affected and as some circumstances had changed since the original permission and related agreements, in order to amend all the relevant requirements and amended delivery deadlines all previous s106 agreements were consolidated into the Consolidated Agreement - a single agreement dated 1 July 2004. The agreement is between the Council and the University of London NHS Foundation Trust ("the Trust"). The related Odeon site/Grafton Way development was granted permission on 28 July 2004.

The 2004 Consolidated Agreement, which is the subject of this application, carried forward both the previous obligations related to the main hospital development (Phases I and II) and the approved Odeon site proposals, and contains a number of requirements, including:

- Off-site affordable Housing provision for a minimum of 30 units, on a site to be nominated and to be calculated based on a formula set out in the s106. The Cleveland Street site was finally nominated in May 2006 and an additional 1,425 sqm related to the Odeon scheme was calculated;
- A Community Centre which was created at John Astor House and now leased to the Council and occupied;
- A Centre for Independent Living which was to have been part of the Odeon scheme, however, the latest proposal is to part fund the Greenwood Centre project;
- Mental Health Resource Centre(MHRC)-this was also to have been part of the Odeon scheme, but the last proposal was to part fund rebuilding a facility on Tottenham Mews ; and
- Car Parking on the Odeon site for 140 cars to service the main hospital.

A number of the obligations have still not been met and the officers have been involved in long running negotiations to find ways for the obligations can be delivered in the light of changing circumstances and considering appropriate and reasonable alternatives. For example, the Odeon site scheme has not completed and a new medical scheme is being prepared in line with the emerging Fitzrovia Area Action Plan.

This current s106BA variation application relates specifically to the affordable housing requirements contained in the 2004 planning agreement at paragraphs 4.1 - 4.5. Also, the related definitions as set out under Clause 2 of the agreement.

Summary of the Affordable Housing Obligation

The background to this s106 requirement was that the new University College London Hospital was part of a PFI (Private Finance Initiative) project. The business case/funding model for the project was dependent partly on the disposal and redevelopment of surplus hospital sites. The Council's policy in the Fitzrovia area at the time of the original permission was that proposals to increase land for hospital use should be balanced with some form of commensurate release of other hospital land for residential development and a number of sites were identified (See 1997 committee report and subsequent unilateral and s106 agreements).

The 1997 committee report identified "a unique arrangement" in which a 25% affordable housing quota would be delivered off-site, related to the potential future private development across residential sites including the Cleveland Street site.

On the basis of an, as yet, unknown quantum of future development of these released sites a 25%/ minimum / 30 unit stipulation was agreed between the parties.

The consolidated 2004 agreement reiterated this affordable housing provision - again at 25% of any residential developments across four named residential sites and a minimum 30 affordable (rented) units would need to be provided. Given that planning permission had been granted for a development on the Odeon site, the 2004 agreement also incorporated a requirement to provide a further off-site provision of 1,425 sq m of affordable homes to rent. The Odeon site development has never been built out and sits vacant. It should be noted that the Trust are progressing their Proton Beam Therapy scheme proposal on the site in line with the emerging Fitzrovia Area Action Plan.

The back stop minimum requirement of 30 affordable units and 1,425sqm would have been in the event that the policy objective of seeing other sites released for new residential development, which could potentially provide new affordable housing, did not materialise. This has proved to be the case. The four named sites have delivered no new affordable housing:

- The Cleveland Street site – In Trust ownership and still vacant: the nominated affordable housing site;
- 1-9 Huntley Street – A block of 54 nurses flats sold in 2004 and refurbished as 33 private units and 20 shared ownership units;
- Arthur Stanley House – In (partial) Trust ownership and vacant -no housing; and
- The Obstetrics site – Developed as the UCL Macmillan Cancer Centre-no housing.

The Council therefore relies on this fall back position for a minimum amount of affordable housing. There is no similar mechanism apart from the s106 for ensuring a minimum level of affordable housing being delivered on a site in the area. The deadline for meeting the obligation being June 2010 has passed.

The s106 also contains clause 4.2.1 that states:

“...if the All Affordable Housing units are not completed by 1st June 2010 or has not been transferred to a Housing Association in accordance with the requirements set out in Clause 4.1.4 and 4.1.5 the Council may serve notice on the NHS Trust requiring the NHS Trust to offer the Council a conveyance transfer or lease (as the case may be) of the Interest in the All Affordable Housing Land² as a separate parcel, completely cleared of buildings and in a stable, developable and fully decontaminated state for provision of affordable housing, with vacant possession and free from encumbrances, on no unusually onerous terms and together with all relevant ancillary easements, rights and other matters so that the same may be developed for Affordable Housing for a nominal consideration of £1 and the Owner shall comply with such requirements”.

At clause 4.3.1, if the parties agree, the s106 allows for a payment *in lieu* of up to 5 affordable housing units out of the 30 unit requirement. Clause 4.3.2 also says that if the nominated land cannot accommodate the affordable housing units, it allows for a payment *in lieu*.

² This was either the Obstetrics site on Huntley St (now built on) or Cleveland Annexe; which became the nominated site.

APPENDIX C: EXTRACTS FROM THE CONSOLIDATED SECTION 106 AGREEMENT

2. DEFINITIONS AND OPERATIVE PROVISIONS

In this Agreement the following expressions (arranged in alphabetical order) shall unless the context otherwise requires have the following meanings:

- | | | |
|-----|-----------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2.1 | the "Act" | means the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991) |
| 2.2 | "Affordable Housing" | means low cost subsidised housing provided by a Registered Social Landlord or the Council available for rent to people nominated by the Council through its housing allocation scheme who cannot afford to occupy homes available on the open market |
| 2.3 | "Affordable Housing Units" | the low cost and subsidised units of Affordable Housing to be provided on the All Affordable Housing Land in connection with the Original Planning Permission |
| 2.4 | "Agreement" | means this deed |
| 2.5 | "All Affordable Housing Land" | means the area of land to be ascertained in accordance with Clauses 4.1.2 being the area of land reasonably required to accommodate the Affordable Housing required to be provided in respect of the Original Planning Permission and the Odeon Affordable Housing |
| 2.6 | "All Affordable Housing Land Consents" | means all licences, consents, permissions and approvals necessary for the Developer lawfully to demolish and clear (as necessary) all buildings on the All Affordable Housing Land and to construct and use the All Affordable Housing Units |
| 2.7 | "All Affordable" | means the Affordable Housing Units and the |

	Housing Units”	Odeon Affordable Housing
2.8	“the “Blue Land”	means that part of the Property shown coloured blue on the Location Plan being Phase 2 of University College London Hospital Grafton Way London W1
2.9	“the Brief for the Centre for Independent Living”	means the brief appended hereto at Schedule 1 marked the “Brief for the Centre of Independent Living
2.10	“the Brief for the Mental Health Resource Centre”	means the brief appended hereto at Schedule 2 marked “Brief for the Mental Health Resource Centre”
2.11	“the Brown Land”	means that part of the Property shown coloured brown on the Location Plan being Phase 1 of University College London Hospital Euston Road London W1
2.12	the “Centre for Independent Living”	means an area comprising approximately 670 square metres to be constructed and fitted out for use by the Council as a centre for independent living together with a two bedroom flat and 15 car parking spaces to be created on the Odeon Site as part of the Odeon Site Development and as required by the Original Section 106 Agreement
2.13	“the Centres”	means the Centre for Independent Living and the Mental Health Resource Centre
2.14	Fitzrovia Community Centre Certificate of Completion	means the certificate to be issued by the appropriately qualified person responsible for supervising the relevant construction contract certifying that the Fitzrovia Community Centre has been practically completed for the purposes of the construction contract pursuant to which the

said Fitzrovia Community Centre shall have been constructed

- 2.15 **"Community Centre"** means the community centre for the local people in Fitzrovia at the John Astor Site in accordance with the Community Centre Brief
- 2.16 **"Community Centre Brief"** means the brief for the Community Centre appended hereto at Schedule 4
- 2.17 **"Council"** means the London Borough of Camden of Town Hall, Judd Street, London WC1H 9LP
- 2.18 **"Green Travel Plan"** means the plan designed to promote green travel to and from the NHS Trusts properties, appended at Schedule 7 hereto
- 2.19 **the "Housing Association"** means the Registered Social Landlord nominated by the Council (which expression shall where the context requires include its successors in title assigns and persons deriving title through or under it) for the purpose of entering into the Housing Association Agreement
- 2.20 **the "Original Implementation Date"** means the date of implementation of the Original Planning Permission by the carrying out of a material operation as defined in Section 56 of the Act being 1 October 2001 (and "Implement" and "Implementation" shall be construed accordingly
- 2.21 **"Interest"** means:-
- (i) a freehold interest in All Affordable Housing Land where at the time when the Interest is to be conveyed transferred or leased no underground parking either exists or is proposed beneath the surface of All Affordable Housing Land for the benefit of the Obstetrics Site or the

Middlesex Annexe Site as the case may be; or

- (ii) a 999 year headlease of All Affordable Housing Land where at the time when the Interest is to be conveyed transferred or leased there exists or it is proposed by the Developer that there shall exist beneath the surface of All Affordable Housing Land any underground parking for the benefit of the Obstetrics Site or the Middlesex Annexe Site as the case may be in which case, such headlease shall exclude such area of underground parking which shall be reserved for the remainder of the Obstetrics Site or the Middlesex Annexe Site as the case may be and in negotiating the terms of the headlease the parties shall give effect to any relevant paragraphs of the "Principles to which effect is to be given in the negotiation of the Lease" incorporated in the draft lease to the Housing Association which is annexed hereto at Schedule 8, particularly those relating to maintenance and financial obligations relating to the concrete slab and foundations to be constructed in connection with the underground car-parking

- 2.22 **the "John Astor Site"** means the land shown coloured orange on the Location Plan being John Astor House 3 Foley Street London W1W 6DN
- 2.23 **the "Location Plan"** means the plan so entitled and annexed hereto which shows for identification purposes only the Property, the Middlesex Annexe Site, the

		Obstetrics Site , the John Astor Site and the Residential Sites
2.24	the “Middlesex Annexe Site”	means the land at 44 Cleveland Street London WC1 shown coloured yellow on the Location Plan
2.25	the “Obstetrics Site”	means the area of land shown coloured black on the Location Plan being part of University College Hospital on Huntley Street London
2.26	“Mental Health Resource Centre”	means an area comprising approximately 664 square metres to be constructed and fitted out for use as a mental health resource centre on the Odeon Site as part of the Odeon Site Development for use by the Council as a resource centre for Mental Health plus six car parking spaces
2.27	“Occupation Date”	the first date when any part of the Original Development is occupied
2.28	“the Odeon Affordable Housing”	the units of Affordable Housing with a total floorspace of no less than 1,425 square metres to be constructed, fitted out and occupied exclusively as Affordable Housing in accordance with the requirements of this Agreement in connection with the Odeon Site Application
2.29	“the Odeon Implementation Date”	means the date of implementation of the Odeon Site Planning Permission by the carrying out of a material operation as defined in Section 56 of the Act excluding any operation relating to soil investigations, works or investigations in respect of land contamination, archaeological investigations, the clearance of the Property, any temporary works including the erection of temporary fencing and the erection of hoardings (and “Implement” and “Implementation” shall be

construed accordingly).

- 2.30 **“the Odeon Site”** means that part of the Property shown coloured green on the Location Plan being Land at Grafton Way/Tottenham Court Road W1
- 2.31 **the Odeon Site Application”** a planning application in respect of the development of the Odeon Site that was submitted to the Council on 7th February 2002 for which a resolution to grant permission has been passed conditionally under reference number PSX0005046/R2 subject to the prior completion of this Agreement
- 2.32 **“the Odeon Site Development”** erection of a building for hospital use (C2) comprising 3 basement levels for car parking, ground floor for community health facilities, and 1st to 5th floors as hospital, and related support accommodation and roof top plant pursuant to the Odeon Site Application as shown on drawing numbers: 17550(SP), 19622(--), LB3/C, LB2/B, LB1/D, LG/D, L1/C, L2/C, L3/C, L4/D, L5/A, LR, LG/100/E, (E)01/E, 02/B, 03/B, 01/100, 02/100, (S)01/200, (21)01, (M)04 (subject to any variations to the drawings approved by the Council from time to time)
- 2.33 **“the Odeon Site Planning Permission”** the planning permission to be granted for the Odeon Site Application substantially in the form attached hereto at Schedule 9
- 2.34 **“Original Affordable Housing Agreement”** the agreement made under Sections 106 and 299A of the Town and Country Planning Act 1990 between The Secretary of State for Health, the University College London Hospitals National Health Service Trust, Amec Project Investments Limited and Building and Property Group Limited together comprising Health Management Group

and the Council dated 19th August 1998 to provide Affordable Housing

- 2.35 **“the Original Section 106 Agreement”** the agreement made under Sections 106 and 299A of the Town and Country Planning Act 1990 between The Secretary of State for Health, the University College London Hospitals National Health Service Trust, Amec Project Investments Limited and Building and Property Group Limited together comprising Health Management Group and the Council dated 19th August 1998 to provide inter alia a Centre for Independent Living, a Mental Health Resource Centre, car parking, public art and highway contributions
- 2.36 **the “ Original Application”** means the planning application submitted by the Developer and the NHS Trust on 6 December 1996 and given reference number PS9604299R2
- 2.37 **the “Original Development”** means:
- (i) redevelopment by the erection of a new University College Hospital of approximately 650 beds, including wards, surgical facilities, outpatients, day care, seminar rooms, laboratories, accident department, radiology, ancillary offices, workshops, storage and associated services and some 1,000 sq. m. of A1/A3 floorspace and
 - (ii) the provision of car parking and two community health facilities within the Green Land
- 2.38 **“the Original Planning Permission”** means the planning permission granted for the Original Development pursuant to the Original Application dated 19 August 1998 a copy of

which is annexed hereto at Schedule 10

- 2.39 **“Phase 1”** means the two hospital blocks forming part of the Original Development comprising, firstly, the block bounded by Euston Road, Tottenham Court Road and Beaumont Place, London W1 and secondly, to the immediate east of that block a high rise block on the corner of Euston Road and Gower Street, London W1 all to be constructed on the Blue Land pursuant to the Original Planning Permission
- 2.40 **“Phase 2”** means the hospital block to be constructed on the Brown Land pursuant to the Original Planning Permission
- 2.41 **“Phase”** shall mean either Phase 1 or Phase 2 where the context so permits
- 2.42 **“Planning Obligations Monitoring Officer”** a planning officer of the Council from time to time allocated to monitor the progress of all planning obligations pursuant to Section 106 of the Act to whom all notices, correspondence, approvals etc must be sent in the manner prescribed at clause 15.1 hereof
- 2.43 **“the Parties”** mean the Council and the NHS Trust
- 2.44 **“Phase 1 Certificate of Completion”** means the certificate to be issued by the appropriately qualified person responsible for supervising the relevant construction contract certifying that Phase 1 has been practically completed for the purposes of the construction contract pursuant to which Phase 1 shall have been constructed
- 2.45 **“Phase 2 Certificate of** means the certificate to be issued by the appropriately qualified person responsible for

	Completion	supervising the relevant construction contract certifying that Phase 2 has been practically completed for the purposes of the construction contract pursuant to which Phase 2 shall have been constructed
2.46	the "Price"	shall mean a price determined by the Council being equivalent to 115% of the Housing Corporation Total Cost Indicator for Band A or, if the Housing Corporation ceases to publish such Total Cost Indicators, such equivalent affordable housing price structure as is in existence at the relevant time or, if there be none, the figure generated by 115% of Total Cost Indicator Band A indexed in accordance with the All Items Index of Retail Prices over the period commencing on the date when the Total Cost Indicator ceases to have effect and ending on the date when the Price is or is likely to be paid
2.47	the "Property"	means all of the Blue Land Brown Land and the Odeon Site
2.48	"Registered Social Landlord"	a registered social landlord registered as such by the Housing Corporation who has entered into an agreement with the Council to secure the Affordable Housing Units as accommodation for people nominated by the Council through its housing allocation scheme
2.49	"Residential Sites"	means all or any of the following sites where the context so admits: <ul style="list-style-type: none"> (i) 1-9 Huntley Street, London edged in purple on the Location Plan; (ii) Arthur Stanley House, Tottenham Street, London edged in grey on the Location

Plan;

- (iii) The Middlesex Annexe Site edged in yellow on the Location Plan;
- (iv) The Obstetrics Site edged in black on the Location Plan.

2.50 **the “Unilateral Undertaking”** the unilateral undertaking made under Sections 106 and 299A of the Town and Country Planning Act 1990 by the Secretary of State for Health, the University College London Hospitals National Health Service Trust, Amec Project Investments Limited and Building and Property Group Limited together comprising Health Management Group to the Council dated 18 September 1998 to provide community provision for the local community in Fitzrovia

4. **OBLIGATIONS OF THE NHS TRUST**

The Provision of Affordable Housing

4.1 The NHS Trust covenants with the Council as follows:

4.1.1 No later than April 2006 the NHS Trust shall give notice to the Council either:-

- (a) that the All Affordable Housing Land shall be part of the Obstetrics Site; or
- (b) that the All Affordable Housing Land shall be part of the Middlesex Annexe Site.

4.1.2 All Affordable Housing Land shall be such area of land in respect of which the NHS Trust shall have given notice to the Council pursuant to Clause 4.1.1 as the parties agree is reasonably required to accommodate All Affordable Housing Units and the parties shall use all reasonable endeavours to agree the All Affordable Housing Land within three months of the Calculation Date specified in clause 4.4.1

4.1.3 The NHS Trust hereby acknowledges that if All Affordable Housing Land is to be part of the Middlesex Annexe Site then any planning permission subsequently granted for the residential development of the Obstetrics Site may require the provision on that site of Affordable Housing in conformity with the policies of the Council (unless such provision for the Obstetrics Site has already been included in the Middlesex Annexe Site).

4.1.4 No later than April 2007 the NHS Trust shall:

- (a) submit and thereafter expeditiously pursue planning applications to the Council for the redevelopment or refurbishment of the Residential Sites for residential use such applications to be in general accordance with Council and Central Government adopted Planning Policies having prior to submission of such applications consulted with the Council as to their substance and having had regard to such consultations;
- (b) Obtain at its own expense (in consultation with the Housing Association) All Affordable Housing Land Consents:

- (c) subject to Clause 4.2 enter into a binding agreement (which shall include an agreed form of lease substantially in the form of the draft lease annexed hereto at Schedule 8) in a form to be approved by the Council (such approval not to be unreasonably withheld or delayed) with the Housing Association (the "Housing Association Agreement")

4.1.5 The Housing Association Agreement shall provide for the following steps to have taken place by no later than 1st June 2010 :

- (a) the All Affordable Housing Units shall have been completed on the All Affordable Housing Land in a good and workmanlike manner using good quality materials in accordance with the detailed specification of the Housing Association; and
- (b) that a lease of the All Affordable Housing Units shall have been granted to the Housing Association (which shall be a headlease and not subject to any derivative interests or if the interest granted to the NHS Trust is itself a leasehold interest then an underlease of the same without any intermediate interest between) upon the Housing Association paying the Price to the NHS Trust such lease to be for a term of 125 years (less 7 days if the NHS Trust holds a leasehold interest in the All Affordable Housing Land) at a peppercorn rent upon the terms or substantially the terms of the draft lease annexed hereto and in negotiating the terms of that lease the parties shall give effect to the "Principles to which effect is to be given in the negotiation of the Lease" incorporated in the said draft lease;

4.2 Transfer Of The All Affordable Housing Land For Nominal Consideration

4.2.1

- (a) Without prejudice to the Council's ability to enforce Clause 4.1.4 and 4.1.5 above if the All Affordable Housing Units are not completed by 1st June 2010 or has not been transferred to a Housing Association in accordance with the requirements set out in Clause 4.1.4 and 4.1.5 the Council may serve written notice on the NHS Trust requiring the NHS Trust to offer the

Council a conveyance transfer or lease (as the case may be) of the Interest in the All Affordable Housing Land as a separate parcel, completely cleared of buildings and in a stable, developable and fully decontaminated state for provision of affordable housing, with vacant possession and free from encumbrances, on no unusually onerous terms and together with all relevant ancillary easements, rights and other matters so that the same may be developed for Affordable Housing for a nominal consideration of £1. and the Owner shall comply with such requirements.

- (b) the making of any conveyance transfer or lease of the All Affordable Housing Land to the Council pursuant to this Clause shall absolve the NHS Trust of any further obligation to the Council hereunder and the NHS Trust shall be entitled to include in any such conveyance transfer or lease a covenant restricting the use of the All Affordable Housing Land to use for Affordable Housing.
- (c) the NHS Trust hereby agrees that if the Council has served notice on the Council pursuant to Clause 4.2.1 (a) it shall indemnify the Council in respect of the costs which the Council demonstrates as having been reasonably incurred in the selection and nomination of the Housing Association.
- (d) Any conveyance, transfer or lease whether to the Housing Association pursuant to Clause 4.1.4(a) or to the Council pursuant to Clause 4.2.1 shall contain such provisions that either party to it may reasonably require having regard to the relevant planning permission or the requirement to provide Affordable Housing or any other material matters AND if there shall be any dispute as to the form of lease or transfer then either party may refer the drafting of the same to Conveyancing Counsel ("Counsel") of at least ten years standing and should the parties be unable to agree the identity of such Counsel then his appointment shall be referred to the Chairman for the time being of the Bar Council and the form of such assurance or lease as drafted by Counsel shall be final and binding upon the

parties hereto and the costs of such Counsel shall be in his award

4.3 Payments in Lieu of Affordable Housing

4.3.1 The parties agree that the number of units within the Affordable Housing Units which the NHS Trust covenants in the Housing Association Agreement to construct may be less (by up to five units) than the number of units calculated in accordance with Clause 4.4.2.

4.3.2 In the circumstances described in Clause 4.3.1 or (if All Affordable Housing Land is to be part of the Middlesex Annexe Site if the parties agree that the All Affordable Housing Land cannot accommodate the Affordable Housing Units) then the parties will agree the number of Affordable Housing Units which are not capable of being so provided and the NHS Trust shall pay to the Council within 28 days of such agreement being reached in respect of each unit of Affordable Housing which it has been agreed shall not be provided on All Affordable Housing Land a sum equivalent to the Price for the relevant number of units.

4.4 Calculation Of The Affordable Housing Units

4.4.1 For the purposes of this Agreement the number of units comprised in the Affordable Housing Units shall be calculated by no later than 1 December 2008 (the "Calculation Date").

4.4.2 The number of units comprised in the Affordable Housing Units shall be equivalent to 25% (or the nearest percentage of whole units) of the total number of new residential units:

(a) which shall have been completed on the Residential Sites at the Calculation Date; and

(b) which shall not have been completed on the Residential Sites at the Calculation Date but in respect of which applications submitted pursuant to Clause 4.1.4(a) shall have been made and in respect of which the grant of planning permission has been recommended by Council officers.

4.4.3 For the purpose of the calculation referred to in clause 4.4.2 above:

(a) the said percentage shall only apply to the net increase in residential units after the date of this Agreement on that Residential Site comprising 1-9 Huntley Street; and

(b) the Affordable Housing Units shall comprise a minimum of 30 residential units regardless of what development takes place on the Residential Sites.

4.5 MIX AND STANDARDS OF THE AFFORDABLE HOUSING UNITS AND THE ODEON AFFORDABLE HOUSING UNITS

All Affordable Housing Units shall reflect the design and other standards contained in the Housing Corporation's scheme work and design criteria and the Council's adopted housing strategy policy and the Council's adopted Planning policies for the year in which the Housing Association Agreement is entered into Provided that the unit mix of All Affordable Housing Units shall be

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substantially the same as that for which planning permission has been granted for the Residential Sites at the Calculation Date unless the Council requires some alternative unit mix (such alternative mix not in any event to require an enlargement of the agreed envelope of the scheme of All Affordable Housing Units for which planning permission shall have been granted

