

## Meeting of the Board of Governors sub-committee to review the contract with the DfE regarding the SBC estates strategy

10.00 am on Thursday, 22 October 2020  
in MS Teams

### Agenda

<i>No.</i>	<i>Item</i>	<i>Pages</i>	<i>Presenter</i>
1.	Welcome and apologies		JC
2.	Declarations of Interest <i>Governors are required to declare any interest in any item of business at this meeting</i>		JC
3.	Draft contract with DfE for SBC estates strategy	3 - 28	DP

**Date of next meeting**  
**4.00 pm on Thursday, 19 November 2020**

**Members:** Jerry Cope (Chair), Michael Cutbill (Vice-Chair), David Phoenix and Rashda Rana

**In attendance:** Michael Broadway and Richard Flatman

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# Agenda Item 3

	CONFIDENTIAL
Paper title:	SBC estates strategy – draft contract with DfE
Board/Committee:	LSBU Board sub-committee
Date of meeting:	22 October 2020
Author(s):	Michael Broadway, Deputy University Secretary
Sponsor(s):	Dave Phoenix, Group CEO
Purpose:	For Approval
Recommendation:	<p>The committee is requested to:</p> <ul style="list-style-type: none"> <li>i) approve the terms of, and entry into, the Amendment and Consent Deed with the DfE on behalf of LSBU;</li> <li>ii) consent to SBC entering into the Amendment and Consent Deed with the DfE;</li> <li>iii) approve, on behalf of the LSBU Board, the future performance of any and all of LSBU's obligations set out in the Amendment and Consent Deed;</li> <li>iii) authorise the Group CEO (being a governor of LSBU) to approve any required amendments to the Amendment and Consent Deed necessary in order to achieve agreement with DfE;</li> <li>iv) authorise any two Governors (or any Governor and LSBU's company secretary (Company Secretary), or any Governor in the presence of a witness) to execute and deliver the Amendment and Consent Deed, and any other deeds, instruments, certificates, contracts or other documents necessary in order to give effect to the Amendment and Consent Deed for and on behalf of LSBU (and for the avoidance of doubt, the Vice Chancellor, the LSBU Group Chief Financial Officer and the Company Secretary are authorised to execute any such instrument, certificate, contract or other document (not required to be signed as a deed) for and on behalf of LSBU); and</li> <li>v) authorise the Group CEO, Group CFO or the Secretary to take any other action that may be required (or authorise certain individuals to do so on LSBU's behalf) as may be necessary or desirable to complete the Amendment and Consent Deed for and on behalf of LSBU, including (if required) the despatch of</li> </ul>

	any certificates, documents and notices relating to the Amendment and Consent Deed.
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## Executive summary

As part of the transfer of Lambeth College to SBC and the LSBU Group, the DfE provided funding under a Grant Agreement. Under the Grant Agreement, up to £17.15m of that funding is repayable to the DfE if, after completing the estates strategy, there is any surplus from the budget for the estates strategy. Under this Grant Agreement, the DfE is required to approve SBC's estates strategy.

In order to approve SBC's estates strategy, the DfE has requested that SBC and LSBU enter into an Amendment and Consent Deed with the DfE which allows the DfE to potentially reclaim the £17.15m for a period of up to ten years after the completion of the estates strategy.

This deed has been negotiated with the DfE and is in near final form – attached in appendix 1. The deed has been reviewed in detail by VWV, legal advisors, acting for LSBU and SBC. The areas still being negotiated are the definitions of 'Financial Indebtedness', 'Matured Obligation' and 'Estates Strategy'. These are definition points where there appears to be agreement on the principle but not the wording.

In summary, the main obligations for SBC of the new deed are:

- If in the 10 year period after completion of the estates strategy SBC
  - makes a disposal from the new site (not including short-term leases as long as they make up less than 10% of the overall estate);
  - incurs any financial indebtedness (not for refinancing any financing used for the estates strategy); or
  - releases any capital value from the property in any other way (excluding any value released by the College in the ordinary course of business)

then any net sums received by the College shall be paid by the College to DfE up to a maximum amount of £17,150,000.

- the College may only use the Property in accordance with the terms of the Asset Deed (agreed previously).

- LSBU and SBC will provide the DfE with details of the key milestones in respect of the Redevelopment. These are being monitored by the LSBU Group Project Board.
- SBC must use reasonable endeavours to complete the Redevelopment as soon as practically feasible.
- The redevelopment must proceed in accordance with the Major Assumptions and no amendment to the Major Assumptions must be made by the College and/or the University without the prior written consent of DfE.

The main obligation for LSBU is that it is giving a parent company guarantee to the DfE in the event that SBC does not meet its financial obligations to the DfE. Advice on LSBU's ability to give a guarantee (as a charity) from VWV is set out in appendix 2 to this paper.

These obligations of LSBU and SBC to DfE under this Deed shall terminate with effect from the earlier of payment by SBC (or LSBU) of £17,150,000; 10 years from completion of the estates strategy or 1 January 2035.

In addition, the DfE has agreed a 'checkpoint' for the estates strategy. This allows SBC to assess whether Block D is financially viable and, if not, to propose an alternative scheme to the DfE (for its consent).

## **Resolutions**

The committee is requested to:

- i) approve the terms of, and entry into, the Amendment and Consent Deed with the DfE on behalf of LSBU;
- ii) consent to SBC entering into the Amendment and Consent Deed with the DfE;
- iii) approve, on behalf of the LSBU Board, the future performance of any and all of LSBU's obligations set out in the Amendment and Consent Deed;
- iii) authorise the Group CEO (being a governor of LSBU) to approve any required amendments to the Amendment and Consent Deed necessary in order to achieve agreement with DfE;
- iv) authorise any two Governors (or any Governor and LSBU's company secretary (Company Secretary), or any Governor in the presence of a witness) to execute and deliver the Amendment and Consent Deed, and any other deeds, instruments, certificates, contracts or other documents necessary in order to give effect to the Amendment and Consent Deed for and on behalf of LSBU (and for the avoidance of

doubt, the Vice Chancellor, the LSBU Group Chief Financial Officer and the Company Secretary are authorised to execute any such instrument, certificate, contract or other document (not required to be signed as a deed) for and on behalf of LSBU); and

v) authorise the Group CEO, Group CFO or the Secretary to take any other action that may be required (or authorise certain individuals to do so on LSBU's behalf) as may be necessary or desirable to complete the Amendment and Consent Deed for and on behalf of LSBU, including (if required) the despatch of any certificates, documents and notices relating to the Amendment and Consent Deed.

2020

Amendment and Consent Deed  
relating to  
South Bank Colleges

The Secretary of State for Education (1)  
London South Bank University (2) and  
South Bank Colleges (3)

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## DATE

## PARTIES

- (1) **The Secretary of State for Education** of Sanctuary Buildings, Great Smith Street, London SW10 3BT (**DfE**)
- (2) **London South Bank University**, a higher education institution and an exempt charitable company limited by guarantee (registered company number 00986761) whose principal office is at 103 Borough Road, London, SE1 0AA (**University**)
- (3) **South Bank Colleges**, an exempt charitable company limited by guarantee (registered company number 11495376) whose registered office is at 103 Borough Road, London, SE1 0AA (**College**)

## AGREED TERMS

### 1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Deed the following definitions and rules of interpretation in Clause 1 apply:

**Accounting Principles** [the generally accepted accounting principles and statutory requirements relating to further education corporations \(including FRS 102 and the Statement of Recommended Practice for Further and Higher Education Institutions\) and statutory requirements relating to further education corporations together with any other requirements of DfE relating to such accounts from time to time.](#)

**Alternative Block D Model** has the meaning given to that term in Clause 3.4.

**Asset Deed** the asset deed between DfE, the University and the College dated 6 August 2018.

**Block A** Block A as described in the Major Assumptions and the Strategy Document.

**Block B** Block B as described in the Major Assumptions and the Strategy Document.

**Block D** Block D as described in the Major Assumptions and the Strategy Document.

**Business Days** a day (other than a Saturday or Sunday) on which banks are open for general business in London.

**Checkpoint** has the meaning given to that term in Clause 3.2.

**Clapham Property** has the meaning given to that term in Schedule 1.

**Disposal** a sale, lease, transfer or other disposal by the College of the Property (whether by a voluntary or involuntary single transaction or series of transactions) provided that:

(a) ~~(i)~~ the grant of any licence of the Property; ~~(ii) and~~

(b) the grant of any lease of part of the Property for a term (including any option to renew) not exceeding 5 years and which is validly excluded from the security of tenure provisions of the Landlord and Tenant Act 1954;

shall not constitute a **Disposal** for the purposes of this Deed unless and to the extent that the relevant ~~part parts~~ of the Property which ~~is~~ are subject to ~~any all~~ such ~~licence licences~~ and/or ~~lease leases~~ shall as a consequence of any such grant exceed 10% (ten per cent) of the total area of the Property.

#### Expiration

the earlier of (i) 10 years following the date of Property Completion and (ii) 1 January 2035 provided the date of Property Completion has occurred.

#### Finance Lease

any lease or hire purchase contract, a liability under which would, in accordance with the Accounting Principles, be treated as a balance sheet liability (other than a lease or hire purchase contract which would, in accordance with the Accounting Principles in force prior to 1 January 2019, have been treated as an operating lease).

#### Financial Indebtedness

any indebtedness for or in respect of:

- (a) monies borrowed and debit balances at banks and other lenders;
- (b) any amount raised by acceptance under any acceptance credit facility or dematerialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any Finance Lease;
- (e) receivables sold or discounted (other than any receivables to the extent they are sold on a non-recourse basis);
- (f) any amount raised under any other transaction (including any forward sale or purchase agreement) having the commercial effect of a borrowing;
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price (and, when calculating the value of any derivative transaction, only the marked to market value shall be taken into account);
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution in respect of an underlying liability of an entity which is not either the College or the University which liability would otherwise fall within one of the other paragraphs of this definition;
- (i) any amount of any liability under an advance or deferred purchase agreement if one of the primary reasons behind entering into the agreement is to raise finance or the agreement is in respect of the supply of assets or services and payment is due more than 90 days after the date of supply;
- (j) any amount raised by the issue of shares which are redeemable (other than at the option of the issuer) or are

	<a href="#">otherwise classified as borrowings under the Accounting Principles; and</a>
	<a href="#">the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (j) above.</a>
<b>Grant Funding Agreement</b>	the grant funding agreement dated 31 January 2019 and made between the College and DfE.
<b>Guaranteed Obligations</b>	the obligations of the College detailed in Clauses 3.6 and 3.7 of this Deed and Schedule 4.
<b>Legal Charge</b>	the legal charge over the Property dated 31 January 2019 granted by the College in favour of the Secretary of State for Education.
<b>Local Authority</b>	Lambeth London Borough Council.
<b>Major Assumptions</b>	the major assumptions set out in Schedule 3.
<b>Party</b>	a party to this Deed.
<b>Principal Grant</b>	has the meaning given to that term in the Grant Funding Agreement.
<b>Property</b>	the property detailed in Schedule 1 (which for the avoidance of doubt comprises the Clapham Property and the Vauxhall Property).
<b>Property Completion</b>	the issuing of the completion or final certificate of compliance with the Building Regulations 2010 by the Local Authority building control service or by a licensed approved inspector for all phases of the Redevelopment (excluding Block D if the College confirms in accordance with Clause 3.3.1 that the redevelopment of Block D is no longer viable but including any Alternative Block D Model approved by DfE in accordance with Clause 3.4).
<b>Redevelopment</b>	the redevelopment of the Property in accordance with the Strategy Document which will include (for the avoidance of doubt) the sale of part of the Clapham Property and part of the Vauxhall Property.
<b><u>Redevelopment Financial Indebtedness</u></b>	<a href="#">any Financial Indebtedness incurred by the College and/or University which is utilised solely to undertake the Redevelopment.</a>
<b>Review</b>	has the meaning given to that term in Clause 3.2.
<b>Schedule 4</b>	has the meaning given to that term in Clause 3.1.
<b>Strategy Document</b>	the estates strategy document appended at Schedule 2 <a href="#">and any supporting document insofar as such document provides additional detail to the Strategy Document and provided that such supporting document was created prior to the date of this Deed.</a>
<b>Vauxhall Property</b>	has the meaning given to that term in Schedule 1.

## 2. CONSENT

2.1 Subject to the College complying with the provisions of Clause 3 below, DfE:

2.1.1 consents to the College proceeding with the Redevelopment;

- 2.1.2 confirms and agrees that such consent constitutes the prior written consent of the Secretary of State for Education to the Redevelopment required by clause 6.1.3 of the Asset Deed; and
- 2.1.3 confirms and agrees that such consent constitutes the prior written consent of the Secretary of State for Education to the Redevelopment required by clause 6.3.2 of the Legal Charge (and that no such consent shall be required by clause 6.2 of the Legal Charge to the grant of any licence or lease by the College which does not constitute a Disposal in accordance with the terms of this Deed).

### 3. CONDITIONS

- 3.1 With effect from the completion of this Deed Schedule 2 of the Grant Funding Agreement will be amended by the deletion of the existing Schedule 2 and its replacement with the wording set out in Schedule 4 of this Deed (**Schedule 4**).
- 3.2 Following the issuing of the completion or final certificate of compliance with the Building Regulations 2010 by the Local Authority building control service or by a licensed approved inspector for the Redevelopment of Block A and Block B (the **Checkpoint**) the status of the Redevelopment will be reviewed by DfE (the **Review**).
- 3.3 Within 10 Business Days of the Checkpoint, the College will confirm in writing to DfE that either:
  - 3.3.1 the redevelopment of Block D is no longer financially viable and will not proceed; or
  - 3.3.2 the redevelopment of Block D is financially viable and will proceed on the basis that either:
    - (a) redevelopment of Block D has already commenced and the remainder of the Redevelopment is contractually committed; or
    - (b) the College has not yet commenced the redevelopment of Block D but the College can demonstrate to the reasonable satisfaction of DfE that Block D will be completed within a period of 2 to 5 years of the Checkpoint.
- 3.4 If the College confirms in accordance with Clause 3.3.1 that the redevelopment of Block D is no longer viable and will not proceed the College can propose an alternative model (the **Alternative Block D Model**) to deliver the education case detailed in the Strategy Document, provided that the Alternative Block D Model shall be subject to assessment by and the approval of DfE.
- 3.5 Subject to the College's compliance with Clauses 3.2-, ~~3.3~~ and ~~3.3.4~~, DfE shall complete the Review in a timely manner and promptly notify the College in writing of its completion and, where relevant, whether it has approved any Alternative Block D Model.
- 3.6 The College will repay the requisite amount of Principal Grant to DfE in accordance with the provisions of Schedule 4.
- 3.7 If at any time following the Property Completion and before or at the date of Expiration the College:
  - 3.7.1 makes a Disposal; or
  - 3.7.2 incurs any ~~financial indebtedness~~ Financial Indebtedness for any purpose other than to refinance any ~~financial indebtedness incurred in respect of the~~ Redevelopment Financial Indebtedness; or
  - 3.7.3 releases any capital value from the Property in any other way but excluding any such value released by the College in the ordinary course of operating a college of further education (and carrying out any activities which are ancillary and/ or incidental to the operation of such a college);

then any net sums received by the College in accordance with Clauses 3.7.1 to 3.7.3 (after deducting all reasonable costs and expenses incurred by the College in relation to any such Disposal, refinancing or release) shall be paid by the College to DfE up to a maximum amount calculated by deducting the amount of Principal Grant properly payable by the College in accordance with Clause 3.6 and Schedule 4 from the amount of Principal Grant specified in the Grant Funding Agreement (being £17,150,000).

- 3.8 For the avoidance of doubt, and subject to the terms of this Deed, the College may only use the Property in accordance with the terms of the Asset Deed.
- 3.9 The University and the College will provide DfE with details of the key milestones in respect of the Redevelopment which are being monitored by the LSBU Group Project Board and which will provide quarterly updates against such milestones to DfE.
- 3.10 The College must use reasonable endeavours to complete the Redevelopment as soon as practically feasible.
- 3.11 The Redevelopment must proceed in accordance with the Major Assumptions and no amendment to the Major Assumptions must be made by the College and/or the University without the prior written consent of DfE.
- 3.12 The Parties hereby agree and acknowledge that all of the obligations of the University and the College to DfE under this Deed shall terminate with effect from the earlier of:
- 3.12.1 payment by the College (or as the case may be and for the avoidance of doubt the University in accordance with Clause 4) to DfE of the full amount of the Principal Grant specified in the Grant Funding Agreement (being £17,150,000); and
- 3.12.2 the date of the Expiration.

#### **4. GUARANTEE & INDEMNITY**

- 4.1 The University guarantees to DfE and his or her successors, transferees and assigns that whenever the College does not pay any of the Guaranteed Obligations within 10 Business Days of written demand by DfE after they fall due the University shall make due and punctual payment to DfE on demand of the Guaranteed Obligations.
- 4.2 If the Guaranteed Obligations are, or become, unenforceable, invalid or illegal otherwise than due to an act, omission, or default of DfE (or any successor body), the University agrees to indemnify and keep indemnified DfE in full and on demand from and against all and any losses, costs and expenses suffered or incurred by DfE arising out of, or in connection with, any failure of the College to perform or discharge the Guaranteed Obligations.
- 4.3 The University as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under Clause 4.1 agrees to indemnify and keep indemnified DfE in full and on demand from and against all and any losses, costs and expenses suffered or incurred by DfE arising out of, or in connection with, any failure of the College to perform or discharge the Guaranteed Obligations. The amount payable by the University under this indemnity shall not be greater than the amount which it would have had to pay under Clause 4.1 above if the amount claimed had been recoverable on the basis of a guarantee.
- 4.4 This guarantee is and shall be at all times a continuing security and shall cover the ultimate balance of all monies payable under this Deed, irrespective of any intermediate payment or discharge in full or in part of the Guaranteed Obligations.
- 4.5 The liability of the University under this guarantee shall not be reduced, discharged or otherwise adversely affected by:
- 4.5.1 any act, omission, matter or thing which would have discharged or affected the liability of the University had it been a principal debtor instead of a guarantor or indemnifier; or

- 4.5.2 anything done or omitted by any person (other than DfE or person(s) acting on his or her behalf) which, but for this provision, might operate or exonerate or discharge the University or otherwise reduce or extinguish its liability under this guarantee.
- 4.6 The University waives any right it may have to require DfE (or any trustee or agent on his behalf) to proceed against or enforce any other right or claim for payment against any person before claiming from the University under this Clause 4.
- 4.7 The University shall on a full indemnity basis pay to DfE on demand the amount of all costs and expenses (including legal and out of pocket expenses and any value added tax on those costs and expenses) which DfE incurs in connection with:
- 4.7.1 the preservation or exercise and enforcement, of any rights under or in connection with this guarantee or any attempt so to do; and
- 4.7.2 any discharge or release of this guarantee.
- 4.8 Until all amounts which may be or become payable by College under or in connection with this Deed have been irrevocably paid in full, and unless DfE otherwise directs in writing, the University shall not exercise any security or other rights which it may have by reason of performance by it of its obligations under this Clause 4 whether such rights arise by way of set-off, counterclaim, subrogation, indemnity or otherwise.
- 4.9 This guarantee shall be in addition to and independent of all other security which DfE may hold from time to time in respect of the discharge and performance by the College of the Guaranteed Obligations.

## **5. CONFIDENTIALITY**

- 5.1 Each Party undertakes that it shall not at any time disclose to any person the content of this Deed except as permitted by Clause 5.2.
- 5.2 Each Party may disclose the content of this Deed:
- 5.2.1 To its employees, officers, representatives, or advisers who need to know such information for the purposes of exercising the Party's rights or carrying out its obligations under or in connection with this Deed. Each Party shall ensure that its employees, officers, representatives, or advisers to whom it discloses the Deed complies with this clause 5;
- 5.2.2 As may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
- 5.3 The Parties may disclose the fact that this Deed has been entered into to third parties.

## **6. ASSIGNMENT AND OTHER DEALINGS**

- 6.1 DfE may at any time assign, transfer, delegate, declare a trust over or deal in any other matter with any or all of its rights and obligations under this Deed to, or in favour of any government department, executive agency, non-departmental public body or other body which at the time of such assignment, transfer, mortgage, charge, subcontracting, delegation, or declaration has the function of regulating or funding further education providers in England.
- 6.2 The University and the College shall not assign, transfer, mortgage, charge, subcontract, delegate, declare a trust over or deal in any other manner with any of its rights and obligations under this Deed.

## 7. ENTIRE AGREEMENT

- 7.1 Subject always to the terms of the Asset Deed and the Grant Funding Agreement (as amended by this Deed), this Deed constitutes the entire agreement between the Parties and supersedes and extinguishes all promises, assurances, warranties, representations, and understandings between them, whether written or oral relating to its subject matter.
- 7.2 Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Deed. Each Party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this Deed.
- 7.3 This Deed shall be binding on and enure to the benefit of, the parties to this Deed and their respective successors and permitted assigns, and references to any party shall include that party's successors and permitted assigns.

## 8. COSTS

Each Party shall bear its own costs incurred in connection with the negotiation, preparation and execution of this Deed.

## 9. VARIATION

No variation of this Deed shall be effective unless it is in writing and signed by the Parties (or their authorised representatives) which continue to exist at the point of the variation.

## 10. WAIVER

No failure or delay by a Party to exercise any right or remedy provided under this Deed or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

## 11. SET OFF

DfE may set off any present ~~(i.e. due and payable) liquidated liability of~~ matured obligation due from the College and/or the University under this Deed against any ~~present liquidated liability of~~ matured obligation owned by DfE to the College and/or the University, regardless of the place of payment, booking branch or currency of ~~such liability~~ either obligation.

## 12. SEVERANCE

- 12.1 If any provision or part-provision of this Deed is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Deed.
- 12.2 If any provision or part-provision of this Deed is deemed deleted under Clause 12.1 the Parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended result of the original provision.

## 13. NOTICES

- 13.1 Any notice or other communication given to a Party under or in connection with this Deed shall be in writing and shall be delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office (if a company) or its principal place of business (in any other case).
- 13.2 Any notice or communication shall be deemed to have been received:

- 13.2.1 if delivered by hand, on signature of a delivery receipt or at the time the notice is left at the proper address; and
- 13.2.2 if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second business day after posting or at the time recorded by the delivery service.
- 13.3 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.
- 13.4 A notice given under this Deed is not valid if sent by email.

#### **14. COUNTERPARTS**

- 14.1 This Deed may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all the counterparts shall together constitute the one Deed.
- 14.2 The executed signature page of a counterpart of this Deed by email in PDF or other agreed format shall take effect as deliver of an executed counterpart of this Deed. If this method of delivery is adopted, without prejudice to the validity of the agreement thus made, each Party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.

#### **15. THIRD PARTY RIGHTS**

~~15.1~~ Unless it is expressly stated otherwise this Deed does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any terms of this Deed.

#### **16. GOVERNING LAW & JURISDICTION**

- 16.1 This Deed and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.
- 16.2 Each Party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractually disputes or claims) arising out of or in connection with this Deed or its subject matter or formation.

This Deed is executed and delivered as a deed by the parties on the date



## SCHEDULE 1

### PROPERTY

<b>Property description</b>	<b>Land Registry title number</b>
Clapham Common South Side, London SW4 9BL (the <b>Clapham Property</b> )	TGL150604
Vauxhall Centre, Lambeth College, Belmore Street, London, SW8 2JY (the <b>Vauxhall Property</b> )	TGL149378

**SCHEDULE 2**  
**STRATEGY DOCUMENT**

## SCHEDULE 3

### MAJOR ASSUMPTIONS

#### Configuration per campus (buildings and size)

The College will build an estate supporting a new Technical College concept at the Vauxhall Property and a 'gateway' College at the Clapham Property. The estate will support 4,362 (FTE) students from Lambeth itself and other south London communities and will include up to 29,805 sqm of dedicated facilities. The Clapham Property will house 6000m<sup>2</sup> (+/-10%) and the Vauxhall Property 21, 677m<sup>2</sup> (+/-5%). The Vauxhall Property is planned as Block A ~~10,054m<sup>2</sup>~~10,050m<sup>2</sup> (+/-5%)., Block B ~~6,972m<sup>2</sup>~~7,940m<sup>2</sup> (+/-5%).and Block D ~~4,654m<sup>2</sup>~~4,570m<sup>2</sup> (+/-5%).

#### Curriculum Offer :

##### Vauxhall Property :

Block A : to deliver Construction, Engineering, Sciences, Dentistry, Computing and Digital Arts

Block B to deliver Nursing, Health and Social Care, Early Years Education, Sports Science, Psychology and Pharmacy

Block D to deliver Financial Services, Accountancy, Business, Leadership and Management, HR/CIPD, Project Management and Marketing

##### Clapham Property :

Block S : to deliver Gateway provision and SEND

The approximate weightings of the curriculum areas are set out within the Strategy Document. The College is not expected to materially change the curriculum area weightings that drive the total campus configurations.

## SCHEDULE 4

### REPLACEMENT SCHEDULE 2 OF THE GRANT FUNDING AGREEMENT

1. The maximum sum which can be recovered under the provisions of this Schedule 2 from You is £17,150,000, being the total of the Principal Grant.
2. We, You and LSBU have entered into the Asset Deed. This Grant Funding Agreement is the "Conditional Grant Agreement" referred to in the Asset Deed.
3. We, You and LSBU have also entered into a deed of amendment and consent (the "**Amendment and Consent Deed**") dated  2020. The Amendment and Consent Deed has amended the provisions of this Schedule 2.
4. You have previously supplied Us as part of an application for funding made to Us in May 2018 by the Corporation with a high level estates strategy (the "**Estates Strategy**") (in the form attached at Appendix 1 to this Grant Funding Agreement) in relation to the disposal and/or development of the Properties, including part or all of the land and freehold buildings at 45 Clapham Common, Southside, Lambeth, London SW4 9BL (the "**Clapham Property**") and part or all of the Vauxhall Centre, Belmore Street, London, SW8 2JY (the "**Vauxhall Property**").
5. Subsequently you have supplied to Us the "**Strategy Document**" in relation to the "**Redevelopment**" of the "**Property**" (each as defined in the Amendment and Consent Deed). We agree with and consent to the Redevelopment in accordance with the Strategy Document and the "**Major Assumptions**" (as also defined in the Amendment and Consent Deed). You must use Your reasonable endeavours to complete the Redevelopment as soon as practically feasible and use Your reasonable endeavours to repay all (or part of) the Principal Grant to Us in accordance with the provisions of this Schedule 2.
6. The Asset Deed states that the sale of part of the Clapham Property in accordance with the Strategy Document is an Agreed Disposal of the Clapham Site in accordance with the Asset Deed and does not require the consent of the Secretary of State. The Amendment and Consent Deed also provides for the consent of the Secretary of State to the Redevelopment (this paragraph is for the avoidance of doubt only and does not affect the interpretation or legal effect of the Asset Deed).
7. In this Schedule 2:
  - a. "**Sale Proceeds**" means the proceeds from the sale of part of the Clapham Property and the sale of part of the Vauxhall Property as described in the Strategy Document on the best terms reasonably obtainable;
  - b. "**Development Costs**" means (subject to the provisions of paragraph 8) all of the reasonable costs and liabilities incurred by You in relation to the Redevelopment of the Property (including for the avoidance of doubt the Clapham Property and Vauxhall Property) less any funding provided by Us to You or LSBU in relation to the Development Costs.
8. You and We agree that the Development Costs shall exclude the cost of redeveloping Block D if You confirm to Us in accordance with the Amendment and Consent Deed that the redevelopment of Block D is no longer viable but shall include the cost of any "**Alternative Block D Model**" (as defined in the Amendment and Consent Deed) approved by Us in accordance with the Amendment and Consent Deed.
9. For the purposes of this Schedule 2, the Sale Proceeds shall be determined by agreement between You and Us with reference to the transactional sale proceeds of the Property. You and We will endeavour to reach an agreement in a timely manner provided that if either You or We conclude that an agreement cannot be reached, either party may refer the dispute to a chartered surveyor with not less than 10 years' experience in valuing property similar to the Clapham and/or Vauxhall Properties who shall be appointed (in default of agreement between You and Us) by the President of The Royal Institution of Chartered Surveyors on the application of either You or Us (an "**Expert Surveyor**"). The Expert Surveyor shall determine the amount of the Sale Proceeds in accordance with paragraph 17. If the Expert Surveyor dies or refuses or is unable to act the

procedure for appointment will be repeated as often as necessary. The Expert Surveyor's fees and the costs of his appointment will be payable by You and Us in such proportions as he determines or in default of such determination equally between You and Us.

10. For the purposes of this Schedule 2, the Development Costs shall be determined by agreement between You and Us and You and We will endeavour to reach an agreement in a timely manner provided that if either You or We conclude that an agreement cannot be reached, either party may refer the dispute to a chartered quantity surveyor with not less than 10 years' experience in assessing the costs associated with capital expenditure on property development projects (including capital developments in the context of the provision of education) who shall be appointed (in default of agreement between You and Us) by the President of The Royal Institution of Chartered Surveyors on the application of either You or Us (an "**Expert QS**"). The Expert QS shall determine the amount of the Development Costs in accordance with paragraph 17. If the Expert QS dies or refuses or is unable to act the procedure for appointment will be repeated as often as necessary. The Expert QS's fees and the costs of his appointment will be payable by You and Us in such proportions as he determines or in default of such determination equally between You and Us.
11. In endeavouring to agree the Sale Proceeds and Development Costs in accordance with paragraphs 9 and 10 You and We will act:
  - a. In order to advance the Objective; and
  - b. Reasonably and in good faith.
12. You and We agree that the Principal Grant is only repayable to Us on the terms of this Schedule 2 following the sale of part of the Property and the completion of the Redevelopment of the Property, when You will repay to Us an amount of the Principal Grant equal to the Sale Proceeds less the Development Costs up to the maximum amount of the Principal Grant (being for the avoidance of doubt £17,150,000). You and We shall agree a repayment schedule to ensure that the Principal Grant due for repayment (if any) is repaid in a timely manner.
13. Following the repayment of part or all of the Principal Grant (if any) in accordance with paragraph 12 above, You will have no further obligation to repay all or any part of the Principal Grant to Us, except as provided by the Amendment and Consent Deed.
14. We also agree that if, following the sale of the Property and the completion of the Redevelopment of the Property there is, after deducting the Development Costs, no remaining balance of Sale Proceeds, You will have no further obligation to repay all or any part of the Principal Grant to Us, except as provided by the Amendment and Consent Deed.
15. If and when You are under no further obligation to repay all or any part of the Principal Grant to Us in accordance with paragraphs 12, 13 or 14 above, and notwithstanding whether You have any obligations to Us under the Amendment and Consent Deed, we will promptly execute a DS1 and do all such other acts and things may be reasonably necessary to release our Security over the Property ~~and all of Your obligations under this Grant Funding Agreement shall terminate (with the exception of Your obligation to retain records pursuant to paragraph 11 of Schedule 3 to this Grant Funding Agreement).~~
16. If, in order to implement the Redevelopment, it is necessary that all or part of the Property is sold prior to entering into the contractual commitments necessary in order to redevelop the Property, We will release Our Security over the relevant Property to facilitate its sale if You can demonstrate to Our satisfaction (acting reasonably and in good faith and in order to advance the Objective) that:
  - a. The proceeds from the sale of the Property will represent the best terms reasonably obtainable (and any dispute about this shall be determined by an Expert Surveyor in accordance with paragraphs 9 and 17 of this Schedule); and
  - b. The costs and liabilities incurred in relation to the Redevelopment of the Property shall not exceed what is reasonable and appropriate (and any dispute about this shall be determined by an Expert QS in accordance with paragraphs 10 and 17 of this Schedule).

17. The Expert Surveyor and/or Expert QS shall:
  - a. Act as an expert and his decision will be final and binding on You and Us (except in case of manifest error);
  - b. Give You and Us the opportunity to make written representations to him and written counter representations on each other's original written representations;
  - c. Consider all written representations made on behalf of You or Us which are delivered to him within such period or periods as he stipulates; and
  - d. Owe a duty of care to both You and Us.
18. Any monies which are properly recoverable by Us in accordance with this Schedule 2 must be repaid to Us within 30 days of a request by Us to do so. If any amount repayable in accordance with this Schedule is not repaid within 30 days of a request for repayment, We reserve the right to unilaterally deduct that amount from any other sum which is due or which may later become due to you under this Grant Funding Agreement or any other agreement or contract you may have with Us.
19. For the avoidance of doubt, the obligations owed by You and Us under this Schedule 2 shall continue until there is no further obligation on You to repay all or any part of the Principal Grant in accordance with the provisions set out in this Schedule 2 (as such Schedule may be varied from time to time by agreement between You and Us).

EXECUTION

The Corporate Seal of

...

**THE SECRETARY OF  
STATE FOR  
EDUCATION**

affixed to this deed is  
authenticated by:

.....

**by the Secretary of State**

**DAuthorized**

**EXECUTED AS A  
DEED by LONDON  
SOUTH BANK  
UNIVERSITY** acting by

.....

**Director**

~~{Name of director}~~  
, a director; and

.....

**Director**

~~{Name of director}~~  
, a director

**EXECUTED AS A DEED**  
by **SOUTH BANK**  
**COLLEGES** acting by

~~[Name of director]~~  
, a director; and

.....  
**Director**

~~[Name of director]~~  
, a director

.....  
**Director**



## **South Bank Colleges**

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**Advice in relation to a guarantee**

**London South Bank University**

**21 October 2020**

## 1 Background

1.1 We have been asked to advise London South Bank University (the "**University**") in relation to a proposed guarantee of obligations owed by its wholly-owned subsidiary, South Bank Colleges ("**SBC**"), to the Secretary of State for Education (the "**DfE**").

1.2 SBC was established to operate the college of further education previously operated by Lambeth College. It owns properties at Clapham and Vauxhall (together the "**Property**") previously owned by Lambeth College. SBC proposes to redevelop the Property.

1.3 It is proposed that SBC and the University will enter into a deed (the "**Deed**") with the DfE which will regulate SBC's liability to repay certain grant funding to the DfE (the "**Grant**"), up to a total amount of £17.5m. A draft of the Deed has been negotiated with the DfE and is in a near final form, subject to any further changes required by the parties.

1.4 The University is a party to the Deed solely in order to guarantee SBC's obligations to the DfE to:

1.4.1 repay the Grant to the DfE out of the proceeds of sale of part of the Property as part of the redevelopment in accordance with the terms of the Deed; and

1.4.2 following the completion of the redevelopment, to repay the Grant out of the proceeds of any disposal, refinancing or other release of capital value made or realised by SBC in relation to the Property;

up to the maximum amount of the Grant, being £17.5m (the "**Guarantee**").

1.5 The University's obligations under the Guarantee are in addition to the existing security for SBC's obligations to the DfE granted over the Property and also extend to an indemnity to the DfE in respect of any costs and expenses it incurs in enforcing the Guarantee.

1.6 Please note that we have only been asked to advise on the University's power to enter into the Guarantee by executing the Deed and that we have not reviewed or advised on any other issues which may be relevant including e.g. any consent required from any existing lender to the University. We have also not set out in this note a detailed analysis of the terms of the draft Deed.

## 2 The University's powers

2.1 As a limited company, the University's powers are governed by its articles of association. The University has an express power to give guarantees "*... so far as permitted by charity law..*" and a general "catch-all" power under article 3.1 "*... to do anything which is calculated to further its Objects or which is conducive or incidental to doing so...*". The "Objects" referred to are the University's charitable objects, which include advancing both higher and further education.

2.2 On the face of it, these powers are wide enough to allow the University to give the Guarantee. However, the extent to which a specific express power which is expressed to be subject to charity law or a general power can be used to guarantee the obligations of an associated non-charitable body was called into question by the High Court's decision in the case of *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd v Bates & Partners (A Firm) [1986] 1 WLR 1440*.

2.3 In that case, a charitable housing association guaranteed the obligations of a non-charitable development company to a lender. The company (which was under the control of the same body of persons although not a subsidiary of the association) was contracted to carry out a housing development project on behalf of the association. It was held that the association

did not have the power to give the guarantee on the basis that neither a "catch all" power nor any implied power permitted the association to give away its assets, which was what the guarantee amounted to.

- 2.4 The Judge in *Rosemary Simmons* said that the association "*merely received the satisfaction of knowing that work it desired to see carried out would be carried out by a third party. But the [association] must advance its own charitable purposes either by its own actions or through its agents or subsidiaries. In guaranteeing the [development company] it was not advancing its interests in that way.*" Although the association was seeing its objects promoted, that did not remove the difficulty of the association "*committing itself gratuitously to bear the liabilities of a third party*".
- 2.5 Although *Rosemary Simmons* remains settled law, the correctness of the decision has been called into question, including recently by the Law Commission in its review of social investment by charities. In any event, in our view the proposed Guarantee in relation to SBC can be distinguished from the facts in *Rosemary Simmons* in two respects:
- 2.5.1 SBC is a wholly-owned subsidiary of University. The Judge in *Rosemary Simmons* indicated that the decision may have been different if the development company was a subsidiary of the association. Although his reasoning is not expressly set out, it appears this is on the basis that the association would be advancing its charitable objects *itself*, albeit through a subsidiary.
- 2.5.2 SBC is, like the University, a charity, with charitable objects that are compatible with those of the University itself. The activities which SBC is able to carry out are activities which the University could therefore itself properly carry out.
- 2.6 On this basis, our view is that the activities of SBC directly further the University's charitable objects and, because SBC is a subsidiary, on the reasoning in *Rosemary Simmons* the University can be said to be furthering its own charitable educational objects through its subsidiary.
- 2.7 It is also worth noting that the Charity Commission's guidance in *Charities and Trading* (CC35) is consistent with the decision in *Rosemary Simmons*. The Commission's view is that trustees will have acted improperly (and therefore could be at risk of personal liability) in guaranteeing the liabilities of a non-charitable trading subsidiary where the parent charity could not itself properly have carried on that trade. Although it is not said expressly, by implication the general "prohibition" on guaranteeing the liabilities of a trading subsidiary will not apply where the subsidiary is carrying out activities which the charity could itself carry out.
- 2.8 In summary, therefore, the University does in our view have the power to give the Guarantee.

### 3 Exercising the power

- 3.1 While the University may have the power to give the Guarantee, the exercise of that power must be in the best interests of the University and its charitable educational objects.
- 3.2 In particular, the University will need to be satisfied that SBC is carrying out activities which further the charitable educational objects of the University and therefore which the University could itself carry out. SBC's own charitable objects (which, as we have said, are compatible with those of the University) obviously provide a high degree of assurance that this is the case.
- 3.3 We suggest the following factors are also likely to be relevant when the University is considering the above:

- 3.3.1 The extent to which the Guarantee is considered to be necessary or expedient to enable SBC to operate effectively, including any impact on its ability to secure funding for the redevelopment from other sources.
  - 3.3.2 The impact on the University's charitable educational objects of improvements in SBC's ability to deliver outcomes for its students, together with any impact on the University's own students.
  - 3.3.3 The financial risk to the University of giving the Guarantee. The amount of the Guarantee is potentially significant and by giving it the University loses the benefit of SBC's limited liability status, which would otherwise "ring fence" its liabilities and protect the University from them.
  - 3.3.4 Equally, an assessment of the practical likelihood of SBC defaulting on its obligations is likely to be relevant, particularly taking into account the DfE's continuing security over the Property (up until the completion of the redevelopment) and that SBC's obligations under the Deed are contingent in a number of respects e.g. in simple terms, the obligation to repay the Grant on sale of part of the Property as part of the redevelopment will depend upon whether the proceeds of sale exceed the costs of the redevelopment.
  - 3.3.5 As the sole member of SBC, the University would also potentially have the ability to direct the board of SBC if it considered that a default was likely (subject to any specific company law considerations and on the basis of recent case law which confirms that the member of a charitable company owes a duty to act in the company's interests).
- 3.4 There are likely to be other factors that the University considers to be relevant and these should be clearly identified and assessed in making a decision to exercise the University's power to give the Guarantee.
- 3.5 In summary, provided the University is satisfied that it can justify the Guarantee as being in the best interests of the University and its charitable educational objects, the University can in our view properly give the Guarantee by entering into the Deed.

**VWV**

**21 October 2020**