

North Hertfordshire District Council

Development at Churchgate, Hitchin

1. Executive Summary

1.1 North Hertfordshire District Council (the "Council") have asked Eversheds LLP to provide advice in relation to the proposed development at Churchgate, Hitchin. The Council have asked Eversheds to consider the following questions:

1.1.1 Can the Council deal exclusively with one developer without running either a procurement exercise or some form of market testing exercise?

The Council may in certain circumstances deal exclusively with one developer without undertaking an EU procurement process. The Council should note that any such decision relies on case law and is accordingly not risk free. The Council should agree its minimum requirements for the Site including if the reprovision of car parking and the market are requirements and whether it is prepared to work to the limitations that are required for the arrangements not to be caught by the EU procurement regulations.

In order to satisfy best value and State aid, the Council should obtain an independent valuation of the Site from a suitably qualified valuer and in accordance with both sets of rules. Where it has received two competing proposals, the best way for the Council to satisfy itself that it is securing best consideration on the disposal is to undertake some form of competitive process. Whilst that process might fall short of a full EU procurement, it would need to be sufficient to enable the Council to satisfy itself that best consideration was being secured. Please see paragraphs 3.1 to 3.27.

1.1.2 If so, how could the Council demonstrate best consideration for use of its assets?

In order to demonstrate best consideration for its assets, the Council will need to evaluate the price of the land taking into account matters which can be weighed in money or monies-worth so that essentially the highest price must be accepted. If land is not disposed of by open tender, there is a need to ensure that there is a robust approach to valuation of the land. Please see paragraphs 4.3 and 4.9.

1.1.3 Does the scale of any proposed development affect the answer to 1.1.1 above?

As detailed in paragraph 5.3, the scale of the proposed development may affect the Council's requirements, as if the value exceeds the works threshold for EU procurement then the risks of challenge are higher because of potential breaches of the Regulations rather than judicial review only for breach of Treaty principles.

- 1.1.4 Is the answer to 1.1.1 above different if a potential developer already has a lease on part of the site (including whether the percentage of ownership of the proposed new development area is a factor) as opposed to a developer with no existing land interest in the site?

The ownership of part of the Site by a prospective developer is a relevant factor in determining whether exclusivity is a reasonable approach. However, the fact that the Council undertook a procurement exercise for the development of the Site previously undermines this argument. Please see paragraphs 6.1 and 6.2.

- 1.1.5 Does the scale of development in relation to an existing lease affect the answer to 1.1.1 above? Does the extent to which an existing lease is extended and/or re-gear affect the answer to 1.1.1 above?

The scale of the development in relation to an existing lease might be relevant to the Council's decision to proceed by way of exclusivity. Please see paragraphs 7.1 and 7.2.

- 1.1.6 Are there any other relevant considerations?

The Council should have regard to judicial review as well as State aid issues if the Council, in addition to any land transfer, provides wider support towards the proposed development on terms that are not fully commercial in nature. Please see paragraphs 8.1 and 8.2.

2. **Background**

- 2.1 Site 1 comprises the existing Churchgate Centre, the market area including the frontage along the river and Biggin Lane car park. Site 2 comprises the areas in site 1, the St Mary's Square car park and Portmill Lane West and East car park (together the "Site"). Site 1 includes a shopping centre which is currently let in part on a long lease to Hammersmatch for a period of 125 years from 29 September 1973. The Council has been approached separately by two developers who wish to redevelop site 1 and site 2 respectively.

3. **Can the Council deal exclusively with one developer without running either a procurement exercise or some form of market testing exercise?**

Powers

- 3.1 There may be circumstances in which the Council could deal exclusively with one developer without running either a procurement exercise or market testing exercise.
- 3.2 Before considering the technical issues relating to the need or otherwise for compliance with the procurement regime, we highlight the importance of the decision making process which might lead the Council to deal exclusively with one prospective purchaser.
- 3.3 The Council in exercising its power to dispose of land is governed by statute and there must therefore be a proper reason to exercise the power in the manner proposed.
- 3.4 Local authorities are "creatures of statute". This means that they are only empowered to act if they have an explicit statutory power, or one may be inferred by necessary implication. In addition to specific powers the Localism Act 2011 confers a power of general competence by which (subject to certain limitations) an authority can do anything which an individual can do.
- 3.5 Authorities also have the power to do anything which is calculated to facilitate or is conducive or incidental to the discharge of any of their functions under section 111 Local Government Act 1972. The word functions has been given a wide meaning by the courts, to include all of the duties and powers of local authorities and covers such matters as borrowing and investment (*Hazell v Hammersmith & Fulham [1992] 2 AC 1*).
- 3.6 The manner in which authorities exercise their powers is also important, because the failure to take into account relevant considerations, or *the failure to follow proper procedures*, could result in the Council being challenged by way of judicial review. If an authority acts outside its powers or is subject to procedural failures this is "ultra vires" and is challengeable in the Courts. This covers the familiar concept of Wednesbury reasonableness, that is, the importance of ensuring that no decision of the Council can be challenged on the basis that it was procedurally improper, irrational or perverse. In addition, all of the relevant considerations must be taken into account and irrelevant ones ignored. The authority should not do anything which no reasonable authority would do, ie act irrationally. To avoid the risk of challenge, the Council therefore has to think carefully about what it wants to do in relation to this development and be satisfied that it lies within its statutory powers.
- 3.7 Local authority decisions, particularly those which relate to a novel or innovative project, or the creation of an external entity (such as a Special Purpose Vehicle or a joint venture company) may be subject to scrutiny, to determine whether or not there has been compliance with the public law framework. The Council's

external auditors may need to be consulted on proposals at an appropriate juncture.

- 3.8 In making decisions therefore the authority must identify the power; ensure that it is appropriate to the circumstances; and then ensure that the power is exercised properly. If an authority either exceeds its powers or exercises them wrongly it may be subject to challenge. If a Court decides that the Council's actions are ultra vires, then the arrangements are void from the start.
- 3.9 Fiduciary duty - the public law framework reminds Members and Officers that the money which they spend on behalf of the Council is not their own money but money they hold on behalf of the local electorate. Similarly the assets of the authority including property and other investments are also held on trust. This public stewardship is described as a fiduciary relationship which requires authorities to ensure value for money. This is something which arises from case law, although there is no detail on precisely how an authority must demonstrate that it has obtained value for money or satisfied the duty (outside such measures as the EU procurement regime and requirements for best consideration on disposal of land). We understand that the Council has two competing proposals including one from the leasehold owner of part of the site. Accordingly, the second proposal may require the Council to take steps to compulsorily acquire land in the ownership of its competing bidder.
- 3.10 The Council needs to undertake a detailed appraisal of the reasons why it intends to dispose on an exclusive basis. If the Council wishes us to do so we can review such an analysis. The decision it reaches will be capable of being challenged under judicial review. One of the key considerations for the Council will be the issue of making a case for compulsory acquisition faced with a bid from the existing leasehold owner.
- 3.11 Where it has received two competing proposals, the best way for the Council to satisfy itself that it is securing best consideration on the disposal is to undertake some form of competitive process. Whilst that process might fall short of a full EU procurement of works, it would need to be sufficient to enable the Council to satisfy itself that best consideration was being secured. The starting point for any such exercise (and for any exclusive negotiations) must be the securing of an independent valuation from a suitably qualified valuer to inform the process.
- 3.12 We have been provided with the Council's agreed arrangements for the disposal of land including competitive disposal. These provide a degree of flexibility in determining which process to follow including Private Treaty, Public Auction, Formal Tender, Informal Tender, statutory offer back to the former owner, or long lease. The method chosen will depend on a judgement as to the objectives of the disposal and an assessment of the actual and potential interest in purchasing and developing the site. If the result of that exercise is that the

Council wants to proceed with one of the two current interests, then at the very least an informal tender process would be advisable. If the aims for the site and surrounding circumstances suggest a wider interest then a more formal process may be required. A final view on the best approach can only be taken when the aims and opportunities are clearer and further evaluation of the preferred method can then take place. Any competitive process will also need to satisfy the open and unconditional bidding procedure required for State aid (see paragraphs 4.10 to 4.15).

Procurement considerations

3.13 We turn now to the technical requirements on market testing. The Council is required to procure under the Public Contracts Regulations 2006 (as amended) (the "Regulations") where it meets the following criteria: (1) the Council, as a contracting authority; (2) enters into a contract in writing; (3) with someone else; (4) for pecuniary advantage; (5) which contains a binding obligation for the provision of goods, works or services; (6) which will be above the threshold detailed in the Regulations; and (7) which is not otherwise exempt from the procurement rules.

3.14 Regulation 2(1) defines a "public works contract" as follows:

"... a contract, in writing for consideration (whatever the nature of the consideration)

a. for the carrying out of a work or works for a contracting authority; or

b. under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements..."

3.15 Compliance with public procurement and land transactions has developed with case law starting with when the ECJ held in the case of *Jean Auroux and others v Commune of Roanne C-220/05* that, notwithstanding that the development in question was to be disposed of to third parties, the development was a public contract such that the Regulations applied in the following circumstances:

3.15.1 a contracting authority does not necessarily have to become the eventual owner of a work for the contract to comprise a public works contract;

3.15.2 for the purposes of deciding whether a contract exceeds the works threshold, the total value from the point of view of the tenderer is the relevant figure, including any sums to be received from third parties; and

3.15.3 the fact that both parties to an agreement are contracting authorities and the second authority will procure any consequent contract to physically carry out the work in accordance with the public procurement rules, will not exempt the original agreement from the rules.

3.16 This was followed by another ECJ ruling in Case C-451/08 *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben*. Following this case, the Office of Government Commerce¹ (the body previously responsible for procurement policy) published guidance (at paragraph 14) clarified that, when deciding whether a development agreement comprises a public works contract, questions for consideration are:

3.16.1 is there a work or works required or specified by a contracting authority?

3.16.2 is there an enforceable obligation (in writing) on a contractor to carry out that work or works?

3.16.3 is there some pecuniary interest for carrying out this work (not necessarily a cash payment)?

Paragraph 15 suggests that, if the answer to any or all of those questions is "no", then it is unlikely that the development will be subject to the Regulations. Paragraph 15 states "If the answer to all those questions is "yes", it is likely that the agreement will be subject to the public procurement rules."

First Limb

3.17 Taking each point in turn, the ECJ held that "*to establish that a contracting authority has specified its requirements, the authority must have taken measures to define the type of the work, or at least, have had a decisive influence on its design*". An invitation for a site to be developed in accordance with national or local land-use planning policies with the developer free to put forward its own proposals and specifications within these parameters is unlikely to fall within the definition of a requirement specified by the contracting authority.

3.18 Therefore, to exclude from procurement requirements the Council must ensure that it does not specify its requirements or have a decisive influence on the redevelopment at the Site. The Council would need to ensure that it has grounds to use this approach and that the audit trail supported there not being any requirement or a decisive influence on the redevelopment at the Site.

¹ Procurement Policy Note – Public Procurement Rules, Development Agreements and s106 "Planning Agreements", Updated and Additional Guidance information note 12/10 30 June 2010.

- 3.19 The courts will look at all the evidence and the Council will need to consider its audit trail in relation to whether it specifies its requirements or not.
- 3.20 Where the Council exercises its planning functions, it should consider whether the planning policy could adequately reflect any Council requirements for the Site, which would avoid the need for the Council to specify its requirements to trigger a procurement. This is a question of fact and will depend on the specific approach taken by the Council.

Second Limb

- 3.21 In relation to the second limb, a sale or lease of land to a developer with the intention of both parties that the developer will undertake a particular work or works in accordance with the contracting authority's needs is not in itself sufficient to engage the Regulations. A development agreement between a contracting authority and a developer which sets out the intended nature of the proposed development is unlikely to constitute a contract subject to the Regulations unless the developer is placed under a binding obligation to carry out at least part of the development.
- 3.22 In *R (On the Application of Midlands Co-Operative society Limited) v Birmingham City Council* [2012] EWHC 620, the court stated that: "*to fulfill the purpose of the Directive [the Public Contracts Directive 2004/18/EC], a required element is a commitment by the contractor, legally enforceable by the contracting authority, to perform the relevant works. It is insufficient if legally the contractor has a choice and is entitled not to perform the works.*"
- 3.23 The facts of the case referred to above concerned the contractor's obligations under a planning permission and a section 106 agreement. The court stated that the obligations under such an agreement do not arise unless the planning permission is implemented (ie the development started). Until that point, the contractor is not legally committed to start the development at all and the Council could not require them to perform any works. It was, however, conceded that once the section 106 agreement is triggered by the contractor starting the development, there would be an obligation to perform works, legally enforceable by the Council. On that basis, the court held that, because there was no legally enforceable obligation to perform any relevant works, the arrangement did not constitute a "public works contract" for the purposes of the Regulations; and hence, the procurement provisions of the Regulations did not apply.
- 3.24 It is therefore possible in principle for the Council to enter into an agreement which does not contain binding obligations to undertake works, without triggering the need to comply with the Regulations. The practical result of this is that the Council cannot require the developer to develop the Site.

- 3.25 Even where the agreement can be structured so that there is no obligation on the developer to build, there is of course no guarantee that the case law detailed above will be upheld by another court if a challenge is brought and therefore some risk must remain that a court would determine otherwise such that the Regulations would apply. If nevertheless the Council wish to proceed on a risk-assessed basis that the agreement does not contain a legally binding obligation then it will be very important to try to structure the document in this way. Specific advice will be required in relation to this but the Council needs to accept that it cannot enforce the development to take place. The Council could include a longstop date in the agreement so that if development had not commenced the rights for the developer ends and it would be free to deal with the land again.

Third Limb

- 3.26 The ECJ in *Helmut Müller* ruled that a public contract would not arise unless the contracting authority receives a direct economic benefit. Direct economic benefit is likely to include circumstances where:
- 3.26.1 the contracting authority is to become owner of the work or works;
 - 3.26.2 the contracting authority is to hold a legal right over the use of the works to make them available to the public;
 - 3.26.3 the contracting authority derives economic advantages from the future use or transfer of the work, has contributed financially to the work, or has assumed economic risks in case the works are an economic failure.
- 3.27 If the Council obtains a direct economic benefit over the development then it will need to undertake a procurement in accordance with the Regulations unless it consider it can rely on one of the other limbs described above. The Council will therefore need to consider whether it wishes to stipulate any requirements for the Site which would result in direct economic benefit and, if so, it will need to undertake a procurement exercise. It is not wholly clear when there will be direct economic benefit in all cases. Where the Council benefits from rental income (even if it stays the same as it is currently), then this will likely constitute a direct economic benefit. Whilst a cost neutral rental may not be a direct economic benefit, there may be direct economic benefit under the other limbs and so the arrangement will need to be reviewed on a case by case basis.

Options for the Council

- 3.28 The Council may therefore consider that it is minded to structure the transaction as a land deal (which does not involve the award of a works contract) under the headings above. In such circumstances, the Council could deal with one developer only. If the Council takes this approach it should be mindful that this approach is not without risk. For example, the Commission's Interpretative

Guidance on Community Law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives suggests that Treaty principles apply where a public body grants rights to a third party and such rights would be of interest to parties in other Member States. Compliance with these principles would include ensuring that there is sufficient advertising of the opportunity and that an authority undertakes a fair transparent process with equal treatment in selecting a development partner. There is inconsistent case law in the UK at present as regards the question of whether a land development arrangement (which does not involve the award of a public works contract) is in principle subject to the Treaty principles, with a recent case in the English courts taking the view that these do not apply in certain circumstances. However, there is doubt as regards the correctness of this approach, not least because of the apparent conflict of this authority with certain EU court decisions. We would be concerned therefore if the matter were brought before the EU courts that they may take a stricter approach and apply Treaty principles which would require the opportunity to be opened up to competition and not be awarded to a developer without procurement. Equally, we cannot exclude the possibility of an English High Court differentiating the current circumstances from previous case law and taking a stricter approach on the matter by reference to certain EU law authorities.

- 3.29 The Council would also need to be careful if it was relying on a land deal arrangement falling outside of the Regulations to ensure it did not specify its requirements. It would be a procurement risk to seek to pass the procurement obligation of any obligations to the developer. The third limb of the Auroux case at paragraph 3.15.3 above would apply in a similar way to the way the court applied it in that case.
- 3.30 The Council may consider concession contracts for the car park and the market which would see risk transfer to the concessionaire and under which the consideration given by the Council consists of or includes the right to exploit the service or works by the concessionaire under the contract. The current Regulations exclude service concession contracts and regulate works concession contracts over £4,322,012 to a lesser extent but which requires a competitive process advertised via the OJEU. For service concession contracts and work concession contracts below the threshold, the Treaty principles will apply where there is intercommunity trade. The EC has also passed a new Concessions Directive which the UK government needs to bring into force in England by April 2016. These require all concessions over £4,322,012 to be procured through the OJEU but with a less strict procurement regime applying. Below threshold we anticipate the Treaty principles will apply where there is intercommunity trade. As any concession linked to a land deal could be held to be a works contract to which the Regulations apply, careful regard would need to be given to such an approach. If the Council is minded to consider this approach we would be happy to advise on the strengths and weaknesses.

- 3.31 The difficulty and risk for the Council in this instance is that the Council has previously undertaken a procurement in accordance with the Regulations for the development and knows of interest in the land to be redeveloped and therefore there may be challengers interested in the Site.
- 3.32 Specifically, the Council has two developers interested in entering into exclusive arrangements with it. It seems to us that there is an immediate challenger if the Council chooses one developer over the other, especially as it has been receiving proposals from both developers. In addition, other economic operators may challenge, including those who bid in the previous procurement exercise.
- 3.33 The decision to rely on the arrangement being a land deal and not a works contract may therefore be challenged for procurement breach, judicial review and State aid. Alongside bringing actions in the UK courts a challenger could complain to the EC for breach of procurement rules and State aid. It is a free process to complain and is likely to bring delays to the project.
- 3.34 To seek to bring legal certainty for procurement, the Council may wish to issue a Voluntary Ex Ante Transparency notice ("**VEAT**"). This is issued in circumstances where the Council has a justification for not undertaking a prior advertisement, eg, in circumstances where it enters into a pure land transaction (which is not subject to the Regulations) it may wish to issue a VEAT. The VEAT would need to detail the following in order for the Council to seek to rely on the protection it offers under Regulation 47K:
- 3.34.1 the name and contact details of the contracting authority;
 - 3.34.2 a description of the object of the contract;
 - 3.34.3 a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice (ie why the Council considered the award of the contract without publication of a contract notice to be permitted by the Regulations);
 - 3.34.4 the name and contact details of the economic operator to be awarded the contract; and
 - 3.34.5 where appropriate any other information which the contracting authority considers it useful to include.
- 3.35 Where it published a VEAT, the Council would also need to allow a ten day standstill period before entering into the contract. A VEAT will therefore be published in the Official Journal of the European Union and will put the marketplace on notice of the arrangement entered into by the Council. The decision whether to issue a VEAT is a commercial decision for the Council. If the Council issues a compliant VEAT and is not challenged, then an advantage of

issuing a VEAT is that the remedy of ineffectiveness will not apply. Ineffectiveness is the cancelling of those terms of the contract which have yet to be performed so that the contract is set aside. We would also comment that it could be possible for a challenger to challenge the validity of a VEAT even outside of the 10 day period so that the 6 months in effect continues if the Council does not have a valid ground for issuing the VEAT. Without issuing a VEAT, an ineffectiveness claim may be brought within 6 months from the day after the contract has been entered into. We set out below in sections 3.37 and 3.38 other consequences of a successful challenge for breach of the Regulations.

- 3.36 In addition or instead of a VEAT, the Council could also consider issuing a contract award notice in the OJEU. This has the effect of reducing the challenge period from 6 months to 30 days. The same point regarding challenging the validity of the notice as in sections 3.35 applies.

Consequences of a successful challenge

- 3.37 In circumstances where the Regulations apply but the parties proceeded outside of the Regulations, the proposed agreement between the Council and the developer would constitute a direct award of a public contract. The consequences of a successful challenge for a direct award of a contract include a declaration of ineffectiveness, damages, and fines.

- 3.38 For damages, the time limit for challenge is 30 days extendable by a court to up to three months from the date the challenger knew or ought to have known about the breach. The Council should note that the time limit for challenge may therefore run for the life of the contract, unless the Council takes steps to mitigate this risk. This may include, for example, issuing a VEAT or a contract award notice. The Council should also factor in the costs of defending/admitting a claim which will include legal costs as well as management time and possible adverse audit findings and publicity. The EC may also bring infraction proceedings at any time, for example, where a complaint is made to the EC which can lead to the contract being set aside and damages.

4. How could the Council demonstrate best consideration for use of its assets?

General principles of best consideration

- 4.1 Section 123 Local Government Act 1972 enables local authorities to dispose of land held for general purposes in any manner they wish. However, disposals must be at the best consideration that can reasonably be obtained, unless the disposal is of a short tenancy for less than seven years or the Secretary of State's consent is obtained. This requires the Council, at the time of disposal, to obtain the highest price for any purpose, no matter what the proposed use of the development may be.

- 4.2 The requirement to secure best consideration applies to disposals other than a lease for less than 7 years. The consideration may be capital or revenue or a mixture of both depending on the structure of the transaction and the requirement to secure best consideration applies to freehold and leasehold transactions.
- 4.3 In terms of achieving best consideration, there is a fairly long line of cases, including Middlesbrough, Hackney, Essex and Pembrokeshire which require local authorities to evaluate the price of land taking into account matters which can be weighed in money or monies-worth, so that essentially the highest price must be accepted. There are a couple of cases which suggest that a last minute bid may be rejected for sound commercial reasons, eg if it is a spoiling bid which will result in the loss of an existing sale, or the purchaser, for example, does not have the funds to complete, but not otherwise. Each case must, of necessity, depend on its own facts. However, if an unsolicited offer for the Council's land were received, the Council would need to give it due consideration, including as to whether it was a serious offer and how it would affect the overall regeneration of the site.
- 4.4 In *R v Pembrokeshire CC ex parte Coker* [1999] 4 All ER 1007 it was held that although an authority could take into account the fact that a disposition would create jobs, the only criterion to be applied in deciding whether the best consideration reasonably obtainable had been obtained was the commercial value of the disposition to the authority. The case was approved in *R (on application of Lemon Land Limited) v Hackney LBC* [2001] EWHC Admin 336 where the court held that the potential for job creation, despite its benefits to the community does not have a monetary value and cannot therefore be regarded as consideration for the purposes of section 123 (2) or be taken into account to justify accepting a lower offer for the sale of land.
- 4.5 In *R v Essex County Council, ex parte Clearbrook Contractors Limited* (1981, unreported), a decision of a local authority to reject a bid purely on ethical reasons was quashed and the court suggested that there was a need to probe or explore the limits of opposing bidders. In *R v Lancashire County Council ex parte Telegraph Service Stations Limited*, *The Times* June 25 1988, a decision of a local authority to reject a bid for ethical reasons was also quashed, where the authority did not wish to gazump a company, having received a higher offer.
- 4.6 There are occasions when other factors can be taken into account, for example, in *R (Lidl (UK)) v Swale Borough Council* (unreported, February 23, 2001), it was accepted as valid for a local authority to accept an offer which formed part of a comprehensively presented scheme in preference over a higher offer which was subject to contract and part of a series of inconsistent offers, where it was not certain the scheme would proceed.

- 4.7 Generally speaking any contract to dispose of land may be set aside at any time up until completion where the Council's statutory duty to obtain best consideration is not met. In the case of *R (on the application of Structadene Limited) v Hackney LBC* (2000) 3 LGLR the authority had only entered into a contract for sale when the applicant applied for judicial review of the decision to sell the property without obtaining the permission of the Secretary of State. The Court held that, until the sale had been completed, the purchaser held only an equitable interest which was not enough to give rise to the protection available under section 128 Local Government Act 1972.
- 4.8 This section gives protection to any person claiming that consent of the Minister which has been required has not been given, or any requirement as to advertisement or consideration of objections has not been complied with prior to disposal, where effectively there has been some technical breach of procedure prior to completion.
- 4.9 If land is not to be disposed of by open tender then there is a need to ensure that there is a robust approach to valuation of the land, which we will consider below in paragraphs 4.16 to 4.18.

State aid

- 4.10 In addition to best value the Council will need to ensure compliance with State aid rules. These are separate tests. The European Commission has issued guidance on State aid elements in sales of land and buildings by public authorities ("the Sale of Land Guidelines"). These guidelines expressly provide that State aid issues will not arise in respect of the sale of land by a public body if it can be established that the sale is at an open market value, as established either by way of an open and unconditional bidding procedure or by way of an independent expert evaluation (i.e. by a chartered surveyor) subject always to such valuation being undertaken in accordance with the conditions set out in the Sale of Land Guidelines. They apply equally to both freehold and leasehold disposals.
- 4.11 The Council will need to consider either subjecting the land to a bidding process or it will need to ensure that it obtains professional valuation advice on best consideration at the time it disposes of land. Professional valuation advice may be provided by the Council, the District Valuer and/or independent valuers. Whilst the District Valuer may be used as a source of valuation advice, if the scheme is relatively complex it may be more appropriate to seek independent advice. The District Valuer or Council valuer would need to be independent ie any undue influence over their valuation would need to be excluded. Where it is difficult to assess market value or there is some divergence of view in ascertaining market value it may be sensible to obtain opinions from both internal and external sources or even two external sources.

- 4.12 In order to eliminate any possibility of State aid (at the level of the proposed land disposal) the land will need to be sold at a price which represents no less than its open market value as ascertained by way of an independent valuation. The Sale of Land Guidelines provide details as to how the base value of the land is to be assessed and what, if any, deductions can be made from that base value as a result of economic obligations imposed regarding the land in question.
- 4.13 If the relevant valuation was not undertaken in accordance with the unconditional bidding procedure requirements set out within the Sale of Land Guidelines, the valuer will need to confirm that the land is being sold at its open market value or greater (net of any deduction in its value resulting from any special obligations relating to the land and buildings which are attached to the sale and which any potential buyer would have been required and in principle able to fulfil). Such obligations could include restrictions in terms of use of the land or planning gain obligations linked to the land subject to such restriction/obligations running with the land.
- 4.14 Aid issues (in the context of the land disposal) will only arise if the valuers are unable to provide the necessary confirmation that the land is being sold at its market value or greater as established in accordance with the requirement of the Sale of Land Guidelines. If the land is sold at an undervalue, then the difference between its market value and the sale price will probably (subject to some exceptions) amount to State aid which will need to be approved in advance by the European Commission, in which case further analysis will be required. Where an illegal State aid is given there is a ten year limitation period from the date of the grant of last aid and clawback must be with interest from the date of the State aid first being given to date of repayment.
- 4.15 An important consideration to note is that the State Aid Rules operate separately from the Council's "Best Consideration" obligations and therefore even where there is no necessity to obtain the Secretary of State's specific consent for disposal at an undervalue in accordance with the requirements of the General Disposal Consent 2003, State Aid issues will still need to be addressed. The ODPM Circulate 06/03 which sets out the General Consent reminds authorities that disposals are required to comply with the State Aid Rules.

Disposal at less than best consideration

- 4.16 There is a General Consent contained in ODPM circular 06/2003 which allows the disposal of land at less than best consideration, where it will help to secure the promotion or improvement of the economic, social or environmental wellbeing of the area and provided the undervalue is less than £2m. The Council would need to establish that it was disposing of the relevant land to secure the redevelopment of the area for wellbeing purposes (as defined in section 2 Local Government Act 2000).

4.17 In addition, disposing of the land under the general consent must be compliant with rules on State Aid, which links back to the valuation issues covered above.

4.18 The decision to dispose of land would need to take into account all relevant considerations, including the Council's fiduciary duties to its Council tax payers/others and the potential for unlawful state aid.

5. **Does the scale of any proposed development affect the answer to 1.1.1 above?**

5.1 The scale of the development may affect the procurement and the exclusivity decision.

5.2 The scale of the development may be an issue in the decision to proceed by way of exclusivity in that the Council may be losing the opportunity to maximise its return by not including a range of potential bidders.

5.3 The scale of the development may have an impact on whether a developer challenges as the higher the value the greater the opportunity that is lost and therefore a challenger may be more likely to want to pursue an action. If the value exceeds the works threshold of £4,322,012 then the risks of challenge are higher because of potential breaches of the Regulations rather than a judicial review only for breach of the Treaty principles. The analysis of whether the transaction can be a land deal and fall outside of the Regulations is not altered by the size of the development.

6. **Is the answer to 1.1.1 above different if a potential developer already has a lease on part of the site (including whether the percentage of ownership of the proposed new development area is a factor) as opposed to a developer with no existing land interest in the site?**

6.1 The ownership of part of the site by the prospective purchaser is a relevant factor in determining whether exclusivity not competition is a reasonable approach. Here, site 1 is currently let in part on a long lease to Hammersmatch for a period of 125 years from 29 September 1973. The lease has around 84 years left to run.

6.2 From a vires perspective the Council can argue that the timescales and cost, including the potential need to exercise compulsory powers justify an exclusive approach. We would expect a costed appraisal being required to support such an approach.

6.3 The Council may wish to seek to rely on Regulation 14(1)(a)(iii) of the Regulations to argue that the developer has an "exclusive right" and that it is entitled to rely on the negotiated procedure without notice.

- 6.4 Regulation 14(1)(a)(iii) provides that a contracting authority may undertake the negotiated procedure without prior publication of a contract notice in circumstances where *“for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the public contract may be awarded only to a particular economic operator.”* The negotiated procedure without notice is only available in exceptional circumstances to negotiate with that bidder only. The new Directive 2014/24/EU provides that contracting authorities may only utilise these grounds when *“no reasonable alternative or substitutive exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement”*. Whilst the new Public Contracts Regulations 2015 which implement Directive 2014/24/EU are not yet in force, we consider that these principles apply as a result of current case law and that in any event, if challenged prior to entry into force of the new Public Contracts Regulations 2015, the courts will consider the provisions of the Directive 2014/24/EU to be persuasive.
- 6.5 This approach is different to the land deals not forming a works contract caught by the Regulations as discussed above, where the Council would be proceeding on the basis that the development of the Site and surrounding land is a land deal and so exempt from the Regulations. The negotiated procedure without prior publication of a contract notice is an acknowledgment that the development falls within a works contract and therefore caught fully by the Regulations unless the negotiated route with one bidder can be relied upon.
- 6.6 It seems unlikely to us that the conditions in Regulation 14(1)(a)(iii) are satisfied by the suggestion that the development can only be awarded to one developer for either technical or artistic reasons or for the protection of exclusive rights, especially in circumstances where the Council could compulsorily purchase the land. Please note our comments at paragraph 3.10 on this point. The Council would also need to consider if some lesser development could be carried out without the land that is leased. The fact that the Council undertook a procurement exercise for the development of the Site before may further undermine this argument.
7. **Does the scale of development in relation to an existing lease affect the answer to 1.1.1 above? Does the extent to which an existing lease is extended and/or re-gear affect the answer to 1.1.1 above?**
- 7.1 For the reasons set out in paragraph 6.2, we think these issues might be relevant to the Council’s decision to proceed by way of exclusivity. Clearly, if the Council had consciously agreed to change existing commitments to strengthen its case for exclusivity its approach might be questioned and challenged and it would need to justify this.

7.2 From a procurement perspective, we refer the Council to the analysis at paragraph 6.6. The Council should also have regard to whether some lesser development can be carried out or whether it can CPO additional land. If the land to be the subject of the development can be owned by the Council then the considerations in paragraph 4 apply.

8. **Are there any other relevant considerations?**

8.1 As noted above, the decision to enter into an agreement with one developer without undertaking a procurement in accordance with the Regulations or general EU Treaty principles (where the contract is not covered by the Regulations) may be subject to judicial review.

8.2 In addition, State aid issues will arise if the Council, in addition to any land transfer (see section 4 above), provides for wider support towards the proposed development (e.g. grant funding) on terms that are not fully commercial in nature. This could be direct support in the form grant funding, soft loans or non-commercial investments, but also more indirect forms of support, such as taking on liabilities for infrastructure works surrounding the development than would otherwise form part of the development costs (e.g. would be part of normal section 106 obligation imposed on a development of this nature). Full consideration of the nature of the proposed interaction between the relevant developer and the Council would be needed, in order to ascertain if there is any risk of State aid.

8.3 If the basis of any such interaction between the Council and the developer may result in State aid being present, EU Treaty rules prohibit the granting of such State aid unless and until it has been approved by the European Commission ("the EC"). EC approval for State aid can be obtained by way of one of the following mechanisms:

8.3.1 The funding is at a level whereby it can be applied as De Minimis aid in accordance with the De Minimis Aid Block Exemption² (any one entity is capable of being granted, from all sources, up to €200, 000 of De Minimis aid in any rolling period of 3 fiscal years).

8.3.2 The funding/support is compliant with the requirements of a measure within the General Block Exemption Regulation³. Such measures include regional investment and employment aid and SME investment and employment aid. The location of the development (outside of any regional aid assisted area) and the likely size of any developer means

² Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid

³ Commission Regulation [\(EU\) N°651/2014 of 17 June 2014](#) declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty

that the normal routes under the GBER (measures relating to regional investment and employment aid and SME investment and employment aid) are unlikely to be available option here unless the developer is an SME.

8.3.3 The funding/support is compliant with an existing UK State aid scheme that has been formally notified to and approved by the EC. We are not aware of any relevant schemes, unless aid could be linked to additional environmental measures relating to the development.

8.4 Full details of any proposed support to the developer would be required in order to assess what, if any, routes for approval are relevant for State aid.

8.5 The Council will have to ensure that any acquisition by the Council of the existing land owners' interests does not trigger a State aid by way of over-compensation.

9. **Conclusion**

9.1 The Council should decide on its preferred option for the Site, ie, whether it wishes to have minimum requirements or not, and then consideration should be given to the approach which will deliver that outcome. In reaching its decision, the Council will need to have regard to the procurement, best value and State aid considerations detailed above.

9.2 This advice is intended for use by the Council only and may not be relied upon by any other party or disclosed to any other party without our prior written consent.

Eversheds LLP

13 November 2014