

Appendix G

West Berkshire Council Officer Response to Faraday Development Ltd's summary questions:

1. What evidence supported WBC ignoring its obligation to carry out public consultation (including consultation with businesses, residents, employees and land-owners directly affected) prior to the DA (consultation relating to the Vision was not sufficient or reliable)

Response:

WBC did not ignore its obligation to carry out public consultation. There were throughout the process meaningful discussions with various stakeholders at various organised meetings for example the Town Centre task group and Croft. Strutt & Parker led various discussions too in formulating the Development Brief which subsequently was included in the tender (non EU) that was issued widely in leading property publications.

2. What evidence supported:
 - a. The original decision to avoid PPR?
 - b. Continuing to avoid PPR once aware of the risk of a third-party challenge (DA 25a)?

Response:

There is no such thing as the PPR. However I think Faraday Developments Ltd (FDL) refer to Public Contracts Regulations (PCR) however I am not clear of which one in particular.

It is wrong to state there was any decision to avoid the PCR. The Court of Appeal (CA) concluded at paragraphs 66 to 71 of its judgment that the public procurement regime had not been deliberately and unlawfully avoided.

*CA also stated that **“there is no evidence in this case, and indeed no suggestion, of the council having acted at any stage in bad faith, or with any motive to create a mistaken understanding of its objectives in entering into the development agreement or of the "economic and commercial reality" of the transaction.”***

In relation to b) it should be noted that the wording of the Development Agreement (DA) was proposed by St Modwen. The Council made amendments and additions to the wording proposed as it would do with any transaction and to diligently cover its risk whether apparent or not. Here it did so with external specialist advice.

3. Did WBC properly consider whether alternatives would deliver a lower risk/better outcome:
 - a. Procurement method?
 - b. Approach to regeneration (e.g. engaging with land owners and occupiers)?

Response:

WBC were advised by its property consultants, Strutt & Parker (SP). SP formed the procurement strategy as well as the development brief which covered the approach to regeneration. SP and the Council were clear that a wider advertisement of the opportunity for the LRIE regeneration would generate market interest. This led to nationwide advertisement of the development opportunity in the leading property journals, non EU tender and a thorough evaluation and award process.

4. Before committing to very substantial expenditure on the DA process, what evidence supported WBC deciding not to carry out risk and impact assessments relating to:
 - a. Holistic development?
 - b. The appointment of a single development partner?
 - c. Potential harm to occupiers, residents and land owners?

Response:

The Council commissioned a multi-disciplinary feasibility study into the regeneration of the LRIE led by SP. It did not decide on restricting the market to the single or multiple development partners. Indeed Wilson Bowden's bid was formulated with FDL as a junior consortium partner. The market responded better than expected to the LRIE opportunity and the shortlist included a range of developers.

At the time of entering into the DA there was no decision to dispose of the Council's interests in the LRIE. Any such decision was dependent on further evaluation of the land assembly or the parcels of land at the LRIE as they were packaged as separate development lots. Obviously at that stage there would have been a detailed consultation both in planning and land terms on how the development would affect the occupiers, residents and leaseholders.

5. Before committing to very substantial expenditure on the DA process, what evidence did WBC have to conclude that holistic regeneration through a single development partner would present the best outcome (economic, social, environmental)?

Response:

As above, I would refer to the multi-disciplinary team that was led by SP in recommending comprehensive regeneration of the LRIE.

6. Before committing to very substantial expenditure on the DA process, what evidence did WBC have to conclude that holistic regeneration would be viable?

Response:

The market responded to the published opportunity with lots of interest in a comprehensive regeneration of the LRIE. Both SP and short listed bidders were keen to point out that if the Council was to achieve its twin objective of regeneration and income maximisation from the LRIE it would be for the site as whole with appropriate land assembly and packages. As part of that was the construction of the link road and also the use of the football ground as a residential development to make the regeneration viable.

7. In pursuing an holistic approach, why did WBC as land owner disregard the 2025 Vision and its own planning authority in relation to appropriate land uses?

Response:

The Council did not disregard its 2025 Vision. The Vision clearly refers to both residential and commercial aspects.

8. Why was WBC's underwriting of a significant part of SMD's risk deemed to be appropriate. (Given that transfer of risk to SMD was key to WBC's justification for the DA in the judicial proceedings)?

Response:

As per earlier the DA was entered following thorough tender process (non EU) which led to a lot of interest in the regeneration of the LRIE. All shortlisted bidders presented bids on commercial terms. The decisions to dispose of parcels of land would not arise under the DA until the Steering Committee agreed to it. This meant that prior to the Council committing to any level of risk it would need to be satisfied that the disposal represented best value obviously remaining within the commercial parameters.

9. Why did the terms agreed in the DA differ so significantly from the Heads of Terms approved by the Executive, without referring back to the Executive?

Response:

The terms of the agreement and a summary of the DA were contained in the Executive report approved on 20 November 2014. The Head of Legal and Chief Executive had delegated authority to enter into agreement. We do not consider the DA changed significantly.

10. Why and how (given WBC's declaration in the judicial proceedings of having received expert legal advice) did WBC publish a VEAT notice described by the CoA:

".... the council was seeking to stress that concept, "an exempt land transaction", as the "object of the contract". This, it seems to me, was more than mere over-simplification. It was incorrect, or at best misleading."

Response:

The Council received specialist advice (Bond Dickinson) on the VEAT notice prior to its publication and its drafting. The Council was open and transparent about its intention to award the contract hence the publication of the VEAT notice. It contained factually correct information and the Council observed a standstill process before awarding the DA.

The Council's main purpose of entering into the DA was the redevelopment and regeneration of the LRIE. There was established case law both domestic and EU which was applied. The requirements set out by the European Court of Justice, in the Helmut Müller case stated that in order to determine whether the development agreement should be classified as a public contract for EU procurement purposes is that the contractor must be "directly or indirectly obliged to provide the works". The High Court undertook a detailed examination of the terms of the DA and analysed the practical impact of those provisions. The High Court concluded that the development agreement did not create an enforceable obligation on St Modwen to carry out the redevelopment and so it was not a public contract for the purposes of the EU procurement rules.

The CA agreed that the development agreement was not a public works contract at the time it was concluded because there were no enforceable obligations. However, the CA decided that the arrangement had to be looked at as a whole. In entering into the development agreement, the Council was committing itself to entering into a public works contract in the future without complying with the public procurement legislation.

11. In the context of financial returns, which was correct:

- a. The representation in judicial proceedings that the income stream from LRIE was significantly important to WBC and financial enhancement was the key objective of the DA ("to maximise returns from the property").
- b. The representation in numerous public meetings that the income stream from LRIE was not significant and financial enhancement was not the key objective of the DA.

& 12. In light of the CoA's characterisation of one of the two main breaches committed by WBC ("*the unlawful direct award of contracts is the most serious breach of EU law in the field of public procurement*"), is WBC right to claim it was akin to a technical breach?

Response:

The Council has been clear from the outset and is evident in the DA of the twin objectives for the LRIE. Regeneration of the LRIE and income maximisation.

FDL are clearly stating excerpts from the CA judgment without context. We obviously don't want to mislead the Task Group by doing the same however we urge that both the High Court and CA judgments are read carefully. Judgements contain a detailed examination of the Council's approach. We also refer to our summary of the CA judgment if it would assist the Task Group. Please follow the link below.

<https://info.westberks.gov.uk/CHttpHandler.ashx?id=46767&p=0>