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Draft

Leeds City Council

Directors' Mandate – EASEL Regeneration Project

trowers & hamblins
Sceptre Court
40 Tower Hill
London
EC3N 4DX

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
www.trowers.com

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1 Introduction

- 1.1 You have been appointed at the nomination of Leeds City Council to be a Director on the board of the EASEL Regeneration Company (the **Company**).
- 1.2 With a view to guide your conduct as a director of the Company we set out below, the General (Part A) and Specific (Part B) directors' mandate for the Company.
- 1.3 This briefing paper acts as an introductory briefing guide for newly appointed directors and sets out the core duties of a director as provided in the Companies Act 2006 (the **Act**), and the common law. It may be necessary for the Company to arrange training for newly appointed directors to ensure that they are familiar with their powers and duties in their role as directors.

PART A – GENERAL MANDATE

- 1.1 The Act contains a new duty on company directors which is far more wide-ranging and onerous than the previous duty. The Act incorporates for the first time a statutory statement of directors' duties and this operates alongside the existing common law rules.
- 1.2 At common law the following directors' duties exist:
- a duty to exercise skill and care,
 - b duty to act in good faith and in the best interests of the company,
 - c duty to act within the powers conferred by the company's memorandum and articles of association and to exercise powers for proper purposes,
 - d duty to avoid conflicting interests and conflicting duties, and
 - e duty to not make a secret profit.

2 The general duties under the Act

The general duties set out in the Act are detailed in paragraph 2.1 to 2.7 below. Directors will have to comply with the duties set out at paragraphs 2.1-2.4 and 2.6-2.7 from 1 October 2007. The duty to avoid conflicts of interest set out at 2.5 below, will not apply until 1 October 2008 but should be applied, in any event, as good practice.

2.1 Duty to act within powers

- 2.1.1 A director must act in accordance with the company's constitution and must only exercise his powers for their proper purpose. The 2006 Act defines a company's constitution, for the purposes of the general duties, as the company's Articles and Memorandum of Association and directors will need to review the company's constitution in order to ensure that decisions are taken in accordance with them.

2.2 Duty to promote the success of the Company

- 2.2.1 A director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.

- 2.2.2 In fulfilling this duty, a director must have regard to (amongst other matters):
- a the likely consequences of any decision in the long term,
 - b the interests of the company's employees,
 - c the need to foster the company's business relationships with suppliers, customer and others,
 - d the impact of the company's operations on the community and the environment,
 - e the desirability of the company maintaining a reputation for high standards of business conduct, and
 - f the need to act fairly as between the members of the company.
- 2.2.3 In having regard to the factors listed in paragraph 2.2.2 above, the general duty to exercise reasonable care and skill when acting as a director will apply.
- 2.2.4 The meaning of "success for the benefit of the company's members as a whole" is unclear. Department of Trade and Industry (**DTI**) guidance states that "success" in this context will usually mean "long-term increase in value" for commercial companies. The DTI has also said that the decision as to what will promote the success of the company, and what constitutes such success, is one for the director's judgement taken in good faith. It is for the director to evaluate business decisions utilising his judgement exercised in good faith.
- 2.2.5 The Act recognises that the duty to promote the success of the company will be overridden in an insolvency situation by the interests of the creditors of the company.
- 2.3 **Duty to exercise independent judgment**
- 2.3.1 A director must act independently and without undue influence from third parties. This duty is not infringed by a director acting in accordance with an agreement entered into by the company that restricts the future exercise of the directors' discretion or in a way authorised by the company's constitution. The duty also does not prevent the directors from exercising a power to delegate as granted by the company's constitution.
- 2.4 **Duty to exercise reasonable care, skill and diligence**
- 2.4.1 A director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both the general knowledge, skill and experience that may be reasonably expected of a person carrying out the functions carried out by the director in relation to the company combined with the general knowledge, skill and experience that the director actually has.
- 2.4.2 In applying the test, regard must be had to the functions of the particular director, including his specific responsibilities, as well as the circumstances of the company. This means that directors will have different levels of responsibility dependent on their experience and other such matters.

2.5 **Duty to avoid conflicts of interest**

- 2.5.1 A director must avoid situations in which he has or could have a direct or indirect interest that conflicts with or may conflict with the company's interests. This applies in particular to the exploitation of property, information or opportunity by the director (whether or not the company could take advantage of the property, information or opportunity).
- 2.5.2 This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company, which should instead be declared (see paragraph 2.7 below).
- 2.5.3 The duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or if the matter in question is authorised by the directors. Board authorisation is only effective if the required quorum is met without counting the director in question or any other interested director and if the conflicted directors have not participated in the taking of the decision or if the decision would have been made without the participation of the conflicted directors.

2.6 **Duty not to accept benefits from third parties**

- 2.6.1 Directors must not accept any benefit (including a bribe) from a third party which is conferred because of his being a director or his doing or not doing anything as a director. This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest. Benefits granted by the company, its holding company or subsidiaries and benefits given by the director's service contract are excluded.
- 2.6.2 This duty has been categorised separately from the general duty to avoid conflicts of interest, so that a director obtaining a benefit from a third party can only be authorised to accept a benefit by the members of the company, rather than by the board.

2.7 **Duty to declare interest in a proposed transaction or arrangement**

- 2.7.1 A company's constitution will set out whether it is acceptable to enter into contracts where a director of the company has an interest. If the company's constitution allows a contract then the directors must confirm that the contract entered into is one which is both required by the company for the supply of goods or services and the nature and level of consideration provided for the same is reasonable in relation to its value.
- 2.7.2 The director must declare to the other directors the nature and extent of any interest, direct or indirect in a proposed transaction or arrangement with the company.
- 2.7.3 The declaration of interest must take place prior to the commencement of the company meeting and the director must withdraw from the meeting when the relevant item is being discussed by the board. The director must not participate in the meeting for the purposes of quorum or indeed, when the voting of the board takes place.
- 2.7.4 A director need not be a party to the transactions for the duty to apply, for example the firm of which the director is a partner is a party to the contract with the company.

2.7.5 Under common law, no declaration of interest is required where the director is not aware of his interest or where the director is not aware of the transaction or arrangement in question – for these purposes directors are treated as being aware of matters of which they ought reasonably to be aware.

3 **Additional points to note**

3.1 The duties as set out in the Act are owed by the directors to the company. Accordingly, it will be the company who will have an action against the directors for breach of any of the duties. However, please note that the Act introduces a new statutory derivative action (similar to the existing common law action) permitting shareholders to bring an action against a director on behalf of the company.

3.2 The Act includes other provisions imposing a "duty" on directors, such as the duty to deliver accounts and reports to the Registrar.

3.3 Companies may provide more onerous duties in their articles but the articles may not dilute the statutory duties except to the extent expressly allowed by the Act.

3.4 More than one of the general duties may apply in any given case. The cumulative effect of the duties means that where more than one duty applies, the directors must comply with each applicable duty, and the duties must be read in this context. For example, the duty to promote the success of the company will not authorise the director to breach his duty to act within his powers, even if he considers that it would be most likely to promote the success of the company. As well as complying with all the duties, the directors must continue to comply with all other applicable laws. The duties do not require or authorise a director to breach any other prohibition or requirement imposed on him by law.

PART B - SPECIFIC MANDATE – (EASEL Regeneration Company)

1 **Shareholders Agreement**

1.1 Directors should make themselves aware of the provisions of the Shareholders Agreement executed on behalf of the Council. Directors' specific attention is drawn to the following sections:

- a. The business and aims and objectives of the joint venture (see clause [•] and Schedule [•])
- b. The obligations of shareholders (see clause [•])
- c. The shareholder consent matters (Schedule [•])
- d. The project approval procedure (see clause [•])
- e. The deadlock provisions (see clause [•])
- f. The Memorandum and Articles of Association (Schedule [•] and [•] of the Shareholders Agreement)

2 Council appointee

- 2.1 The Council directors' must always act and respect their status as "Council appointees" and should not act independently of an instruction or a requirement communicated to you by the Council through its authorised representatives.

3 Decision making

- 3.1 In the unlikely event that a director of the Company is also a member of the Council planning committee, or sub-committee or working group dealing with the Council's local development framework you should not compromise your position as a director on the Company by being part of an adjudication of a planning application dealing with a project approved by the project approval procedure of the Company, and should otherwise take all steps reasonably possible to ensure that you comply with the Council's standing orders.
- 3.2 You should refrain from discussing that planning application, being involved in a debate upon the adjudication of that application, or otherwise taking part in a planning committee decision which influences the approval of that project.

4 Shareholder Consent Matters

- 4.1 You will, as a director of the Company, take all reasonable steps to ensure that you do not act or decide upon a matter before the Company, which conflicts with the need to ensure the Shareholder Consent Matters are preserved.
- 4.2 You will not vote to approve the variation and amendment to the Shareholder Consent Matters which at all times cannot be decided upon in a board meeting unless they have full consent of the Council as the shareholder in the Company, and unless you were given an express mandate on behalf of the Council varying the Shareholder Consent Matters you will not vote for a proposal to do so, or in connection with a project which is consistent with those Shareholder Consent Matters, or otherwise waive the Shareholder Consent Matters.
- 4.3 If you have any doubts as to any action you are required to take or matter you are required to vote on as board director, you should take legal advice independently or in the first instance for clarification from the legal adviser to the Council in relation to your position as a Council officer if appropriate.

5 Insurance

- 5.1 The Council has agreed to indemnify you and take out insurance, in respect of your duties as a director of the Company and you should make yourself familiar with these requirements and the provision of that cover and any conditions attached to it.
- 5.2 Generally, however, you will not act in order to prejudice that insurance by acting unreasonably, negligently or recklessly so as to incur liability on behalf of the Council. Should you do so you may qualify the extent of the indemnity which the Council has given to you in terms of you accepting this office and therefore reasonable conduct should be maintained at all times.

6 Term of appointment as director

6.1 The Council has the right at any time to remove you from this office at its absolute discretion, where it is no longer in the interests of the Council for you to act as a board director or in the case of the director being an officer employed by the Council that employment has ceased for whatever reason.

7 Alternate Directors

7.1 The appointment, or their replacement, of an alternate director, as set out in clause [•] of the Shareholders Agreement can only take place with the approval of the Council.

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