

APPENDIX 2

KINGSTON HOSPITAL LOAN CHECKLIST FOR ITFF LOAN

Updated: 18 th September 2014			
	Action completed.		
	Good progress made.		
	Some progress made.		
	Significant work required.		

REF	ISSUE	ACTIONS REQUIRED Responsible / timelines	STATUS	ACTIONS UPDATE
Overview 1	Ensure that the Trust is able to enter into the proposed transaction.	DD		Review completed.
Overview 2	Ensure that the proposed loan facility meets the Trust's needs.	SM		Review completed.
Overview 3	Ensure that the agreed financial terms (interest rate, availability, repayment profile and additional costs) are correctly reflected in the document?	SH		All financial terms are correctly reflected in the agreement. Only the interest rate remains to be set. The NLF interest rate on the day that the agreement is signed by the Secretary of State for Health will be rate for the duration of the loan
Overview 4	Understand the conditions, if any, that the Trust must satisfy in order to draw down on the loan.	DD / SH		Conditions Precedent understood. No issues. See ITFF Conditions Precedent Checklist (Appendix 4) for checklist of meeting the requirements.
Overview 5	Understand the fetters on the Trust's business operations contained in the loan agreement; for example, key restrictions, prohibitions and consents required for "ordinary course" business activities?	SM		The Trust has reviewed and understands the constraints as detailed in the agreement.

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Loan Agreement Terms ("LAT") – Definitions - Agreed Purpose and Schedule 3	<p><i>The Trust should confirm that DH agrees with the purpose proposed by the Trust.</i></p> <p><i>Capsticks recommends that Schedule 3 makes clear the details of the proposed works, including a description and plan of the relevant areas or premises. For clarity it should be stated that; "The Property is not subject to the PFI agreement between the Trust and Prime Care Solutions (Kingston) Limited dated 23 November 2004."</i></p>	<p>SH</p> <p>SH</p>		<p>Schedule 3 includes the wording proposed by Capsticks.</p> <p>DH has clarified that the list of projects is not exhaustive and that any saying could be used on similar capital projects, particularly where the additional work is carried out on buildings already impacted under the Agreed Purpose.</p>
LAT – Definitions - Availability Period	<p><i>The end date of the Availability Period is yet to be inserted in the Agreement.</i></p> <p><i>The Trust needs to carefully consider and negotiate this date mindful of the development schedule for the Property.</i></p> <p><i>The Trust needs to be aware that it is intended that the facility will not be available for an indefinite period. Subject to the parties agreeing to the contrary, any sums not drawn down within the Availability Period will cease to be available to the Trust.</i></p> <p><i>If therefore the development works are delayed and this has a knock on effect on the proposed dates for draw-down, the Trust will need to make DH aware of this to ensure that they enter into negotiations for the extension of the Availability Period in sufficient time.</i></p>	<p>SH</p> <p>SM / HG</p> <p>SM / HG</p>		<p>Should there be an delay to the works, then the DH will be open to discussing changing the drawdown schedule.</p>
LAT – Definitions - Property	<p>The definition of "Property" is "any building or facility required to deliver the Agreed Purpose". <i>It would be preferable if this definition were to refer to the description and plan(s) in Schedule 3, rather than the generic and potentially ambiguous definition currently in the Agreement.</i></p> <p><i>For clarity it should also be stated that "The Property is not subject to the PFI agreement between the Trust and Prime Care Solutions (Kingston) Limited dated 23 November 2004."</i></p>	<p>SH</p> <p>SH</p>		<p>Schedule 3 includes the wording suggested by Capsticks.</p>

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LAT – Clause 4: Initial Conditions Precedent	<p>Schedule 1 sets out the conditions that need to be satisfied before the first advance. These are matters for internal governance and will need to be taken into consideration when working out timescales and the Anticipated Drawdown Schedule. A failure to satisfy the initial conditions is often the main cause for delay with loan arrangements.</p> <p>DH has discretion to require copies of any other authorisation, document, opinion or assurance it considers necessary or desirable. It is essential that the Trust is in dialogue with DH to ensure that it is clear as to what DH's requirements are in readiness for the first anticipated drawdown.</p>	DD DD		Completed.
LAT – Clause 4: Further Conditions Precedent	<p>At the time of each drawdown, the Trust must confirm that no Default is continuing or would result from the drawdown and repeat those representations made under clause 14. The Trust will be deemed to make these representations on execution of the Agreement and each time it issues an Utilisation Request. In practice these representations will be implied by the Trust's actions. The DH is not obliged to investigate that the representations made are true. The Trust needs therefore to make itself aware of the representations contained within clause 14 so as not to inadvertently put itself in breach of the Agreement and subject to an indemnity payment.</p>	SM / DD		For future reference.
LAT – Clause 5: Utilisation	<p><i>The Trust has been asked to specify its anticipated drawdown schedule by financial quarter, and this should reflect its development schedule.</i></p> <p>Whilst this is a committed facility, DH's commitment to provide funds is subject to the provisions contained within clause 5:</p> <ul style="list-style-type: none"> • Clause 5.2: five business days' notice is required. • Clause 5.2.1: maximum one request per month. • Clause 5.3 (A): drawdown date must fall on a Business Day within the Availability Period. • Clause 5.4.2: each drawing must be in a minimum of £150,000. 	GH / DD		Completed.
LAT – Clause 6: Payments and	Complete details within the Repayment Schedule when	SH		Completed.

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Repayment	details are known.			
LAT – Clause 6: Tax Deduction Indemnity	The reason for the inclusion of the tax indemnity at clause 6.1 is that DH has taken a “cost plus” approach to the lending; its argument being that any tax that erodes their margin (other than tax on that margin) should be for the account of the Trust as the borrower. Given that this is an arrangement between two public bodies, the Trust may wish to argue that it should only take change of law risk, on the basis that DH should be able to determine its current tax exposure. (In private sector corporate lending however this is usually a difficult point for the borrower to win.)	SM / SH		Memo to DH followed by discussion. DH will not modify its standard contract.
LAT – Clause 7: Prepayment and Cancellation	The Agreement permits the voluntary prepayment of all or part of the Loan. It is standard form for the borrower to be required to give a specified period of notice to the lender with an agreed minimum prepayment: in the case of the Agreement, seven days and £250,000. The notice period and minimum payment should be open to negotiation. As the borrower, the Trust would generally seek a short notice period and a low minimum amount to ensure flexibility. The Trust should therefore consider whether the minimum payment amount meets its needs.	SM / DD		The Trust is happy with the wording in the agreement.
LAT – Clauses 8 and 9: Prepayment and Cancellation	The Trust should ensure that capital repayments and interest payments are affordable and appropriate in the light of the Trust’s overall financial accounts and processes.	DD		Review completed.
LAT – Clause 11: Indemnities	With regard to clause 11.3.1, Capsticks would argue that it is only reasonable for DH to be indemnified where following the investigation it turns out there was a Default.	SM		Memo to DH followed by discussion. DH will not modify its standard contract.

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LAT – Clause 14: Representations	<p>The Trust will be deemed to have made certain representations on execution of the Agreement and (with the exclusion of clauses 14.9, 14.10, 14.12.2 and 14.16.2) on each Utilisation Request and on the first day of each Interest Period. The Trust will need to consider therefore if it is able to give these representations. If it cannot then it will need to negotiate them with DH.</p> <p>The Trust must decide which representations are:</p> <ul style="list-style-type: none"> • acceptable; • acceptable subject to disclosure; • acceptable if amended; or • unacceptable. <p>In reviewing representations, it is worth noting that their function is to allocate risk for particular events. A misrepresentation typically entitles the lender to cease making further advances and triggers an Event of Default. Consequently, it is important for the Trust to ensure that the representations contain suitable carve-outs (exceptions) and materiality thresholds.</p> <p>Capsticks' view is that most of the representations reflect current market practice. Capsticks would, however, draw The Trust's attention to the following:</p> <ul style="list-style-type: none"> • Clause 14.6.2: This requires the Trust to make all reasonable enquiries regarding reasons why any necessary consent might cease to be valid. Capsticks would suggest that the representation states that "there exists no reason known to it, without having made enquiries..." Otherwise the burden of making enquiries is triggered each time the representation is repeated, which is a considerable and unnecessary administrative burden for the Trust. • Clause 14.7: the Trust represents and warrants 	SM / SH		<p>The Trust has concluded that it is able to give the representations.</p>

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	<p>that it is the legal and beneficial owner of all property required to deliver the Agreed Purpose. Is this correct?</p> <ul style="list-style-type: none"> • Clause 14.8: the representation on governing law and enforcement is an objective legal point and Capsticks would suggest that it is not appropriate for the Trust to give this representation. • Clause 14.13: the Trust should check the requirements in respect of its financial statements reflect its normal practice. <p>Once the Trust is comfortable with the representations it is giving it must keep these at the forefront of its mind for the duration of the loan term given the implications of an inaccurate representation.</p>			
LAT – Clauses 15 and 16: Information Undertakings	The Trust will need to ensure that provisions are put in place to be able to meet reporting obligations. The Trust should make sure that it has reasonable time (mindful of its internal processes) to provide any such information, that it is not duplicating existing reporting obligations and that the information that it is requested to supply is limited to that within its own knowledge and control. The Trust may wish to suggest that communications undertaken in the ordinary course of the Trust’s business are excluded.	SM / DD / SH		Memo to DH followed by discussion. DH will not modify its standard contract.
LAT – Clauses 15 and 16: General Undertakings	The Trust should ensure that the specified figures for permitted disposals (up to 10% total net assets in any financial year) are not too low so as to impact on its day to day operations.	SM		Memo to DH followed by discussion. DH will not modify its standard contract.
LAT – Clauses 15 and 16: Negative Pledges	The following kinds of commercial security have been prohibited in the Agreement: <ul style="list-style-type: none"> • Sales and leasebacks. • Recourse sales of receivables. 			Review completed by the Trust. The Trust does and will not need to be able to do any of these activities.

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	<ul style="list-style-type: none"> Rights of set-off. <p><i>Any of these types of activities that the Trust needs to be able to do, or continue to do, should be negotiated as carve-outs from the negative pledge, perhaps by being included in a definition of "permitted security interests".</i></p>	SM / DD / SH		
LAT – Clause 18: Events of Default	Rather than relying on the ability to be able to cure a Default, the Trust should make itself aware of what constitutes an Event of Default and ensure that it has the capacity to be able to effectively control its own destiny by putting measures in place to prevent such events.	SM / DD		Noted.
LAT – Clause 19.1: Assignment and Transfers	<p>The Trust is restricted from assigning or transferring its rights and obligations under the Agreement. DH however is not subject to the same restriction. DH can assign or transfer its rights and obligations under the Loan, without consent, to an entity owned or <u>supported by</u> the Lender.</p> <p>“Supported by” is vague to say the least and it may be worth seeking clarity on this from DH.</p>	SH		Reviewed. The Trust is happy with the wording in the agreement.
LAT – Clause 19.3: Disclosure of Information	Both parties under this Agreement, as public bodies, are subject to the Freedom of Information Act. Any rights to be able to disclose information therefore should be mutual. The provision is not currently mutual and allows the Lender to disclose information (including financial information) to a large range of organisations. The Trust needs to be aware of the scope of these permitted disclosures.	SM / DD		Noted.
LAT – Clause 20.2: Exclusion of Liability	The concern here however is that the nature of the two parties makes it questionable whether absolute exclusion of liability is appropriate. Under the Information Undertaking potentially sensitive data will be passing from the Trust to DH. Accordingly, DH should be liable in the event of a data breach.			<p>Memo to DH followed by discussion.</p> <p>DH will not modify its standard contract.</p>

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	<i>With this in mind the Agreement should make provision for the Data Protection Act 1998 and recourse in the event of one party's breach to the detriment of the other.</i>	SM / SH		
Schedule 5: Dispute Resolution	<p>Generally, the Agreement provides a good dispute resolution procedure – it proposes a sensible escalation structure, time-limited phases and mandatory mediation.. If all else fails the Agreement provides for compulsory arbitration as a means of determining a dispute.</p> <p>However, The Trust may want to:</p> <ul style="list-style-type: none"> • <i>Include a clause to the effect that the dispute resolution procedure does not preclude the parties from going to High Court to seek injunctions (either generally or in respect of for example information breaches);</i> • <i>Specify who should be involved in the escalation process; for example (a) operational level (b) senior staff not operationally involved in contract services (c) CEOs.</i> 	SM / SH		<p>Memo to DH followed by discussion. DH will not modify its standard contract.</p>