Kingston Hospital NHS
NHS Foundation Trust

APPENDIX 4

KINGSTON HOSPITAL ITFF LOAN
REVIEW COMMENTS FROM NON-EXECUTIVE DIRECTORS

Updated: 18th September 2014		

(blue)	Action completed.
(green)	Good progress made.
(yellow)	Some progress made.
(red)	Significant work required.

REF	ISSUE	ACTIONS REQUIRED Responsible / timelines	STATUS	RESPONSES
Items to check 1	What is the penalty if we don't draw the full funds i.e. we don't undertake all our proposed estate strategy. (Clause 11.2). Capsticks Document Page 9 - "It is standard for the borrower to indemnify a lender against costs or expenses as a result of non-utilisation.			Clause 7.2 of the loan agreement states that the Borrower may cancel the whole or part of the facility (subject to a minimum of £100k). There is no mention of penalties in the loan agreement for carrying out this action. The following text is in the Board paper sent out yesterday: **Other matters** Three other matters have been raised internally by KHT: 1. What would happen if the work were to be delayed beyond the drawdown period (ending March 2016), e.g. through an extended period of bad weather? 2. What would happen if the Trust were to make savings on the work detailed above? 3. What would happen if a project were cancelled? These three matters were discussed the DH.

REF	ISSUES	ACTIONS REQUIRED Responsible / timelines	STATUS	ACTIONS UPDATE
				The written response received was as follows: *"The agreement is clear on the purpose and that the use of the fund can only be for the agreed propose. DH's focus will remain on enabling the investment and ensuring repayment. We would encourage an open line of communication between all parties, and should the need to discuss specific changes arise, we would welcome an approach by the trust to discuss this further at the time."*
Items to check 2	That overdraft loan agreement has any requirement to disclose or has any restrictions re <u>new</u> loans.			Email received from Richard Farr – Lloyds Bank, on 18th September 2014: *"I have reviewed the facility agreement.* *The new loan from the Independent Trust Financing Facility **will not** require consent from us provided that:* *1. It is unsecured.* *2. Any amounts owing under the loan would not be preferential to any amounts owing under the Lloyds facility (if drawn).* Both of these conditions are met under the loan agreement.
Items to check 3	Seek clarification on what we understand to be fixed rate. Is rate set even if we deviate from drawdown schedule but still manage to drawdown within the drawdown period? "Availability period". i.e. we want to put a hold on building works for six months.			Yes, it is fixed for the duration of the loan.

REF	ISSUES	ACTIONS REQUIRED Responsible / timelines	STATUS	ACTIONS UPDATE
Comments on Capsticks document: Overall	As we have got advice from Capsticks I think we would need a very strong argument or alternative if we don't follow most or all of their advice/ recommendations. We are committing the Trust for circa 20 years so we have a fiduciary duty to act in the best interest of the Trust for this period even though it will extend well beyond most of the current Boards tenure. I believe there is an onus on the Trust to at least enter into some discussion with the DH in relation to the many of the recommendations made by Capsticks. While it may be a standard loan agreement, it is common practice in the commercial world to negotiate on the terms of an agreement. As a foundation Trust we are operating in quasi commercial environment. Prioritising the recommendations for discussion may be useful.			Covered in Paper to FIC ***Negotiations with the DH*** *The report from Capsticks highlighted various matters that the Trust should negotiate with the DH and other matters that the Trust might want raise.* *Most of the matters highlighted by Capsticks were raised with the DH. However, the DH's position was that the loan agreement was its standard document for ITFF loans and that it was not prepared to modify any of the wording. DH stated that it had now made a significant number of loans from the ITFF and if it were to make changes to individual agreements, then this would make the management of the loan agreements extremely difficult.* *The only issue raised by Capsticks which was incorporated into the agreement was clarifying that none of the projects to be funded relate to the Kingston Surgical Centre, which is subject to a PFI agreement. This was added in Schedule 3 – Agreed Purpose, a schedule which is "free text" and is completed for each individual loan.* *The Trust has discussed DH's position with Capsticks and it has been agreed than none of the clauses raised with, but rejected by, the DH are "deal breakers" that should stop the Trust from proceeding with the loan.*
Comments on Capsticks document: Recommendations	**Independent review** I am in favour of getting an independent review of the "financial plans" supporting this entire project.			1. Covered in Paper to FIC ***Financial due diligence*** *No financial due diligence on the*

REF	ISSUES	ACTIONS REQUIRED Responsible / timelines	STATUS	ACTIONS UPDATE
	Note that Capsticks has said that independent advice should be sought: Page 3 No 3 "you will need specialist financial review and advice to ensure they are appropriate to the Trust." Clause 8 & 9 Interest: - Page 8: Capsticks document: *"You should obtain specialist review and advice on these provisions to ensure they are affordable and appropriate in the light of the Trusts overall financial accounts and processes".*			*construction of the loan has been carried out, as the only variable is the length of the loan, which has been agreed at 20 years.* 2. The loan is included in the 2- and 5-Year Business Plans that have been approved by the Board and submitted to Monitor.
Comments on Capsticks document: Recommendations	**Representations:** I believe the points raised on representations are worthy of prioritisation; It is important that "due diligence" is undertaken on the representations that the Trust is making. I agree with Capsticks point on carve outs, materiality and the exclusion of communications in the ordinary course of business. It is important that the Trust maintains flexibility to do business now in the future. Some points to note on Agreed Purpose of Loan: See Note on a) Page 5- Exclusive purpose i.e. capital expenditure combined with note on miscellaneous information required Page 12 – "the application of loan monies" and page 11 "a breach of an undertaking will be an Event of Default leading to the accelerated repayment of the Loan" In light of the above points I think the Trust may need to inform the DH if it intends to recompense working capital for monies already expended on the " estate strategy " with monies from the initial loan draw down. To support his it would be useful to have any reference in minutes where we have discussed this course of action. From a good governance perspective the Board also needs to ratify this			Response from Simon Milligan, Director of Finance and Information: The representations, together with Capsticks' comments on them, have been reviewed in detail. The recommendation to FIC and to the Board is that the Trust can make the representations detailed in the loan agreement.

REF	ISSUES	ACTIONS REQUIRED Responsible / timelines	STATUS	ACTIONS UPDATE
	decision - to commence the capital programme and fund it from working capital while the Trust waits to finalise loan agreement.			
Comments on Capsticks document: Recommendations	**Other Points to note in relation to above point:** Note: See Page 7 "Initial Conditions Precedent "the DH has discretion to require <u>copie</u>s of any authorisation, document, opinion or assurance it considers necessary or desirable".			Response from Simon Milligan, Director of Finance and Information: This point has been considered. The recommendation to FIC and to the Board is that this clause is considered acceptable.
Comments on Capsticks document: Summary	**Summary:** While the loan is adding additional financial demands on the Trust, it is also restricting some of the Trusts financial freedoms and flexibility to get alternative liquidity by selling off some of the assets or doing sale and lease back or invoice discounting or even going to commercial banks to get additional loans as they will more than likely need a charge over our assets. The Trust needs to be mindful of this as well as the fact that a default could be triggered if there is an adverse change in the Trust position "i.e. a large negative variation shown in successive financial statements of the borrower."			