

Case No: 59391
Event No: 562233
Dec. No: 323/10/COL

EFTA SURVEILLANCE AUTHORITY DECISION
of 14 July 2010

on the transactions between the municipality of Halden and Fredriksten Utvikling AS
regarding land in the Svingenskogen and Langbrygga areas

(Norway)

THE EFTA SURVEILLANCE AUTHORITY¹,

HAVING REGARD to the Agreement on the European Economic Area², in particular to Articles 61 and Protocol 26 thereof,

HAVING REGARD to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice³, in particular to Article 24 thereof,

HAVING REGARD to Article 1(3) of Part I and Article 4(2) of Part II of Protocol 3 to the Surveillance and Court Agreement⁴,

HAVING REGARD to the Authority's Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement⁵, and in particular Part V "*State aid elements in sales of land and buildings by public Authorities*" thereof,

Whereas:

I. FACTS

1. Procedure

On 9 February 2006, the Authority sent a request for information to Norway (Event No. 361643) to clarify information that appeared in several newspaper articles concerning the municipality of Halden's (hereinafter "the municipality") sale of land to Fredriksten Utvikling AS (hereinafter "FUAS"). The reply from the Norwegian authorities was received on 28 March 2006 (Event No. 369306). On 9 February 2007, the Authority sent a second request for information (Event No. 407857), to which the Norwegian authorities responded on 23 April 2007 (Event No. 418931). On 11 May 2007, the Norwegian

¹ Hereinafter referred to as the Authority.

² Hereinafter referred to as the EEA Agreement.

³ Hereinafter referred to as the Surveillance and Court Agreement.

⁴ Hereinafter referred to as Protocol 3.

⁵ Guidelines on the application and interpretation of Articles 61 and 62 of the EEA Agreement and Article 1 of Protocol 3 to the Surveillance and Court Agreement, adopted and issued by the Authority on 19.1.1994, published in the Official Journal of the European Union (hereinafter referred to as OJ) L 231 of 3.9.1994 p. 1 and EEA Supplement No 32 of 3.9.1994 p. 1. Hereinafter referred to as the State Aid Guidelines. The updated version of the State Aid Guidelines is published on the Authority's website: <http://www.eftasurv.int/state-aid/legal-framework/state-aid-guidelines/>

authorities forwarded a letter by the law firm Grindstad & Co AS regarding the subject matter (Event No. 421433).

2. Description of the measures under investigation

2.1. General facts regarding the municipality of Halden

The municipality of Halden (hereinafter “the municipality”) is situated in the south-eastern part of Norway, approximately 120 km from Oslo. Halden has a population of 27 000 inhabitants and covers an area of 640 km².

The measures under investigation are contracts regarding sale of land in two areas. The first area is called “Svingenskogen” and is located outside the city centre. The second area is called “Langbrygga” or “Rutebilstasjonen” and is located at the old harbour.

2.2. “Svingenskogen”

In 1972, the municipality acquired 182 000 m² at “Svingenskogen” (gnr. 37 bnr. 7) situated approximately 7 kilometres to the west of the city centre for the total sum of NOK 65 000, equalling NOK 0.35 per m². During the first half of the 1980’s, the municipality unsuccessfully attempted to develop the area as an industrial zone and to sell plots.

2.2.1. Skøytehalltomta

On 27 October 1987 the municipality and the international construction company Skanska entered into an agreement, according to which Skanska would prepare approximately 81 000 m² of the area for construction (level out the terrain). In return, the municipality would either sell that part of the area to Skanska for a price of 6-10 NOK per m² or indemnify Skanska for the costs of levelling out the area at a rate of NOK 170 per m².

On 26 January 1989, the municipality and Skanska entered into a sales agreement for a part of the area called Skøytehalltomta⁶. The price was set at NOK 8 per m², which could be adjusted to a maximum price of NOK 10 per m², depending on the result of a pending court procedure. The Norwegian authorities have explained that a court was reviewing the value of the land in the area of “Svingenskogen” following an expropriation procedure carried out in 1987. On 17 December 1990 the court ruled that despite the fact that the expropriation value in 1987 was set at NOK 14 per m², the lowest acceptable sales price per m² in 1989 was NOK 6. The reason for this difference was that the plan to build a skating rink in the area had been abandoned in the meantime and the value had thus decreased.

In August 1999, FUAS acquired an option to buy Skøytehalltomta from Skanska for NOK 9 500 000. By contract dated 31 August 2000, FUAS bought the developed Skøytehalltomta for approximately NOK 122 per m² and paid NOK 5 750 000 to Skanska for the development of the land and NOK 3 750 000 corresponding to the title to the land directly to the municipality.⁷

⁶ This agreement contained a clause that if the municipality would not consent to Skanska’s planned use of the area, the company could request it to repurchase the area or parts of it for NOK 212 per m².

⁷ It is not clear whether the latter sum covers the actual cost of developing the land. In any event, if it was not the case, the deficit would have been borne by Skanska and not by the municipality and thus would not constitute state aid.

2.2.2. *Undeveloped areas*

In 2000 FUAS approached the municipality regarding the acquisition of additional, undeveloped land⁸ in order to develop the “Svingenskogen” area as a whole.

By agreement dated 11 October 2001 the municipality sold two plots of undeveloped land in the “Svingenskogen” area⁹ to FUAS for a price of NOK 25 per m². According to the sales contract, FUAS was obliged to prepare part of the land for business purposes. The municipality preserved a right of repurchase conditional upon FUAS not having started the development within a period of 6 years.

Furthermore, the municipality agreed to rezone the area in order to permit the extraction of rocks. In return, the municipality would be entitled to 50% of the profits, but not less than NOK 1 per ton as remuneration.

In 2001 FUAS also acquired options to buy two privately owned estates in the “Svingenskogen” area for NOK 25 per m², conditional upon the land being rezoned for industrial purposes.

2.3. “Langbrygga” or “Rutebilstasjonen”

The second sale investigated by the Authority concerns an area called “Langbrygga” or “Rutebilstasjonen”, which is located next to the harbour in the centre of Halden. The area consists of former landfills from paper and sawmill industries and during the last fifty years, the area has *inter alia* been used to host the main bus station in Halden and a petrol station.

In the beginning of the 1990’s, the municipality planned to relocate the bus station to an area near the railway station and to build a hotel in the Langbrygga area. Throughout the 90’s, the municipality discussed these plans with different investors without result. The Norwegian authorities have explained that the local company FUAS was the only investor interested in building a hotel.

On 3 October 2000, a member of the Norwegian Valuers and Surveyors Association (“Norges Takseringsforbund”) hired jointly by the municipality and FUAS carried out a value assessment of the “Rutebilstasjonen” area and estimated the price at NOK 890 per m².¹⁰

2.3.1. *The 2001 contracts*

In 2000 FUAS and the municipality entered into an agreement laying down the principles for the building of a hotel, flats and business premises in the Langbrygga area. In an endeavour to reduce the investment risk for FUAS, the municipality would make the plot of land where the hotel would be built available at low cost. Furthermore, the construction of flats or business premises on the neighbouring parts of the Langbrygga area was foreseen in order to contribute to the financing of the hotel.

For negotiation purposes the Langbrygga area was divided into parts, which were referred to as areas A, B, C, D and E, depending on their history, specific features and ownership. Plots A, B and D were transferred by agreement dated 4 January 2001, by which FUAS

⁸ Gnr. 36 bnr. 26, gnr. 37 bnr. 7 and bnr. 28.

⁹ The sale concerned the plots with the registration numbers gnr. 36 bnr. 26, gnr. 37 bnr. 7 and bnr. 28.

¹⁰ The area should be rezoned in order to allow for 4-level buildings (instead of 3-level buildings as foreseen by the existing plan), such as for example a hotel, offices and apartments. Such regulation would have an important impact on the value of the land.

also acquired an option to buy plot E. Plot C was transferred by agreement dated 3 May 2001.

Areas A and B: Rutebilstasjonen

The former Halden Rutebilstasjon consists of areas A and B¹¹ and covers approximately 4 200 m².

In 1958 the municipality leased part of areas A and B¹² to AS Halden Rutebilstasjon (“HRAS”)¹³ for use as the main bus station in Halden. In 1989 the parties concluded a new lease agreement¹⁴ until 2029 (“the Ground Lease Agreement”).

According to the explanations of the Norwegian Authorities, Halden transferred most of the rights to the land at Rutebilstasjonen to HRAS under the Ground Lease Agreements of 1958 and 1989. In 2000 FUAS acquired these rights directly from HRAS for NOK 3 400 000.

Area C

Area C¹⁵ measures approximately 1 300 m² and was acquired by the municipality in 1992 for NOK 400 000. In May 2001, the title to the land and the building on the site were transferred to FUAS for NOK 750 000¹⁶.

Area D

The municipality acquired Area D¹⁷ in November 1999 from AS Norske Shell for NOK 2 150 000.¹⁸ By agreement dated 4 January 2001, the municipality sold it to FUAS for NOK 2 150 000, i.e. for the same sum that it had paid to Norske Shell AS two years before.

Area E

By agreement dated 4 January 2001 FUAS acquired an option to buy Area E¹⁹ from the municipality for NOK 890 per m², subject to price adjustments in accordance with the consumer price index.

The Norwegian Authorities explained that the price paid by FUAS for the land at Langbrygga in 2001 was as follows:

Area	Size	Price paid	Price per m ²
Areas A and B	4 200 m ²	NOK 3 400 000	NOK 809
Area C	1 300 m ²	NOK 750 000	NOK 577

¹¹ Plot 160/280 and 160/550 of a surface of 1 600 and 2 600 m², respectively.

¹² 3 314.1 m² in total.

¹³ By 1989 the lessee had changed its name to Halden Rutebilstasjon AS. The municipality owned 41,5% of the shares in HRAS.

¹⁴ This Ground Lease Agreement covered 4 714 m² of land (plot 160/280 and some additional land which had previously been used as a taxi station).

¹⁵ Plot 160/522.

¹⁶ This corresponds to a price of approx. NOK 577 per m²

¹⁷ Plots 160/254/255/489.

¹⁸ The municipality acquired the areas with registration no. 160/ 254,255 and 489 (total: 2 818.7 m²), and 62/337 and 338 (total: 1 091,5 m²) for a total price of NOK 4 300 000 (NOK 2 150 000 each). This corresponds to a price of approx. NOK 550 per m².

¹⁹ Plot 160/253 consists of the remainder of plot 160/253, approximately 1 500 m².

Area	Size	Price paid	Price per m2
Area D	3 910 m2	NOK 2 150 000	NOK 550
Area E	1 500 m2	NOK 1 335 000	NOK 890
Total	10 910 m2	NOK 7 635 000	NOK 699

2.3.2. The 2005 contracts amending the 2001 contracts

The municipality amended the zoning regulation for the Langbrygga area in 2001 and 2004. The latter plan allowed for the construction of a five-storey hotel building and increased the permitted building density to 85%. These amendments were necessary for the development of the area. In 2004 the municipality planned the additional building of flats for disabled or elderly people and a Music and Cultural Hall in the Langbrygga area.

In order to realise the municipality's new development plans, the contracts concluded with FUAS in 2001 had to be renegotiated. In May 2005, the municipality and FUAS signed an agreement according to which:

- FUAS had to return the sea-facing part of area A and the entire area C to the municipality without compensation. However, FUAS would be entitled to run restaurants or shops on these areas without paying rent once the new building projects would be finalised.
- FUAS relinquished the option to acquire part of areas A and B located at the border between the two areas. On this area the municipality would construct a Cultural Centre, practicing facilities for a brass band and residential care apartments.
- As a result of these amendments, the surface acquired by FUAS in areas A and B was reduced by approx. 1 800 m2 to 2 400 m2, augmenting the price paid to NOK 1 400 per m2.
- FUAS was obliged to build a hotel on the remainder of area A.
- FUAS would build apartments on area D, to be sold on the open market.
- FUAS remained entitled to acquire area E, as agreed in the 2001 contract.

The Norwegian Authorities provided this overview of the price paid by FUAS for each area at Langbrygga after the amendments made in 2005:

Area	Size	Price paid	Price per m2
Areas A and B	2 400 m2	NOK 3 400 000	NOK 1 417
Area C	relinquished	NOK 750 000	n/a
Area D	3 910 m2	NOK 2 150 000	NOK 550
Area E	1 500 m2	NOK 1 335 000	NOK 890
Total	7 810 m2	NOK 7 635 000	NOK 978

II. ASSESSMENT

1. The presence of state aid

To be considered as state aid, the measures assessed must fulfil the criteria outlined in Article 61(1) of the EEA Agreement, which reads as follows:

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

1.1. Market economy investor principle

In the following the Authority will assess whether the municipality granted state aid to FUAS in connection with the sale of land at Svingenskogen and at Langbrygga (or Rutebilstasjonen). These sales of land could qualify as state aid if the sales were not carried out at market price. If, however, the transactions were carried out in accordance with the market economy investor principle, i.e., if the municipality sold the land for its market value and the conditions of the transaction would have been acceptable for a private seller, the transaction would not have involved the granting of state aid.

As a point of departure, whether a property has been sold at market value should be assessed at the time of the conclusion of the contract. The circumstances of the sales under assessment are somewhat particular in the sense that several consecutive sales agreements exist.

1.2. State Aid Guidelines on the sale of land

According to the Authority's State Aid Guidelines on the sale of land, a sale of land and buildings following a sufficiently well-publicised and unconditional bidding procedure, comparable to an auction, accepting the best or only bid, is by definition at market value and consequently does not contain state aid. However, the municipality did not arrange for an unconditional bidding procedure in any of the sales under assessment in the case at hand.

Alternatively, a sale of land following an independent value assessment carried out by one or more independent asset valuers prior to sales negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards does not constitute state aid. No value assessment was carried out for the Svingenskogen sale. An expert evaluation of the land in the Langbrygga area was collected prior to the sales negotiations. This assessment expressly mentioned that future rezoning might have an effect on the value of the land, which happened both in 2001 and 2004. These changes triggered an amendment of the 2001 sales agreement in 2005. Therefore, although the independent expert assessment is representative as far as the analysis of the 2001 contracts is concerned, its value may be more limited for the assessment of whether state aid was granted after the contracts were amended in 2005.

1.3. “Svingenskogen”

Since the existence of state aid cannot automatically be excluded for the Svingenskogen area, the Authority is required to assess the sale directly under Article 61(1) EEA. The Authority must assess whether the sale was carried out in accordance with the market economy investor principle.

The sale of land at Svingenskogen to FUAS is composed of two different transactions that are intrinsically linked, the sale of Skøytehalltomta (on which Skanska exercised an option) and the sale of undeveloped areas.

Skøytehalltomta

As mentioned above, following an expropriation procedure and based on expert assessments, the Court ruled in 1990 that the lowest acceptable price in the area in 1989 had been NOK 6 per m². The price of NOK 10 per m² agreed in 1989 between the municipality and Skanska was higher than the market price. Despite the fact that the 1989 option agreement was binding and infinite, the parties agreed to a “fair” new price adjusted for the interim rise in consumer prices set at NOK 48.08 per m².

The Authority concludes that no aid was involved in the transfer of Skøytehalltomta.

Undeveloped areas

In 2000, FUAS acquired undeveloped land in the “Svingenskogen” area from the municipality for NOK 25 per m², subject to conditions. At the same time, FUAS also unconditionally acquired two plots of land in the same area from private owners for the same price. Furthermore, the municipality obliged FUAS to prepare part of the land for business purposes, for which no compensation was foreseen. At the same time, it granted permission for rock extraction from the area. The municipality will get a compensation of 50% of the profits from the rock extraction.

It is important to assess this deal in its entirety. FUAS paid a price for the land which corresponded to its market value. Moreover, it had to prepare the land for business purposes without compensation and agreed to give the municipality 50 % of the profits from rock extraction. The municipality was particularly interested in finding a private investor who would develop the Svingenskogen area as a whole and free the municipality from the risk connected to that project. By entering into a contract covering the entire area with FUAS, the municipality ensured that those parts of the land where no rocks were to be extracted would nevertheless be developed for business purposes.

For these reasons, the Authority concludes that no aid was involved in the sale of Svingenskogen to FUAS.

1.4. “Langbrygga”

The Authority’s assessment of the Langbrygga area relates to the contracts between the municipality of Halden and FUAS signed in 2001 and amended in 2005.

Areas A and B

The 2001 contract was substantially modified in 2005. As a result of this amendment, FUAS acquired 2 400 m² in the Langbrygga area for NOK 3 400 000, which corresponds to a price of NOK 1417 per m². This price is considerably higher than the price paid for any other plot in the area (see below), and also by far exceeds the value estimate of the

independent expert in 2000, which was NOK 890 per m².²⁰ Moreover, although FUAS by the amendment in 2005 also acquired certain new advantages, such as a right to run restaurants and shops free of lease, it was also obliged to build the hotel, a project that at the time not necessarily appeared to be profitable. The Authority has moreover taken note of the existing Ground Lease Agreement, running until 2029. Finally, the Authority has taken note of the information submitted by FUAS' attorney regarding the subsequent sale of the land, including the obligation to build the hotel. FUAS made no profit under this sale, which in the Authority's view confirms that the original price was appropriate.

For these reasons, the Authority considers that FUAS did not receive any aid in the context of this transaction.

Area C

FUAS acquired area C in 2001, but following the 2005 amendments to the property was returned to the municipality. FUAS did not receive any financial compensation for the work carried out in the area apart from an option to use part of the area free of charge in the future. The Authority considers that FUAS did not receive any economic advantage in relation to this transaction.

Area D

In 2001 FUAS acquired area D for NOK 2 150 000, which equals a price of approx. NOK 550 per m². The price paid by FUAS in 2001 corresponds to the primary cost to the municipality of acquiring the land from Shell in 1999, i.e. just two years earlier. Reference is made to section 2.2.d of the Guidelines on the sale of land and buildings, according to which "the primary cost to the public authorities of acquiring land and buildings is an indicator for the market value unless a significant period of time elapsed between the purchase and the sale of the land and buildings. In principle, therefore, the market value should not be set below primary costs during a period of at least three years after acquisition".

The transaction under assessment was carried out two years after the municipality acquired the land from a private operator on the open market. Therefore, the Authority considers that the price reflected the market value of the land. The reason for the price being considerably lower than the value estimate in the expert assessment for the other parts of Langbrygga may be that there was a contamination risk due to the former use of the site as a petrol station. Since FUAS intended to build a hotel in the area, it would be obliged to clear any contamination.

Area E

FUAS still has an option to buy this land on the conditions set forth in the 2001 agreement, i.e. at a price of NOK 890 per m² but subject to price adjustments in accordance with general price rises. This price corresponds to the estimation of the independent value assessor and thus the agreement does not entail the granting of state aid.

However, should FUAS decide to exercise this option, it would have to be assessed whether the price adjustments will be done in accordance with market terms or whether state aid would be involved.

²⁰ As mentioned above, this value assessment was made at a time when the future zoning regulation was not determined and is therefore not necessarily representative for the value of the property in 2005.

2. Conclusion

On the basis of the foregoing assessment, the very extensive information provided by the Norwegian Authorities and taking account of the special character and location of the properties in question together with the plans of the municipality regarding urban planning development, the Authority concludes that the transactions between the municipality of Halden and FUAS regarding land in the Svingenskogen and Langbrygga areas do not involve state aid within the meaning of Article 61(1) of the EEA Agreement.

The Norwegian authorities are, however, reminded that any modifications of these agreements may constitute state aid within the meaning of Article 61(1) of the EEA Agreement and would have to be notified to the Authority in accordance with Article 1(3) in Part I of Protocol 3 to the Surveillance and Court Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The EFTA Surveillance Authority considers that the transactions between the municipality of Halden and FUAS regarding land in the Svingenskogen and Langbrygga areas do not involve state aid within the meaning of Article 61 of the EEA Agreement.

Article 2

This Decision is addressed to the Kingdom of Norway.

Article 3

Only the English language version is authentic.

Done at Brussels, 14 July 2010.

For the EFTA Surveillance Authority

Per Sanderud
President

Sverrir Haukur Gunnlaugsson
College Member