



Advice Note

State Aid Advice: Thurnscoe Housing Development

1 Background

- 1.1 We have been instructed by Barnsley Metropolitan Borough Council (the **Council**) to advise on the state aid implications of the Seasons (Willow Heights) Housing Development in Thurnscoe (**the Development**).
- 1.2 The Council has secured funds from the Housing Infrastructure Fund – Marginal Fund for a £2.039m grant (**the HIF grant**) to enable the accelerated completion of essential infrastructure works for Phase 3 of the Development which is aimed to expedite the delivery of 311 new homes.
- 1.3 The funding is being provided to bridge the gap and to enable the delivery of essential infrastructure including roads, drainage and utilities.
- 1.4 The Council estimates that the total costs of the Development are £40.9m of which the cost of Infrastructure is £2,208,804.
- 1.5 Keepmoat (the **Development Partner**) are the Council's development partner for the project and will undertake the property and infrastructure works.
- 1.6 The Council has asked for advice as to whether the proposed funding of the Project is compatible with the EU rules on state aid.
- 1.7 In drafting our advice, we have used factual information provided by the Council in the HIF Marginal Fund Report to Cabinet, the funding application and the draft funding agreement. To the extent that any factual information contained is incorrect please inform us promptly as it may change our advice.

2 Legal Framework

- 2.1 A state aid exists when all of the following four conditions are met.

1st Condition – The assistance must be granted by the state or through state resources.

2nd Condition - The assistance favours certain undertaking(s) which are engaged in an economic activity.

3rd Condition - The assistance gives a selective advantage to such undertaking(s) and thereby distorts or potentially distorts competition.

4th Condition - The assistance affects trade between member states.

2.2 Where a state aid exists it may nonetheless be compatible with the EU state aid rules. The Commission has established "safe harbour" provisions for state aids that meet certain conditions in the General Block Exemption Regulation (651/2014) (the **GBER**). It also permits a limited amount of "de minimis" aid to undertakings and as a last resort, state aid schemes may apply to the Commission in advance for approval.

3 Legal Analysis

3.1 The Project comprises of a number of elements: the HIF Grant; Council funding; works contracts to build out the Project; and home sales. Accordingly, we have identified three potential beneficiaries in the Project:

- 3.1.1 the Council;
- 3.1.2 the Development Partner; and
- 3.1.3 the eventual homeowners/tenants:

3.2 We do not regard the Council as a beneficiary of state aid for the reasons set out in paragraph 3.3 below.

3.3 The HIF Grant and the Council funding are supporting the Council in the provision of local infrastructure to facilitate the development of new homes. Our assessment is that this assistance does not meet all of the conditions for state aid set out in paragraph 2.1 above:

- 3.3.1 The HIF Grant is being provided by the state but is being provided to the Council rather than directly to any private undertakings (i.e. public to public).
- 3.3.2 In our view, the Council is not acting as a separate "undertaking" but is acting in its capacity as a public authority in developing and revitalizing public land.¹ The activities being exercised cannot reasonably be separated from the exercise of these public powers and therefore would fall outside the notion of undertaking.²
- 3.3.3 The assistance is not generally available and is selective.
- 3.3.4 The residential property market in Barnsley is unlikely to be a pan-EU market and therefore the assistance may not affect trade between member states. However, we have not explored in detail whether any house builders or investors in the Barnsley region are likely to be from outside of the UK so it may be possible that trade between member states might be affected in this case although there are good arguments to argue otherwise.

3.4 We note the judgment in *Leipzig Halle*³ provides that the transfer of state resources to a public sector organisation for the construction of infrastructure within a commercial market may constitute an economic activity. For the sake of completeness and in the event that the Council is considered to be acting as an undertaking (in providing residential homes to the commercial market), we consider that exceptions may be available under the GBER (in particular, Article 56 for local infrastructure and regional aid – see further Section 4 below).

¹ See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01) at paragraphs 17 to 18.

² See fn 1 above at paragraph 18.

³ Case C-288/11 P, *Flughafen Leipzig-Halle GmbH, v European Commission*, ECLI:EU:C:2012:821

- 3.5 We do not consider the Development Partner to be a beneficiary of state aid for the reasons set out in paragraph 3.6 below.
- 3.6 We are informed that Keepmoat is the Council's Development Partner for the Development. We are informed that Keepmoat was appointed following a competitive process compliant with public procurement legislation and the Council can demonstrate value for money. This approach should comply with the market economic operator test guidance in the Commission Notice on the notion of state aid⁴.
- 3.7 We do not consider the eventual homeowners/tenants to be a beneficiary of state aid for the reasons set out in paragraph 3.8 below.
- 3.8 We understand that the Council will sell/rent the homes at market rates in an open, transparent and non-discriminatory way. This approach complies with the market economic operator test guidance in the Commission Notice on the notion of state aid⁵. Accordingly, there will be no state aid to homeowner/tenants and in any event, homeowners/tenants are unlikely to be undertakings.
- 3.9 We would recommend that the Council ensures that robust governance processes are put in place to ensure compliance with these "market conditions" requirements in order to avoid state aid issues arising in particular in relation to the Development Partner.
- 3.10 In particular, grant monies should not be provided to the Development Partner in a way that it is 'off-market'. Any granting of favourable conditions to Keepmoat will have to comply with the relevant GBER provisions or will need to fall under the De Minimis Regulation (under €200,000 over three fiscal years).⁶ For these reasons, we would advise that the Council put in place clawback provisions to ensure that no state aid is provided to the Development Partner (i.e. they are obliged to repay any surplus).

4 GBER Exemptions

- 4.1 We have also considered the relevant GBER exemptions in case the Council is considered to be a state aid recipient although our assessment is that it is not state aid (see paragraph 3.3 above).

Article 56

- 4.2 Article 56 (Investment aid for local infrastructures) of the GBER provides a safe harbour for state aid that is granted to improve local infrastructure provided that certain conditions are met. The specific conditions of Article 56 are discussed below.
- 4.3 **Article 56 (1)** requires that the project is for "*the construction or upgrade of local infrastructures which concerns infrastructure that contribute at a local level to improving the business and consumer environment and developing the industrial base*".

The purpose of the Project is to provide roads, drainage and utilities for the Development. Therefore, we regard the Project as a "good fit" for Article 56.

- 4.4 **Article 56(2)** states that the Article shall not apply "*to aid for infrastructures that is covered by other sections of Chapter III of this Regulation with the exception of Section 1 — Regional aid. This Article shall also not apply to airport infrastructure and port infrastructure*".

⁴ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&%20from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&%20from=EN)

⁵ See fn 1 above.

⁶ Regulation (EU) No 1407/2013

The Project is to provide local infrastructure. This does not clearly fit into any of the other exemptions with the exception of regional aid. Therefore, we regard this condition as met.

- 4.5 **Article 56(3)** requires that the *"infrastructure shall be made available to interested users on an open, transparent and non-discriminatory basis. The price charged for the use or the sale of the infrastructure shall correspond to market price"*.

This provision requires the Council to offer the infrastructure in an open, transparent and non-discriminatory way. We recommend governance is put in place after completion of the works to ensure compliance with this requirement. In respect of the price corresponding to market rates, we understand that this will be the case.

- 4.6 **Article 56(4)** requires that *"any concession or other entrustment to a third party to operate the infrastructure shall be assigned on an open, transparent and non-discriminatory basis, having due regard to the applicable procurement rules"*.

We understand that the Council intends to operate the infrastructure itself (or in combination with relevant utilities). It should be noted by the Council that should its plans for the Project change then this stipulation may need to be complied with in tendering any concession to operate the infrastructure.

- 4.7 **Article 56(5)** requires that *"the eligible costs shall be the investment costs in tangible and intangible assets."* "Tangible assets" are defined in GBER⁷ as *"assets consisting of land, buildings and plant, machinery and equipment"*

The development costs identified in the draft grant agreement relate to:

- The remediation, preparatory works and constructions of roads and footpaths;
- Drainage works;
- Works associated with delivery the primary area of public open space.

- 4.8 **Article 56(6)** sets the maximum amount of aid that the Project can receive – *"The aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism"*.

- 4.9 The Council do not expect that the investment will make an operating profit.

- 4.10 **Article 56(7)** provides that *"dedicated infrastructure shall not be exempted under this Article. Dedicated infrastructure is defined as "infrastructure that is built for ex-ante identifiable undertaking(s) and tailored to their needs"*.

We understand that the Council intends to offer access to a wide range of potential users so this condition is satisfied.

- 4.11 GBER also contains a number of other conditions that must be met:

- 4.11.1 Article 1 excludes certain types of aid from being covered by the GBER. We do not consider that any of these apply.

⁷ Article 2(29)

- 4.11.2 Article 4.1(cc) caps the level of aid under Article 56 at €10m and with eligible costs of no more than €20m. The proposed investment is below this cap.
- 4.11.3 The Council must demonstrate an incentive effect which is consistent with the requirements of Article 6. Article 6.2 states that aid is considered to have an incentive effect if the beneficiary has submitted a written application (containing certain information) before work on the project has started. This condition is met.

Regional aid

- 4.12 We understand from the Council that the Development lies within an Assisted Area for the purposes of Regional aid.
- 4.13 Under Article 14 GBER, regional investment aid is compatible with the internal market provided that:
- 4.13.1 the aid is granted in assisted areas;
 - 4.13.2 the aid is granted for an initial investment regardless of the size of the beneficiary.
- 4.14 Regional investment aid may therefore also apply provided that the conditions in Article 14 are met.

5 Potential Schemes

- 5.1 There may also be potential schemes that could be relied on to exempt this aid, including the English Aid for Local Infrastructures Scheme.⁸
- 5.2 We also note that the HIF grant conditions list two Commission clearance decisions from 1999 (Decisions N7471A/99 and N747/8/99 referred to in Schedule 2 at clause 12.1.2). The Commission concluded that the two schemes for partnership support for regeneration were compatible with the internal market and were designed to stimulate investment.

6 Conclusions

- 6.1 It is our opinion that the HIF Grant should not be construed as state aid to the Council. However, if the Council were considered to be an undertaking providing residential accommodation, we consider that Article 56 of GBER and/or Article 14 GBER would be applicable to any state aid provided the conditions are met as indicated above.
- 6.2 We would advise that appropriate clawback provisions are put in place to ensure that there is not any state aid to the Development Partner but that any funding drawdowns paid to the Development Partner are on market terms based on the Market Economy Investor Principle.

Walker Morris LLP

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⁸ Available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417288/English_Aid_for_Local_Infrastructures_Scheme.pdf