

## ANNEX 3

### Legal implications

1. Section 120 of the Local Government Act 1972 gives the Council power to acquire by agreement any land/property:
  - (i) for the purposes of any of its functions under that Act or any other Act or
  - (ii) for the purposes of the benefit, improvement or development of the Council's area or
  - (iii) for any purpose for which the Council is authorised by that Act or any other Act to acquire land
  
2. Section 123 of the Local Government Act 1972 gives the Council power to dispose of property (including by granting a lease). Consent from the Secretary of State for Housing, Communities and Local Government is necessary for the disposal by the Council of any property for a price lower than best consideration (full market value). However (by a General Disposal Consent circular) consent is given by the Secretary of State to disposal for less than best consideration if both of the following conditions are satisfied:
  - (i) The Council considers that the purpose of the disposal will contribute to the improvement of the economic, environmental or social well-being of the Council's area and
  - (ii) The difference between the price being obtained and best consideration/market value does not exceed £2,000,000.
  
3. Property Services consider that
  - (a) the proposals described within this paper represent 'best consideration' (given the restrictive permitted use of the site specified in the lease and the obligation contained in the lease for Yorkare to carry out expensive substantial improvement works and the requirement that care beds be offered back to the Council at Actual Cost of Care)
  - (b) In any event even if the premiums payable to the Council for the grant of the lease(s) is less than best consideration, the

difference between those premiums and best consideration does not exceed £2 million

such that consent is not needed from the Secretary of State for the grant of the proposed 125 year lease(s) to Yorkare.

4. The issue of State Aid should be considered in relation to this project as Council land has been made available as part of the tender. Factors such as size and quality of development, bed numbers and prices, nomination rights and other facilities offered to the Council or its residents, had an impact on the value bidders were prepared to offer for the land itself. This may be below open market value and thus potentially be seen as a state resource being made available on preferential terms, which is a characteristic of state aid. The fact that more land is potentially being made available post-tender adds to the complications. The Council is not putting in any more money than was originally approved, and the provider will be required to pay for any extra land at market value. Whilst this may mitigate a potential risk of challenge it could still be seen as facilitating an advantage to the provider over and above what was originally advertised.
5. The fact that the Council conducts a fully EU compliant procurement process, where all parties have equal chance to express an interest and to bid and that the price offered for the land is part of the evaluation model, ensures that no advantage is being given to one organisation over another and that there is no distortion of either competition or the market. As this was the case when this procurement was carried out, then it is likely that the Council is not in contravention of EU state aid regulations and is unlikely to be subject to any challenge in this respect. It is not unlawful to offer an incentive to allow a project to come to fruition as long as the opportunity is open to all.
6. However, consideration must be given to the fact that the circumstances of this procurement have changed in relation to the land offering, in terms of the Haxby Ambulance Station site and 5 & 7 York Road. Whilst the possibility of the Haxby Ambulance Station site becoming available was noted in the tender documents, the availability of 5 and 7 York Road was not. It is understood the original intention was for the Haxby Ambulance Station site to be used as access to the site but that is no longer the case and access will now be provided through 5 and 7 York Road. Should there be an option to acquire the Haxby Ambulance

Station site in the future, consideration will need to be given to what use the additional land is being put to as it could be argued that this change is a substantial modification to the original tender which, had it been in these terms, would have attracted other bidders. This lends itself to an increased risk of challenge under procurement law as well as possible state aid infringements.

7. This could be mitigated by the fact there was little interest in the proposal as advertised and extra consideration is being offered by the developer. There is a judgement to be made between the public interest in producing an environmentally enhanced scheme which should offer more beneficial facilities for residents and a strict interpretation of some of the legal procedures
8. It could also be argued that, as the site with the existing ambulance station to the frontage is less visually appealing than had been envisaged within the tender documents, Yorkare are in a less advantageous position.
9. If the Council gives a commitment to Yorkare that the Council will purchase the freehold of the ambulance station site (if it can be acquired within two years following transfer of Haxby Hall) and then grant a (circa 125 year) lease of it to Yorkare then this could be interpreted as the Council facilitating the generating/delivery of an additional benefit to Yorkare that was not available when bids were sought during the procurement process.
10. The Executive had previously approved (and the information was publically available) £600,000 to enable the scheme to be brought forward in such a manner as to enable existing staff and residents to remain in Haxby Hall.
11. The inclusion of long lease of the existing ambulance station site was identified as a possibility within the procurement documentation for the Transfer and Transformation of Haxby Hall. The "Notes for Bidders" document included within the tender included the following "*Haxby is currently an important operational base for A&E and Patient Transport (PTS) services provided by Yorkshire Ambulance Service (YAS). The station was built in circa 1978 and has had little by the way of upgrade or improvements works done since it was built. The property is now dilapidated and no longer fit for requirements however it very strategically located for meeting incident demand in Haxby and the surrounding area.*"