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Dear Anna

Milton Business and Science Park – State Aid Compliance

1 Background

- 1.1 Vale of White Horse District Council (the Council) is participating with other Oxfordshire local authorities, the Oxfordshire Local Enterprise Partnership, two universities and two government science institutions in the promotion of Oxfordshire as an international centre for innovation.
- 1.2 The Council has with its partners secured a funding commitment from the Department of Communities and Local Government to support the development of research facilities at Milton Business Science Park (to contribute towards the cost of research infrastructure). The Milton Park infrastructure is aimed at providing two start-up businesses in the bio-medical sciences facilities, including access to laboratories and other infrastructure.
- 1.3 The Council is the Accountable Body for administering the funding on behalf of the DCLG. As part of that function, the Council is required to satisfy itself that the provision of the funding is compliant with State Aid requirements.

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1.4 Our understanding of the relevant facts is:

- 1.4.1 The proposed development at Milton Park is marketed towards start-up businesses in the bio-medical field. The facilities will include bio-medical laboratories and other research facilities which occupants of that building will have access to on a time basis;
- 1.4.2 The amount of proposed grant funding is less than € 20 million and it also constitutes less than 50% of the cost of providing the proposed facilities;
- 1.4.3 The funding is to be provided to MPEC Limited the owner of Milton Park and they will let the accommodation on an open and transparent basis at market rates.

2 **What is state aid?**

- 2.1 We have previously advised officers of the Council on what constitutes State Aid. For brevity we will not repeat that advice in this letter.
- 2.2 The provision of the proposed funding to Milton Park would constitute State Aid as defined under the Treaty of the Functioning of the European Union (TFEU).
- 2.3 As officers are aware, 'State Aid Law' permits funding for a range of activities providing that funding is given under and in accordance with the conditions stipulated by the European Commission in its Decisions and Regulations on State Aid.

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3 **State Aid exemption – General Block Exemption Regulation (GBER)**

3.1 As the Council is aware, the European Commission has been in the process of simplifying and removing 'red tape' from State Aid Law. Part of that process has included reforming the types of activity which aid may be given for, in part to align State Aid Law more closely with amongst other things the European Unions 'Europe 2020' strategy. This strategy includes support for what the Commission considers to be innovative and high technology industries.

3.2 As a consequence of the commission's reforms on 1 July 2014 the new GBER¹ became law.

3.3 The GBER permits public funding and other aid to be provided by the public sector for those activities and purposes which are set out in the regulations. This route permits lawful State Aid to be provided without having to seek the *prior permission* of the European Commission. To qualify as lawful State Aid under the GBER it is not only necessary that funding is for an activity specified in it, it is also necessary to comply with the relevant conditions specified in the GBER.

4 **GBER – Article 26 – Investment Aid for research infrastructures**

4.1 Article 26² is a new category permitting funding / aid to be provided for research infrastructures that perform economic activities.

4.2 The GBER defines 'research infrastructure' as, "*facilities, resources and related services that are used by the scientific community to conduct research in their*

¹ Commission regulation (EU) No 651/2014 of 17 June 2014

²Article 26 (Investment aid for research infrastructures) – Commission Regulation (EU) No 651/2014 of 17 June 2014

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respective fields and covers scientific equipment or sets of instruments, knowledge-based services..."

- 4.3 Article 26.1 expressly permits aid for such infrastructure where it is used for *economic activities*. Our understanding is that the proposed development at Milton Park will provide research infrastructure to be used by start-up businesses which are based on the science of bio-medicine and will enable them to develop in effect bio-medical 'products'.
- 4.4 There are a number of conditions which must be complied with if the Council is to rely upon Article 26 to provide funding to Milton Park. These are:
- 4.4.1 The price charged to users / occupants of the new facility shall correspond to a *market price*;
 - 4.4.2 Access to the infrastructure shall be open to several users' and be granted on a *transparent and non-discriminatory basis*. In effect MPEC must openly advertise the facilities and permit potential users use of the facilities (wherever they are situated in the European Union) provided there is capacity at the facilities and the potential user is prepared to pay the *market price*.
 - 4.4.3 The costs which are eligible for public funding are the intangible and tangible assets at the proposed development; and
 - 4.4.4 The amount of public funding shall not exceed 50% of the eligible costs. It should also be noted that it will be necessary to include in any funding agreement a 'claw-back', which shall require the repayment of public

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funding if subsequent use of the centre means that the public funding exceeds 50% of the eligible costs.

5 Risk issues

- 5.1 The main risk associated with the use of Article 26 is that the conditions it stipulates under which aid/funding may be provided are not complied with.
- 5.2 Article 26 is a new regulation under the GBER whose operation has not been examined by the courts. This means that the Council and MPEC will rely on it without a detailed commentary on the boundaries of its use, which would be provided by a court in a case or through an EU Commission investigation and decision. This means that, as with other law reform, there is a risk in using a new provision which has not previously been subject to a judicial decision.
- 5.3 In Article 26 the term 'scientific community' is used as part of the definition of 'research infrastructure'. Specifically the definition references facilities and resources and related services *used by the scientific community*. There is no further definition of what is meant by the *scientific community*.
- 5.4 It is logical that the start-up businesses (specialising in bio-medicine) which will use the facility at Milton Park to conduct research to develop bio-medical products are part of the *scientific community*. However it could be open to the EU Commission at a later date to determine that the *scientific community* must substantially conform to a particular characteristic such as being involved in some form of academic role.
- 5.5 There is also a slight ambiguity within Article 26 itself. The Article is clear that aid is compatible where research infrastructures are provided or upgraded to *perform*

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economic activities. Paragraph 1 of Article 26 expressly states that such aid is compatible [permitted], "*Aid for the construction or upgrade of research facilities that perform economic activities shall be compatible with the internal market ...*" There is no qualification that such facilities must also be used for a *non-economic* use. The use of those facilities to research and develop bio-medical products complies with the requirement in paragraph 1.

- 5.6 Paragraph 2 of the Article deals with a situation where the research facility is also used for non-economic purposes (eg – pure academic research). It states, "*Where a research infrastructure pursues both economic and non-economic activities*". The paragraph then requires the adoption that the two types of activity are separately accounted for using justifiable accounting principles. This is a common approach which the EU Commissions requires for funding for non-economic activity, no State Aid arises as such activity does not affect the internal market, and economic activity, where state aid may arise.
- 5.7 However, the final part of the Article introduces a degree of ambiguity. Again it refers to, "*Where a research infrastructure receives public funding for both economic and non-economic activities*" and it requires monitoring to be undertaken and a claw-back mechanism to be used if the intensity of aid increases above 50% of the eligible costs due to economic activity increasing beyond that which was envisaged at the business planning stage. This approach is consistent with other State Aid measures where non-economic (no State Aid or State Aid control) and economic activity are coexisting. It is also consistent with the requirements to account separately for these activities specified in Paragraph 2 of the Article.
- 5.8 The ambiguity is that the Article appears not to mandate such claw-back arrangements where facilities are only used for *economic activities*. This omission may be due to the

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fact that at the time the project is assessed (and a decision made on public funding) the assumption is that 100% of use will be for economic activities and no State Aid distortion will occur if subsequently there is some non-economic use.

5.9 We would suggest that monitoring arrangements are adopted and that some claw-back provisions are included in the Accountable Body Agreement.

5.10 Our advice is that the language used in and legal construction of Article 26 means it may be used for funding research facilities which are only used for economic activities, providing that the building and equipment genuinely enables it to be used for research. This is on the basis that the funding infrastructure and projects for *purely non-economic activities* are not subject to compliance with State Aid Law; as such activities would not affect the single European market and therefore would not give rise to State Aid. However, as with the definition of *scientific community* there is scope for a court or the EU Commission to subsequently provide further clarification about this ambiguity which could undermine our analysis and advice.

6 **Accountable Body Agreement**

6.1 The Accountable Body Agreement (ABA) should be concise setting out in broad terms the sums of money to be provided, the purpose of that funding, a broad description of what the money is to be spent on and provisions to ensure State Aid compliance.

6.2 We would expect following terms in the ABA:

6.2.1 Details of the parties;

6.2.2 Amounts of funding to be provided and when it may be drawn down;

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- 6.2.3 A description of what the funding may be spent on – which should be cross-referred to a schedule which has an outline description of the facilities to be constructed / renovated and the users they will be marketed to;
- 6.2.4 The duration which MPEC will be required to make the facilities under the ABA at market rent;
- 6.2.5 State Aid provisions which we would include;
 - (a) An acknowledgement that the parties believe they have structured funding to be compliant with State Aid Law;
 - (b) A requirement for MPEC to promptly refund any payments if they are subsequently held to be unlawful State Aid;
 - (c) A requirement for MPEC to self-monitor to ensure it is not being 'over-subsidised' by the public funding and for it to notify the Council when the facilities are ready and also to confirm that they have been let at market rent.

7 **Previous projects where there have been difficulties with applying funding**

- 7.1 MPEC has raised an issue that to its knowledge similar schemes, relating to business parks, have had difficulties accepting State Aid compliant funding in the past.
- 7.2 In considering this concern the Council should be aware that the proposed development at Milton Park is as far as we understand a specialist development. Its primary objective is to provide research facilities and space for such facilities to enable bio-medical start-ups capacity to develop related products. The second point the

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Council needs to consider is that from 1 July 2014 the EU Commission introduced the new GBER which enables State Aid complaint funding to be provided for a wider range of activities than was previously the case.

- 7.3 Prior to the adoption of the new GBER public funding/aid the range of infrastructure initiatives (which would include business parks) was thrown into doubt by a case known as Stadt Halle³. Prior to the Stadt Halle case the European Commission appeared to support aid for important infrastructure even where that was subsequently used for an *economic purpose*. State Aid Law had permitted support providing that the commercial body operating the infrastructure and the users of that infrastructure paid a market price for doing so. These principles were used by the Welsh Development Agency (amongst many others) to provide support for business parks and innovation hubs. Following Stadt Halle it became more difficult to support infrastructure projects where they were to be exploited for economic purposes.
- 7.4 The European Commission in a subsequent decision known as the *German Incubator Decision* permitted public support and funding for what it referred to as innovation clusters. However, the restriction in that decision in effect prevented private investors/businesses from operating those facilities as there were strict conditions in respect of the owners of such centres not making a profit.
- 7.5 The combined effect of the German Incubator Decision and Stadt Halle was to make it difficult for public bodies to support business parks and research facilities.
- 7.6 The new GBER was introduced by the European Commission as part of its State Aid modernisation programme. This includes consideration of appropriate aid for high tech

³ Case – 26\03 Stadt Halle [2005] ECR I-0001

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and start-up businesses operating across Europe. Article 26 is new and is aimed at enabling funding for research infrastructure which will be used for commercial purposes. This Article has precedence over the Stadt Halle decision providing the conditions stipulated in it are complied with.

8 **Market Rents**

- 8.1 The Council has asked for clarification on how it can be established that the facility to be constructed at Milton Park is charged to its users at a market rent/usage fee.
- 8.2 If the European Commission investigates a State Aid complaint concerning Milton Park it will expect that the Council and MPEC to have taken steps to ensure market rents/fees are charged. Offering use of the facilities to parties across the EU could qualify as a method of establishing market rent/usage fees, though in practice this may prove difficult, as instead of setting a rent MPEC would instead invite offers from those who express an interest in occupying it.
- 8.3 A more practical alternative would be for MPEC to obtain a report from an independent RICS Surveyor (with some experience of similar facilities) which would provide advice on the appropriate level for market rents/fees. MPEC could also verify this with its own evidence of what it is able to achieve in by way of rent and usage fees at this and other sites.

9 **Third party reliance**

- 9.1 This letter has been prepared for the sole use of Breckland Council (the Council) and for no other purpose.

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- 9.2 We do not accept or assume any liability or duty for any other purpose or to any other person to whom this report is shown or into whose hands it may come save where expressly agreed by our prior consent in writing.
- 9.3 The contents of this letter are correct as to the law on the 3 February 2015.

Yours sincerely

Paul McDermott