



16 July 2018

For the attention of Joseph Ejiofor and Zina Etheridge
Haringey Council
River Park House
225 High Road
Wood Green
London
N22 8HQ

Dear Joseph and Zina

Haringey Development Vehicle ("HDV")

1. Introduction

We have now had an opportunity to consider with our advisers the Report and resolutions to be considered at the Cabinet meeting on 17 July regarding the HDV. Having reviewed the Report in detail we are greatly concerned that it is fundamentally flawed. Regrettably, therefore, I am left with no choice but to write this letter to you so that the Council is clear as to Lendlease's position.

My letter of 9 July made clear that Lendlease would have no choice but to act to protect its interests if Cabinet attempts to reverse our position as successful bidder and fails to give proper consideration to alternative options within the scope of the procurement. If Cabinet follows the recommendation set out in the Report, this will expose the Council to expensive and protracted litigation.

The Council has not provided Lendlease with a proper opportunity to be made aware of and address specific issues raised in the Report. In that context, I reiterate, as outlined in my letter of 4 July, that Lendlease remains committed to working with the Council to transform the Borough through new housing, regeneration and employment opportunities and achieve its stated objectives and targets. We also remain willing to meet with Council members, officers and advisers as necessary, in particular to discuss the issues referred to below and ensure that Cabinet is able to make a properly informed decision.

I am available to attend the meeting of Cabinet on 17 July to explain Lendlease's position and to answer questions from Cabinet members. In the meantime, please ensure that all Cabinet members are provided with a copy of this letter, together with the enclosed opinion of James Goudie QC.

2. Overview

The decision by the Council to commence and proceed with the HDV procurement was the result of a careful and thorough process which began in Autumn 2014. It reflected, and was undertaken in the context of, the Council's needs and targets. I set out further detail in section 3 below.

In order to fulfil its needs and meet its targets the Council ran an extensive, expensive and detailed procurement. This culminated in the Council selecting and appointing Lendlease,



first as the preferred bidder, and subsequently as the successful bidder, and the issue of a Contract Award Notice to Lendlease. This is summarised in section 4 below.

It is now recommended that a new administration, in place for only a matter of weeks, should cancel the procurement exercise. However, neither of the two reasons for the recommendation that are set out in the Report withstand scrutiny. The first (transfer of Council assets out of public ownership) reflects purely political considerations. The second (the degree of risk entailed) has always been a feature of the procurement and is capable of being addressed through the inherent flexibility of the HDV vehicle and through dialogue between Lendlease and the Council. The Report is also fundamentally deficient in terms of the analysis and consideration of HDV variants (which is the subject of the enclosed opinion from James Goudie QC). Furthermore, it is clear from the Report that the Council does not have a plan for meeting its strategic objectives and housing targets if the HDV procurement were to be abandoned. Please see section 5 for more detail.

Legally, it is not open to the Cabinet to abandon the procurement: please see sections 6, 7 and 8 below. In short, in light of the procurement process and the Council's needs and targets, that decision would:

- (a) Frustrate Lendlease's legitimate expectation that the Council had committed to conclude the contracts for the HDV. The decision would be susceptible to judicial review on that basis.
- (b) Fail to take into account relevant considerations (as well as failing to ignore irrelevant considerations) and/or be irrational and/or be procedurally unfair. The decision would also be susceptible to judicial review for these further reasons.
- (c) Expose the Council to a significant damages claim for the loss of opportunity to generate the returns that Lendlease expected over the lifetime of the project.
- (d) Create a liability for costs far in excess of the amount referred to in the Report, as well as for the costs arising from the necessary litigation to secure our HDV rights.

3. Council's needs and targets

The Council's decision to proceed with the HDV was taken in the context of:

(a) The housing growth targets set out in the London Plan

1502 new homes are to be completed per year (increasing to 1958 per year in the new London Plan). The minutes of a Cabinet meeting on 10 November 2015 approving the business case for the establishment of the HDV also recorded that:

"[The Council] has challenging economic and housing growth targets from the London plan, as well as a need to maintain its existing housing stock and carry out major estate renewal. It has neither the resources nor the capacity to achieve these alone."

(b) The Council's Corporate Plan

This commits the Council to growth in housing and employment: for example, the Report to Cabinet on 10 February 2015 which recommended exploring the feasibility of a development vehicle, referred to:



"... removing what would otherwise be insuperable barriers to realising the Council's ambitions for building new homes and securing its wider regeneration objectives ... The Council cannot access sufficient capital funding and does not on its own have the commercial and development expertise required to achieve the best possible outcomes."

(c) **The Council's Housing Strategy and Estate Renewal Rehousing and Payments Policy**

In this context, as you know, the HDV involves the development of more than 6000 new homes (at least 40 per cent. of which would be affordable housing), and amenities for the Borough, including a new school, a new skills and employment centre, new sports facilities and a new community building. A statement that remains on the Council website noted under the heading 'Why we can't do this alone' that:

"Our funding has been cut and Government grants to support public sector house building are at an all-time low ... The cost of building new estates would run into billions of pounds but Government rules only allow us to borrow another £50m for housing ... We simply do not have the money, and cannot sustainably borrow it, to realise our ambitious plans for Haringey on our own."

It is also worth highlighting that the previous administration considered, and rejected, the notion that the Council's objectives could be achieved through a wholly owned company (however, as we explain below, the existing procurement exercise could facilitate delivery of housing through a Council wholly owned company, without any real risk of a breach of procurement law). The minutes of the Cabinet meeting on 10 November 2015 recorded that:

"For the Council to establish a wholly owned company and carry out the work itself, would mean a commitment to a level of borrowing that is impossible for the Council to sustain, and a level of risk that would not be prudent."

This vital context did not change at all during the period of the procurement. In fact, there is now an even more urgent need for regeneration and new housing in Haringey. The Council website currently states there are 10,000 households on the housing waiting list. The previous administration rightly concluded, on advice and following a very thorough process, that the various regeneration and housing targets and ambitions simply could not be achieved by the Council acting alone, but that they could be achieved through the HDV.

4. Procurement process

I highlight the following points by way of important background:

- (a) The Council commissioned a report on the options for delivering its objectives in Autumn 2014. In 2015, the Council commenced a comprehensive procurement exercise to identify a partner with which to establish a joint venture for achieving the Council's housing and regeneration objectives as set out in further detail in section 3 above.
- (b) The Council resolved at the Cabinet meeting on 14 February 2017 to "agree to the selection of Lendlease as preferred bidder with whom the Council will establish the joint venture HDV".
- (c) Subsequently, at the Cabinet meeting on 3 July 2017, the Council unanimously resolved:



- (i) "to confirm Lendlease as the successful bidder to be the Council's HDV partner"; and
 - (ii) "to approve the setting up of the HDV with Lendlease".
- (d) Also on 3 July 2017, the Council issued a "Notification of contract award decision" to Lendlease. That notice confirmed that: "Lendlease has been successful in the [HDV] procurement". It also stated that the Council: "intend to award the contract to [Lendlease]" and that the Council aimed "to conclude the proposed contract with [Lendlease] on or after 21 July 2017".
- (e) On 20 July 2017, the decisions that Lendlease was the:
- (i) "successful bidder to be the Council's HDV partner" and
 - (ii) to "approve the setting up of the HDV with Lendlease"
- were reconsidered and confirmed by Cabinet. By late July 2017, the required contracts were all prepared. As paragraph 1.2 of the Report confirms, nothing remained so far as the documentation was concerned other than "refinement and finalisation".
- (f) A statement issued by the Council on 30 January 2018 confirmed that:
- "establishing the HDV remains the Council's agreed approach to providing much needed homes and jobs on its own land and Lendlease remains the Council's preferred partner".

5. Deficiencies in the Report

Sections 3 and 4 of this letter set out the background against which the Report has now recommended that the HDV procurement is withdrawn.

Putting political opinions and external influences to one side, I invite you to consider how an objective and dispassionate reader of the Report would view the recommendation given the circumstances summarised above. To us, and to our advisers, the conclusion in the Report and the recommendation made is illogical when tested against all of the evidence, including much of the material which you have actually included in the Report. That is even more so bearing in mind that the Report confirms that the new administration does not object to the outcomes anticipated by the HDV, or to the principle of partnerships with the private sector.

The Report identifies two reasons for the recommendation to cancel the HDV procurement. Neither reason stands up to any scrutiny.

The first reason is that the new administration does not agree with the transfer of assets out of 100 per cent public ownership. Yet the Report acknowledges the inherent flexibility of the HDV, and the extent of the Council's control over sites transferred into the HDV. More fundamentally, this is a concern driven by political considerations. In particular, it appears to reflect the statement in the Labour election manifesto (as referred to in paragraph 1.6 of the Report). However, that is a matter which cannot be determinative of the decision-making process. As a matter of law, this would amount to an illegitimate fetter on the Council's discretion.

The second reason cited in the Report is the degree of risk that the HDV procurement entails. However, and as the Report notes, the risk element is not new and any concerns that the new



administration has regarding the level of risk can be addressed without cancelling the competitive dialogue procedure. The Council has though failed to provide Lendlease with a proper opportunity to be made aware of specific concerns or afforded us an opportunity to address those concerns. For the avoidance of doubt, Lendlease is ready, willing and able to do so.

The Report also fails to undertake a proper comparison of the risks associated with the HDV, as against the risks inherent in directly managing the Council's commercial portfolio, and seeking to address the Council's housing needs through a company wholly owned by the Council. The consequence of the Council taking that approach would be significantly lower employment creation and community investment and a failure to meet the Council's housing and regeneration objectives.

The Report itself even acknowledges that the Council's strategic outcomes and targets will be adversely impacted by the abandonment of the HDV procurement (see in particular paragraphs 6.38 to 6.42). It is therefore incumbent on the Council to:

- (a) address substantively and accurately the HDV variant options that exist within the scope of the existing procurement;
- (b) clearly outline its plan as to how its strategic objectives and housing targets could ever be met if the HDV procurement is abandoned; and
- (c) acknowledge the restrictions inherent in achieving the delivery of the Borough's housing requirements through a Council wholly owned company.

I set out further detail below on each of these points.

(a) **Proper analysis of HDV variants**

My letter of 4 July highlighted the ability of Lendlease to assist the Council to achieve its priorities (as understood by Lendlease, and as set out in that letter), and urged that proper consideration be given to the inherent flexibility of the partnership model within the context of the existing procurement.

Paragraph 5.4 of the Report contains a blanket rejection of the potential approaches described in Lendlease's letter of 4 July "for the same reasons as all other possible variants of the deal". This is said to be because of (i) risk of challenge for breach of the PCR 2015; and (ii) "concerns of the political leadership about the fundamental approach underpinning the HDV". I have already addressed (ii) above.

In respect of the risk of a procurement law challenge, I enclose an opinion from James Goudie QC. As you know, James Goudie is one of the foremost lawyers in the area of local government law and judicial review. The opinion explains three procurement options formulated by Lendlease that would address, in particular, concerns in relation to control by the Council of the delivery and ownership of affordable housing by the Council. You will see that the conclusion reached by James Goudie is that any of these options would be acceptable from a procurement law perspective. The three options discussed in the James Goudie opinion do not, by any means, represent the only possible variants to the scope of the existing procurement. There are other options as well and this emphasises the importance of the new administration engaging with Lendlease.

Therefore, Cabinet must, as a minimum, sanction a dialogue between the Council and Lendlease and the respective lawyers about both the range of options which are



available and the analysis of those options against the original procurement and the PCR 2015. As matters stand, the Report is inaccurate and misleading in its reference to the risk of the Council breaching the PCR 2015.

(b) **Meeting the Council's objectives and targets without HDV**

The Report is conspicuously, and unacceptably, vague on what might form the Council's "Plan B". Given the conclusions that the previous administration reached as to the lack of resource or capacity to achieve the Council's housing growth and regeneration targets, the Council cannot make a decision to abandon the HDV. The Council would need a feasible and properly tested plan as to how the Council's housing growth and regeneration targets will be met in the absence of the HDV. This would need not only to demonstrate how the Council assesses that its obligations and objectives could otherwise be achieved, but also, and crucially, how any recommended method could be funded.

With respect, unparticularised assurances that the Council is 'developing plans' or 'engaging with the community' (see in particular the contents of paragraph 6.45 of the Report) do not even begin to meet the threshold that Cabinet must require when it considers these matters. As such, the Cabinet is not in a position to approve the resolutions before it on 17 July.

(c) **Council owned housing company**

The only concrete proposal referred to in the Report is the creation of a new-wholly owned housing company, with a focus on delivering new Council homes (this is also the subject of agenda item 10 for the meeting on 17 July).

I have previously made clear that Lendlease fully supports a wholly owned Council company to deliver new housing. You will see that our proposals for alternative structures as set out in the opinion from James Goudie QC have been developed on precisely this basis. They are different from the HDV, but clearly within the existing procurement framework. Therefore, the existing procurement is capable of helping the Council to facilitate the delivery of housing on this basis, including (but not limited to) the ability to procure the necessary levels of borrowing that the Council simply cannot otherwise obtain on its own.

However, it is not rational to suppose that the Council's housing obligations and objectives could be achieved solely through such a company. In this regard, how can the view of the new Leader and Council differ from the conclusion reached by the previous administration in November 2015? If the Council accepts that it will not be possible for housing requirements to be addressed solely through a wholly owned housing company, how will these needs be met, and how will they be funded? There is nothing in the Report to contradict the conclusion that the Council carrying out the work itself would require a level of borrowing that it would be impossible for the Council to sustain.

6. Legitimate expectation

In light of the factual background referred to above, the Council cannot lawfully abandon the HDV procurement. Lendlease proceeded (as it was entitled to do) on the basis of the Council's assurance and commitments that the Council would proceed with the HDV. The parties finalised the terms of transaction documentation and the legality of the carefully selected joint venture structure was affirmed by the Court in the judicial review proceedings.



The Report seeks to make much of the various disclaimers included in the procurement documents but no doubt the legal advice that has been redacted will have put those disclaimers in their true context. The Council's letter of 3 July 2017 (amongst other documents) of course noted that contracts were still to be signed, but the key point is the commitment which the Council made to Lendlease to proceed to conclude the contracts. The Council must fulfil that commitment and it cannot lawfully frustrate the legitimate expectation that it has created.

Legally, the legitimate expectation of finalising the procurement and establishing a joint venture with Lendlease is a "possession" which is subject to the protection of property rights contained in Article 1 of the First Protocol of the European Convention of Human Rights. Depriving Lendlease of that possession would expose the Council to a claim in damages, which would be quantified by reference to the loss of the opportunity to generate the returns that Lendlease expected over the lifetime of the project. In addition, we would, of course, also be entitled to recover the significant costs we incurred in the course of the procurement and the judicial review, as well as in such litigation as is necessary to secure our HDV rights.

7. Irrationality and procedural fairness

My letter of 9 July highlighted our genuine concern that a new administration, in place for only a matter of weeks, could not possibly be in a position to make such a significant change in direction by abandoning an extensive procurement exercise that started in 2015.

The fundamental deficiencies in the Report that I have highlighted in section 5 above, coupled with the need to give Lendlease a proper opportunity to consider and respond to the Council's new concerns, and for the Council itself to give proper consideration to such points as a matter of fairness, mean that any decision by Cabinet to abandon the HDV procurement would be procedurally unfair, irrational, and would fail to take account of relevant considerations whilst also taking into account considerations which are irrelevant.

We would particularly note that the Equality and Impact Assessment undertaken confirms that the Council has failed to give proper consideration to the full implications of the recommended decision. Any objective assessment of the Equality and Impact Assessment will conclude that it would be irrational for the Council to abandon a process which has sufficient flexibility within its structure to enable the Council's corporate objectives to be delivered. Such an objective would also highlight that if the Council chose to abandon the process, it would clearly be failing to take into consideration the full impact and effect of such a decision on the residents and businesses who would stand to gain from the HDV structure.

In our view, the Report falls well short of the level of scrutiny and assessment required. We have invested a considerable amount of time, money, intellectual property and resources in the procurement process. As a matter of procedural fairness and legitimate expectation, the Council must fully explore all reasonable options under the procurement process with Lendlease before reaching a decision to cancel the competitive dialogue procedure and abandon the HDV.

The Council has also failed to discharge its consultation obligation under section 3(2) of the Local Government Act 1999 in respect of the proposal to cancel the HDV procurement. That is an obligation with which the Council ought to be familiar given that it was raised by Gordon Peters against the Council in the judicial review proceedings concerning the legality of the HDV.



8. Restitution claim

The Report proceeds on the basis that the extent of the Council's liability for the costs of Lendlease in the event that the procurement is withdrawn is capped at £520,275. We disagree. You should also be aware that our costs to date are in excess of £5 million.

The other factor that is relevant is the extent to which Lendlease has already contributed material value to the Council, particularly with regard to the enhancement of the Council's commercial portfolio.

9. Conclusion

We have seven points in conclusion.

(a) Lendlease's continuing commitment to Haringey

Lendlease remains proud to have been selected as the successful bidder for the Haringey procurement. We stress that we want to work with the Council to deliver on the Borough's stated objectives and commitments and in the best interests of Haringey's residents.

(b) The Council retains a unique opportunity to deliver for the Borough

The HDV procurement has involved huge time and cost commitments on the part of the Council and Lendlease (and many other parties). The Council stands on the brink of being in a position to transform the Borough through housing, regeneration and employment opportunities for the benefit of all.

In practice, this comes down to a simple choice.

- The Council can proceed with a flexible partner, who will amend the JV within the scope of the procurement to suit the new Council's requirements and so make a real and timely difference in delivering much-needed new homes, public amenities, jobs and wider economic opportunities for local communities.
- Or, it can seek to abandon the procurement on an illegitimate point of principle and so condemn residents to years more uncertainty and under-investment.

(c) The Council's commitment to Lendlease

For the reasons summarised above, the Council made a clear commitment to proceed with Lendlease. Nothing which has occurred subsequently entitles the Council to resile from Lendlease's legitimate expectation that the contractual structure (which has also been affirmed in the judicial review proceedings) would be implemented.

(d) The Report to Council is fundamentally deficient and the Council's consideration of HDV variants is wholly inadequate

The Council's paper for the Cabinet meeting on 17 July is fundamentally deficient in its explanation of why the procurement should be cancelled. It is also incomplete and flawed in its analysis of the reasons why the HDV variants could not be legitimately developed. In particular, the Council has wrongly judged the level of risk of a procurement law challenge.



(e) **The Council has no Plan B**

Furthermore, the Council has only undertaken a superficial review of what it might do if the HDV were to be abandoned. The reality is that the Council has no viable alternative to HDV. Indeed, there is no alternative to HDV which could come remotely close to meeting the Council's objectives and targets and which could be effected without the support of a major private sector partner. In legal terms, the Council's proposed decision is irrational and, therefore, it would be susceptible to judicial review.

(f) **Lendlease's loss of profits and costs**

If the Council proceeds to seek to abandon HDV, that will expose the Council to a significant loss of profits claim as well as a restitutionary claim for Lendlease's costs, and a claim for the value that Lendlease has contributed to the Council.

(g) **Cabinet meeting on 17 July**

For all of the reasons set out in this letter, the Council cannot lawfully follow the recommendation to abandon HDV. Instead, the appropriate course is for the Council to undertake a rigorous review of the wide range of options that it could adopt in conjunction with Lendlease and in accordance with the completed procurement. Lendlease will play a full and constructive role in that process which is clearly in the best interests of Haringey's residents.

As I say, we do not consider that Lendlease has been provided with an opportunity to be made aware of the specific concerns cited in the Report or afforded an opportunity to address those concerns. The Council's decision-making process has failed to meet the necessary standards of fairness and transparency that Lendlease and the people of the Borough are legitimately entitled to expect, including as reflected in the Local Code of Corporate Governance.

We will be making a request under the Freedom of Information Act for material relevant to the Council's decision-making process. We also seek an urgent explanation of the basis on which material in the Report has been treated as being exempt. In particular, please confirm if any material has been treated as exempt other than on grounds of legal professional privilege and, if so, please identify the relevant paragraphs in the Report and explain the position.

In the circumstances, we have no alternative but formally to reserve all of Lendlease's rights against the Council and those involved in this proposed decision.

Please can you consider this letter with your advisers and in Cabinet. I remain willing to meet with you at any time to discuss a constructive way forward. I am also available to attend the Cabinet meeting tomorrow.

Yours sincerely

A handwritten signature in blue ink that reads "Dan Labbad".

Dan Labbad
For and on behalf of Lendlease Europe Holdings Limited