
OSMC Task Group Report: London Road Industrial Estate

Committee considering report:	Overview and Scrutiny Management Commission
Date of Committee:	28 July 2020
Lead Member:	Councillor James Cole (Task Group Chairman)
Report Author:	Report prepared on behalf of the Task Group
Forward Plan Ref:	n/a

1 Purpose of the Report

- 1.1 To outline to OSMC the work undertaken by the task group created to better understand the advice and guidance received in relation to the Council's decision when procuring a preferred partner for the London Road Industrial Estate (LRIE) development.

2 Recommendations

- 2.1 The full list of recommendations by the Task Group are set out in Paragraph 5.42 and Appendix H, and it is recommended that these be adopted by OSMC as recommendations to the Executive.

3 Implications and Impact Assessment

Implication	Commentary
Financial:	None
Human Resource:	None
Legal:	None
Risk Management:	It is considered that the adoption of the recommendations of this report will reduce the risk that projects fail.
Property:	None

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Policy:	None			
	Positive	Neutral	Negative	Commentary
Equalities Impact:				
A Are there any aspects of the proposed decision, including how it is delivered or accessed, that could impact on inequality?		X		
B Will the proposed decision have an impact upon the lives of people with protected characteristics, including employees and service users?		X		
Environmental Impact:		X		
Health Impact:		X		
ICT Impact:		X		
Digital Services Impact:		X		
Council Strategy Priorities:	X			
Core Business:		X		
Data Impact:		X		

Consultation and Engagement:	See full details in the report.
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4 Executive Summary

- 4.1 At its meeting on 9 April 2019, the Overview and Scrutiny Management Commission (OSMC) agreed to conduct a review to better understand the advice and guidance received in relation to the Council's decision making when procuring a preferred partner for the London Road Industrial Estate (LRIE) redevelopment.
- 4.2 This decision was taken following the Court of Appeal judgement in November 2018 which found that the Council had breached European public procurement legislation in identifying a preferred development partner. This came following a judgment of the High Court which found in favour of the Council. The Council was subject to a fine of £1 by the Court of Appeal.
- 4.3 The purpose of the review was to better understand the advice and guidance received in relation to the Council's decision when procuring a preferred partner for the LRIE development.
- 4.4 The Terms of Reference of the scrutiny review appear at Appendix A, and are as follows:
 1. To review the governance arrangements put in place by the Council to manage the LRIE development.
 2. To review the advice and guidance received by the Council which resulted in the Official Journal of the European Union (OJEU) commissioning rules not being followed.
 3. To better understand the cost of the initial advice and the subsequent cost of defending the Council's position in the High Court and Court of Appeal.
 4. To review what lessons have been learnt from this case.

Methodology

- 4.5 The review has been conducted by a cross-party Task Group. The Members of the Task Group were Councillors Jeff Brooks, James Cole, Lee Dillon, Claire Rowles and Andrew Williamson. Councillor Cole was elected as Chairman of the Task Group.
- 4.6 The Task Group met on multiple occasions to review the significant amount of documentary evidence, to direct further enquiries and to take evidence from Council Members (both past and present) and Council Officers (both past and present). Contributions were also requested from external organisations.
- 4.7 The documentary evidence available and considered by the Task Group is significant, and details of the evidence considered appears at Appendix B. This included Reports and Minutes from meetings of the Newbury Town Centre Task Group and Executive between 2008 and 2016. The history of this matter is set out in a chronology at Appendix C.

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4.8 A detailed chronology is also produced at Appendix D, although this is restricted from publication because it contains confidential information relating to matters considered in meetings that are exempt from the publication requirements. Schedule 12A of the Local Government Act 1972 defines 'exempt information' as including:

1. Information relating to an individual (Schedule 12A, Paragraph 1)
2. Information relating to the financial or business affairs of any person (Schedule 12A, Paragraph 3)
3. Information in respect of which a claim to legal professional privilege could be maintained (Schedule 12A, Paragraph 5)

4.9 The officers supporting the Task Group were Sarah Clarke (Service Director, Strategy and Governance), Julie Gillhespey (Audit Manager) Stephen Chard (Principal Policy Officer) and Jo Reeves (Principal Policy Officer).

Acknowledgements and thanks

4.10 The Chairman and Members of the task group would like to thank all those who supported this process and gave evidence to the review.

Summary of Findings

4.11 There are a total of 15 recommendations detailed in the report, which arise out of a detailed consideration of all the evidence. These appear in full at paragraph 5.42 and Appendix H, and these include but are not limited to the following areas:

- The absence of proper project management methodology
- The absence of a detailed business case
- The record keeping and systems for record retention were not adequate
- The project was approached in a piecemeal manner
- Consultants engaged to advise the Council in respect of this project were also appointed on a piecemeal basis

4.12 The Task Group has not found any evidence to suggest that the Council intended to act unlawfully and it is clear that the Council had regard to its legal obligations under the Public Contracts Regulations when considering reports regarding the redevelopment of the London Road Industrial Estate. The evidence is also clear that the Council acted reasonably having taken expert advice from its external advisors throughout this process.

5 Supporting Information

Introduction

5.1 Redevelopment of the London Road Industrial Estate has been a long-term vision of the Council first set out in the Newbury Vision 2025 document in 2003. The document describes the aspiration to provide a positive gateway to Newbury which protected employment while providing canal side residential accommodation for families.

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- 5.2 The Vision was supported by a 15 year action plan. The two most important projects identified in the Vision were Parkway and Market Street and those projects were therefore progressed before London Road.
- 5.3 Newbury Town Centre Task Group (“NTCTG”) was created as a governance group to oversee work in Newbury. Reports would be considered by NTCTG before progressing to the Executive, who would have responsibility for making decisions.
- 5.4 The earliest evidence of options for London Road being considered by the NTCTG was during 2008.
- 5.5 Following a strategic feasibility and market assessment completed by Strutt and Parker who were appointed by the Council in 2011 to advise upon the prospects for securing regeneration of the London Road Industrial Estate. An Opportunity Document was produced by Strutt and Parker in 2012, which together with a market testing exercise was approved by the Executive in January 2013.
- 5.6 This generated a significant level of interest and six potential partners were shortlisted for further consideration. The final six bidders were considered by Members of a cross party working group, which was supported by Officers. This group was unanimous that St Modwen was the best candidate.
- 5.7 In 2014, the Council entered into a development agreement with St Modwen Developments Ltd. Faraday Development Ltd, which was part of a joint unsuccessful bid, challenged the Council’s decision at the High Court on grounds that:
- (1) The Council failed to comply with its duty not to dispose of land for consideration less than the best that could be reasonably obtained (Section 123 of the Local Government Act 1972)
 - (2) The development agreement was a public contract and the Council should have complied with the relevant public procurement legislation.
 - (3) To avoid following the relevant public procurement legislation, the Council did not look to impose enforceable obligations on St Modwen Developments Ltd.
- 5.8 The High Court rejected the challenge on all grounds and held that the development agreement was not a public works contract, nor was it a services contract, the Council had complied with its duty under the Local Government Act.
- 5.9 Faraday Developments Ltd applied to challenge the High Court’s decision on all grounds, and the application for leave to appeal was rejected by the High Court. This application was renewed to the Court of Appeal, which granted leave to appeal in relation to ground 2 of the original appeal, which claimed that the Council had acted inconsistently with its obligations under the public procurement regime.
- 5.10 The Court of Appeal agreed with the High Court on the following points:
- (1) the development agreement did not constitute a public works contract at the time it was entered into, because it did not impose any enforceable obligations at that time

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(2) the development agreement was not a public services contract because the main object of the agreement was the carrying out of works

(3) the Council did not adopt the structure so as to avoid compliance with public procurement legislation

5.11 However, whilst the development agreement did not constitute a public works contract at the time it was entered into, the Court of Appeal took the view that the transaction should be looked into in its totality at the date it was entered into and ‘establish whether, at that date, it embodied defined obligations that will, once they take effect, compose a ‘public works contract’”.

5.12 Upon entering into the agreement, the Council had made a legally enforceable decision to commit itself to the arrangement. St Modwen Developments Ltd had committed itself to the immediately enforceable obligations, but not to the contingency obligations.

5.13 However, the Court of Appeal decided that once St Modwen Developments Ltd had proceeded to draw down the land as per the terms of the agreement, there had been a procurement of development works that did not undergo the requisite procurement procedure. By entering into the agreement, the Council had effectively agreed to act unlawfully in the future.

5.14 The Court of Appeal rejected the argument that the public procurement rules had been deliberately and unlawfully avoided and being obligated to impose a financial penalty, it fined the Council £1. The Council was also ordered to pay Faraday Development Limited’s costs, limited to their costs in the Court of Appeal.

5.15 As a consequence of the judgment, a number of public questions were submitted to the Council’s Executive calling for a review and information on the total costs to the Council. At the Full Council meeting on 6 December 2018 a motion was put by the Liberal Democrat Opposition for an independent inquiry to be held. This motion was lost.

5.16 In January 2019, the Executive resolved to recommend to the OSMC that an inquiry be undertaken.

5.17 OSMC met on 9 April 2019 and agreed the Terms of Reference as detailed above and as included at Appendix A.

Background

5.18 The Task Group held the meetings outlined in the table below:

Meeting date	Focus of meeting
25 July 2019	<ul style="list-style-type: none">• Election of the Chairman• Agreement of the Terms of Reference and Methodology• To begin to establish the timeline• Consideration of questions to be put to witnesses
August/September 2019 – information pack – no meeting	<ul style="list-style-type: none">• Two substantial information packs were provided to the Task Group. These included:

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Meeting date	Focus of meeting
	<ul style="list-style-type: none"> • Executive Membership and Shadow Executive Membership over the relevant time period • Documentation relating to and provided to the Newbury Town Centre Task Group • Maps of the LRIE • Scoring documentation from the appointment process • Court Judgments • Cost information • Documentation provided to the Executive including the Strategic Feasibility Study, developer bid summaries • Relevant questions and answers from Executive meetings • Strutt and Parker appointment documents • LRIE Steering Group membership
9 September 2019	<ul style="list-style-type: none"> • Review of the information received to date. • Identification of witnesses and questions to cover each section of the Terms of Reference
2 October 2019	<ul style="list-style-type: none"> • Input from Internal Audit • LRIE Chronology
18 October 2019	<ul style="list-style-type: none"> • Further work on the LRIE Chronology
14 November 2019	<ul style="list-style-type: none"> • Update on costs • Update on project management methodology • Update on the LRIE Chronology
20 January 2020	<ul style="list-style-type: none"> • Update on costs • Update on LRIE Chronology • Internal Audit Update • Questions for witnesses
24 January 2020	<p>Witness interviews:</p> <ul style="list-style-type: none"> • Nick Carter, Chief Executive • Shiraz Sheikh, Legal Services Manager • Bill Bagnell, Special Projects Manager
14 February 2020	<p>Witness interviews:</p> <ul style="list-style-type: none"> • Former Councillor Gordon Lundie • Councillor Jeff Beck • Former Councillor Keith Chopping • Former Councillor Paul Bryant • Former Councillor Roger Hunneman
25 February 2020	<p>Witness interview:</p> <ul style="list-style-type: none"> • David Holling, previous Head of Legal Services and Monitoring Officer

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Meeting date	Focus of meeting
4 March 2020	Witness interview: <ul style="list-style-type: none">• Councillor Alan Law
8 June 2020	<ul style="list-style-type: none">• Review of evidence including written submissions from:<ul style="list-style-type: none">• Former Councillor Graham Jones• Faraday Development Ltd• Consideration of findings and recommendations
18 June 2020	<ul style="list-style-type: none">• Confirmation of findings and recommendations• Approval of draft report
23 June 2020	<ul style="list-style-type: none">• Consideration of findings and recommendations
30 June 2020	<ul style="list-style-type: none">• Continued review of submission from Faraday Development Ltd including response from officers• Consideration of findings and recommendations
7 July 2020	<ul style="list-style-type: none">• Consideration of findings and recommendations• Consideration of draft report
14 July 2020	<ul style="list-style-type: none">• Confirmation of findings and recommendations• Approval of draft report

Summary of Evidence

5.19 As can be seen from the table above, the Task Group met on a total of 16 occasions over the past year, with some of those meetings lasting the course of a full working day. In addition, the Task Group received and considered a significant amount of documentary evidence as detailed at Appendix B. The documentary evidence was used by the Task Group to direct further enquiries and to take evidence from Council Members (both past and present) and Council Officers (both past and present). Contributions were also requested from external organisations.

5.20 The Task Group sought contributions from the following, who did not respond:

- Frontier Estates Ltd
- St Modwen Developments Ltd
- Wilson Bowden Developments

5.21 Former Councillor Pamela Bale was also approached, who replied to advise that she was unable to assist.

5.22 The Task Group considered whether to seek contributions from Strutt & Parker and Bond Dickinson who were engaged to advise the Council through this project. It was determined on balance that these organisations would not be asked to contribute as it was considered that they would not have had detailed (if any) knowledge or understanding of the matters included in the terms of reference. The Task Group also considered the potential cost of inviting these experts to contribute.

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- 5.23 As noted above, the documentary evidence available and considered by the Task Group was significant (Appendix B). This included Reports and Minutes from meetings of the Newbury Town Centre Task Group and the Executive between 2008 and 2016, where they were considering reports relating to the proposed redevelopment of London Road Industrial Estate. This evidence is summarised in a chronology which is produced at Appendix C. A more detailed version of the Chronology is produced for OSMC at Appendix J, but this contains confidential information and is therefore exempt from publication. Schedule 12A of the Local Government Act 1972 defines 'exempt information' as including:
1. Information relating to an individual (Schedule 12A, Paragraph 1)
 2. Information relating to the financial or business affairs of any person (Schedule 12A, Paragraph 3)
 3. Information in respect of which a claim to legal professional privilege could be maintained (Schedule 12A, Paragraph 5)
- 5.24 Internal Audit also assisted with the review process and interrogated the Council's systems to obtain information, such as financial information from Agresso. Full details of the costs of this project are included at Appendix E.
- 5.25 Some records requested by the Task Group were not available. This included a number of important items such as a risk register noted in the Report to Executive in January 2013 (considering the Opportunity Document) and the minutes of the internal project group which was comprised of the Chief Executive as the project sponsor, together with officers from Property, Planning, and Legal where required.
- 5.26 In 2011, the Council appointed Strutt & Parker to provide a strategic feasibility study for the London Road Industrial Estate. This appointment resulted from a competitive tender exercise, which resulted in three separate bids. The bid submitted by Strutt & Parker had the highest overall score and they were appointed to produce the Strategic Feasibility Study in May 2011.
- 5.27 The legal support required for the completion of the development agreement was also done via a formal competitive process, which saw Bond Dickinson appointed in April 2014. An invitation to quote was issued to four legal firms, with local government experience and the specialisms required for this project. Each of the firms responded and provided a quote and accompanying submission for undertaking the work. The firm which submitted the lowest quote, Bond Dickinson, was appointed. However, no evidence was seen by the Task Group to demonstrate how the submissions had been assessed by officers in order to ensure sustainability, efficiency and cost savings.
- 5.28 The Task Group also interviewed a number of people who had been involved with the process. Some, particularly those who had left the organisation, could not recall all the detail and that was unsurprising given the passage of time. The contribution of the witnesses was however of assistance to this review, and some of the key themes from the verbal evidence is set out below.
- 5.29 The Task Group interviewed officers who had been involved with the process. These interviews indicated:

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- (a) Officers had an understanding of the governance arrangements which they believed were in place.
- (b) Officers were not always clear of their roles, or of the role of others. For example, it was suggested by one officer that Strutt & Parker were the project managers for the project, a suggestion which was emphatically rejected by the Chief Executive who was clear that management of the project remained in house.
- (c) It was clear from these interviews that officers had been surprised by the suggestion that this project could proceed outside of OJEU.
- (d) Officers tested the opinion given that this was not subject to OJEU rules, and sought both internal and external advice on the question of process. The advice was clear that as a land transaction, this would not be subject to OJEU. It was clear that others had adopted a similar approach.
- (e) There was some acknowledgement that systems and processes could have been tighter at the time of the original project, particularly with document management
- (f) Officers indicated that the project had progressed in a piecemeal manner and that there had not been a holistic approach.
- (g) It was considered unlikely that even if those systems had been better at the time that the actual decision as to how to proceed would have been any different.
- (h) Officers were aware of resource constraints, particularly in Legal. This related to the limitations on the disbursements budget and internal resource which had been reduced.
- (i) The budget for the project was managed and if costs escalated, there would have been a request for further funds.
- (j) There was a view expressed by some that the project was being rushed with unreasonable pressure on some officers to progress it quickly.

5.30 A number of Councillors (and former Councillors) were interviewed. Their evidence was again largely consistent and a number of points raised including:

- (a) There was general agreement that appropriate expert advice had been taken and relied upon.
- (b) Councillors did not simply accept the advice given and this was tested.
- (c) Even with the benefit of hindsight, there was little to suggest that they would have done things differently.
- (d) Members trusted the officers involved in the project.
- (e) The project took a long time, and the passage of time meant that it was difficult to recall all the details at this time.

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- (f) St Modwen had been the best and the correct choice as a development partner for the project.
- (g) A clear business case should have been created at the outset.
- (h) Oversight of budgets was at a high level. Projects should have a budget formed on a zero based budget approach.

5.31 Copies of the notes of the witness interviews appear at Appendix F. Some of these are partially redacted due to the fact that they contain confidential information. A full copy of the evidence is provided for Members at Appendix I, which is exempt from publication as it contains confidential material.

5.32 Faraday Developments Ltd was invited to provide written comments on the terms of reference and was asked the following questions:

- Q1: *From your involvement what do you think worked well with how the project was managed by the Council?*
- Q2: *If things did not go as well as possible, what do you think the Council could do to improve these areas?*
- Q3: *Do you have any other comments, relevant to the Terms of Reference, that you would like the Council to consider as part of this review? Please note, only comments relating to the Terms of Reference can be considered as part of this process.*

5.33 The reply from Faraday Developments Ltd (FDL) suggested that the terms of reference of the task group were too narrow, and the submission included commentary on matters relating to the legal case that was considered by the High Court and the Court of Appeal.

5.34 The submission from FDL included 12 questions relating to the Council's approach and actions as follows:

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)*
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)?*
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)?*
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?*
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)?*
6. *Before committing to very substantial expenditure on the DA process, what evidence did WBC have to conclude that holistic regeneration would be viable?*
7. *In pursuing a holistic approach, why did WBC as land owner disregard the 2025 Vision and its own planning authority in relation to appropriate land uses?*
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)?*
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?*
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."***
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 CoAs characterisation 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?*
- 5.35 Officers were asked to consider and respond to the issues raised by FDL in their summary response, and that response is attached at Appendix G.
- 5.36 The submission by FDL has been fully considered by the Task Group. Those comments have been taken into account where relevant to the terms of reference, such as those relating to consultation. However, where that submission went beyond the terms of reference of this review, comments have been disregarded. The purpose of this review

is clearly set out in the terms of reference, and this does not extend to further consideration of the legal arguments which were previously considered in both the High Court and the Court of Appeal.

Proposals

5.37 The investigation has resulted in a number of findings and recommendations. These are set out below by reference to the points for consideration detailed in the Terms of Reference.

5.38 Terms of Reference Point 1 – Governance

To review the governance arrangements put in place by the Council to manage the LRIE development

Findings:

- 1(a) We hoped to find that Project Management had been a key aspect of this project, but in practice found no evidence of formal project management methodology having been in use by Council officers. The Council had a project management methodology in place from 2009 but this was only applied in relation to ICT projects, and as a result the records show a lack of project management controls; for example there was:
 - No evidence of formal project management meetings – minutes proved unavailable;
 - No obvious clear project budget (there were annual budgets);
 - No clear evidence of management of external consultants; and
 - There was a piecemeal approach to the whole project.
- 1(b) We did not find evidence that a clear business case was established for redevelopment of the LRIE. An early Strutt and Parker document did give some elements of a business case and it was clear that reports to the Executive certainly did give some details, but whilst there was a clear goal to secure redevelopment of the site, the route to that goal was not clear in the evidence presented to us.
- 1(c) Interviews with witnesses suggested that there was incomplete understanding of the purpose, role and responsibility of different individuals and groups in the process.
- 1(d) There was a lack of clarity over who was in charge of the day to day management of the project amongst officers.
- 1(e) It was evident from the interviews that some Members had been unclear as to the purpose of the Newbury Town Centre Task Group in relation to the LRIE redevelopment. The Terms of Reference of the Newbury Town Centre Task Group that we found were only in draft form, and there appears to have been an over-reliance on the Newbury Town Centre Task Group which was only a consultative body.
- 1(f) Although there was evidence of officers meeting as a group, and that group included the Chief Executive, Property, Planning, and Legal where necessary, there was no formal project group set up to oversee the whole project at the outset. The Task Group

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noted that a formal Project Group was constituted after the development agreement was completed with St Modwen, but that meetings of this group were suspended following the legal challenge.

- 1(g) The Council did monitor the progress of Strutt and Parker via regular updates provided by them, and it is evident that this information was shared with the relevant governance groups.
- 1(h) Project document filing and retention was good in some areas but not adequate in all areas. A great number of formal meeting documents were made available for this review, but document/record management was a concern for the task group as there had been some key gaps in some areas, such as the lack of a risk register, and of minutes of project management meetings.
- 1(i) The cost of the project was not fully understood at the outset of the project. This is in part due to the fact that the project developed in a piecemeal manner. Costs were however approved by Executive and allocated to the project at each stage. It is considered that a clear business case at the outset would have resulted in a better understanding of the full financial implications of the project.
- 1(j) Risk management arrangements were inadequate. Although there is mention of a risk register in the records there is no evidence of it actually being in place for the project - amongst other things this should have captured which individuals were responsible for the risk to the Council from this project at both Officer and Portfolio Holder levels.

5.39 Terms of Reference Point 2 – Advice

To review the advice and guidance received by the Council which resulted in the OJEU commissioning rules not being followed

Findings:

- 2(a) As the Council did not have sufficient expertise in house for a project of this size it was necessary to procure external expertise. It was noted that the in-house procurement expertise had been reduced, and that there was no sign of a proper skills gap analysis at the outset of the project.
- 2(b) The Council did seek support from external property and legal advisers at appropriate times.
- 2(c) Progress through the stages of the LRIE was piecemeal, in that each stage was gone through, and then it was presented to and reviewed by Members of the Newbury Town Centre Task Group, before being considered and determined by the Executive. As a result advice procured at each stage was procured on an ad-hoc piecemeal basis.
- 2(d) The Council had an established relationship with Strutt & Parker, who had been engaged to assist the Council with other redevelopment projects such as Parkway. While it was acknowledged that the Council had established a good working relationship with Strutt & Parker, there was some concern that there could have been “project creep” from one project to the next.

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- 2(e) The advice, which was considered at appropriate times and by the Executive when taking decisions, indicated that the Council was acting properly in proceeding in the manner that it did. There is nothing to suggest that the advice received was irrational and there was evidence that what was proposed was not unusual.
- 2(f) The Council received clear unequivocal advice from Strutt and Parker that the transaction proposed was a land transaction and thus fell outside of the scope of procurement legislation.
- 2(g) The Council also obtained legal advice from both the internal Legal Team and external legal advisers, Bond Dickinson. The legal advice was also clear and unequivocal that the proposed land transaction was outside the scope of the procurement regime.
- 2(h) The reports to Executive and the minutes of the meetings where this was considered provide clear evidence that the Council had not closed its eyes to the question of procurement, and it was openly discussed and considered in meetings of the Executive. There was no intention to avoid compliance with any legal duty to undertake a procurement exercise.

5.40 Terms of Reference Point 3 – Costs

To better understand the cost of the initial advice and the subsequent cost of defending the Council's position in the High Court and Court of Appeal

Findings:

- 3(a) The advice from Strutt and Parker was commissioned on a piecemeal basis. The failure to review all options for progressing this to conclusion means that the Council could not have known at the time whether or not a more effective outcome could have been achieved.
- 3(b) After the initial work undertaken by Strutt & Parker, the Council undertook a procurement exercise for further property work. A tendering exercise was undertaken at the Feasibility Study stage; there were 3 responses, and Strutt & Parker were awarded the contract with their quote of £39k. That exercise involved the Council's Procurement Officer, who was independent of the project. The estimated value of the work was below the then threshold of the Contract Rules of Procedure requiring contracts to go out to formal tender, which was £50k. Strutt and Parker were then engaged to undertake the Opportunity Document and Market Testing work, and reports requesting the retention of Strutt and Parker for this work, together with the estimated costs, were approved by Executive. Strutt and Parker were invited to provide a fixed fee quote for the final stage of consultancy work on the project, the developer selection process
- 3(c) The Council undertook a procurement exercise via a written invitation to quote, prior to appointing external lawyers to assist with the project. An invitation to quote was issued to four legal firms, with local government experience and the specialisms required. Each of the firms responded and provided a quote, including details of the lawyers within the firm who would assist, how they would approach the project, relevant experience, and costs. The firm which submitted the lowest quote Bond Dickinson, was appointed.

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However, no evidence was seen to demonstrate how the submissions had been assessed in order to ensure sustainability, efficiency and cost savings.

- 3(d) It is clear that the Executive was asked to approve costs at each stage of the project. We heard evidence that there were challenges regarding costs as the legal disbursements budget was limited and there were pressures on officers to deliver work in unreasonable timescales. We did have some concern over how these costs were allowed to escalate, but it was felt that this was once again because of the piecemeal nature of the project.
- 3(e) The total cost of the project and litigation which followed was £946k. The construction of the LRIE Access Road incurred costs of £5.2m, which was funded in part by LEP funding, s106 contributions and DfT Challenge Funding.
- 3(f) The Council spent £156k on property consultants who advised in relation to the project.
- 3(g) The Council spent £58k on legal advice relating to the drafting and completion of the Development Agreement. The Council's in house legal team spent over 200 hours working on the project to the value of £27k. The hourly rate of officers in Legal Services is notably lower than lawyers with equivalent levels of post qualification experience in external firms.
- 3(h) The Council spent £378k on legal costs associated with the litigation which followed. In addition, 135 hours of officers time within Legal Services was recorded against the litigation which has a value of £18.5k.

5.41 Terms of Reference Point 4 – Lessons Learnt

To review what lessons have been learnt from this case

Findings:

- 4(a) Evidence was submitted that suggested that consultation and communications with those directly affected was limited. This is disputed by officers but it is considered that communications could have been better.
- 4(b) Whilst it is clear above that there are some things that could have been done better in this project, when we ask the question "if we had been there, based on the records we have seen and the advice given that we have seen, would we have made any different decisions regarding the proposed redevelopment of the London Road Industrial Estate?" we came to a simple answer, "No".

5.42 Recommendations of Task Group following Review:

- (1) OSMC should satisfy itself that the Council has in place appropriate project management methodology. This should be tested in order to provide assurance that this is now operating effectively and consistently across the organisation. This should include standardised documentation such as a risk register, and project sponsors should ensure that project managers understand their role. This would also ensure that appropriate governance structures, including Project Groups and Governance Groups are formally constituted and are understood by all.

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- (2) All projects should be supported by a clear business case.
- (3) All projects should have a sufficient budget allocated to that project at the outset, including the cost of procuring external advice, and budgets should be monitored appropriately.
- (4) Each Committee / Board should review its Terms of Reference on an annual basis, possibly after the Annual Council Meeting to ensure that the Terms of Reference remain up to date and appropriate.
- (5) A review should be undertaken to ensure that any group fulfilling a governance role understands its purpose and function. All bodies need to understand the role they play in the decision making process.
- (6) The Council's Record Retention Policy should be reviewed to consider whether it is fit for purpose and being implemented uniformly across the organisation. It was considered that the Property Team, which appeared to have poor controls, could improve by establishing a formal document numbering system to reference and then store documents in a central repository. The current document was created for siloed services and is not ideal for long projects – in this era of relatively cheap electronic storage consideration should be given to permanent storage of all documents and emails relating to major projects, and to the long-term availability of such data in the light of future changes to software and storage media.
- (7) Project risks, including financial risks to the Council, need to be assessed and then recorded in a risk register for all projects. This risk register should document ownership of risks both at officer and Member level.
- (8) There is no justification for the Council substantially extending its in-house legal team for large scale (one-off) projects; the Council should continue to procure external expert advice where in house expertise does not exist, or where there is insufficient capacity in the in-house team.
- (9) External expert support for projects should be appropriately procured following a skills gap analysis at the start of the project. Procurement of external experts should be done transparently.
- (10) For future large scale projects OSMC should satisfy itself that the Council tests the market fully and assesses partners to ensure value for money.
- (11) External advice should be procured on the basis of the anticipated full project, in stages if necessary, and on the basis that it may not proceed through each stage of the same.
- (12) All officers' time should be recorded when dealing with large scale projects.
- (13) The Council should review and improve how it consults and engages with those who may be affected by the Council's proposals. Significant projects such as this should have a clear communications plan with a list of key stakeholders.

- (14) Legal Officers should be reminded that the Council's Contract Rules of Procedure must be followed when appointing external advisers which should be done in a uniform and standard process to ensure value and efficiency in accordance with those Rules.
- (15) Future partners should be expected to assist in reviews such as this free of charge and consideration should be given to making this a contractual requirement under the terms of engagement.

6 Other options considered

Not to make any recommendations. It is considered that the reasons for the recommendations are clear and doing nothing would be a wasted opportunity for learning. This option is not therefore recommended.

7 Conclusion

- 7.1 It is clear that the Council's proposals for the redevelopment of London Road have attracted public interest, particularly following the Court of Appeal decision.
- 7.2 The Council was under no obligation to conduct this scrutiny review of advice and guidance received in relation to the Council's decision when procuring a preferred partner for the London Road Industrial Estate (LRIE) development. However, the Council seeks to operate in an open and transparent manner, and considers that any opportunities for learning should be embraced.
- 7.3 The Task Group appointed to conduct this review was an independent cross party working group, made up of both experienced Members and those who were newly elected to the Council in 2019 and therefore after the events which are the subject of this review. All Members of the Task Group were in agreement regarding the findings and recommendations detailed in this report.
- 7.4 It is clear that the Council did not set out with the intention of acting unlawfully. It was given advice as to how to progress the project, which it tested by way of further expert advice. Indeed, the Court of Appeal noted at paragraph 70 of its judgment 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. That "economic and commercial reality" is fully apparent in the terms of the development agreement. It is not disguised.

- 7.5 The Council undertook an extensive competitive selection process before selecting St Modwen as a preferred development partner. Interest in the project had been tested at a national level by way of the Opportunity Document developed by Strutt & Parker. The cross party working group created to select the development partner were unanimous that St Modwen was the best candidate.
- 7.6 There is clear evidence that the Council had considered the issue of procurement when taking decisions, a fact reflected in the reports considered by Executive, and in the

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minutes of those meetings. It is perhaps also of note in this regard that the Council did undertake competitive exercises to appoint property consultants and lawyers for this project.

- 7.7 It is accepted that the passage of time may mean that some processes within the Council have moved on since the matters that are the subject of this review. However, the recommendations detailed above make it clear that lessons that can be learnt from this project, which it is hoped will be accepted in order to ensure that the Council always operates in the most effective and efficient manner.

8 Appendices

- 8.1 Appendix A – Terms of Reference
- 8.2 Appendix B – List of Evidence Considered
- 8.3 Appendix C – Short Chronology
- 8.4 Appendix D – Costs with budget – to follow
- 8.5 Appendix E – Total Costs relating to Project
- 8.6 Appendix F – Redacted Witness Evidence
- 8.7 Appendix G – Questions from FDL with officers response
- 8.8 Appendix H – Findings and Recommendations
- 8.9 Appendix I – Witness Evidence – EXEMPT INFORMATION – Restricted pursuant to paragraphs 1, 3 and 5 of Schedule 12A, Local Government Act 1972
- 8.10 Appendix J - Chronology – EXEMPT INFORMATION – Restricted pursuant to paragraphs 1, 3 and 5 of Schedule 12A, Local Government Act 1972

Subject to Call-In:

Yes: No:

- | | |
|--|-------------------------------------|
| The item is due to be referred to Council for final approval | <input type="checkbox"/> |
| Delays in implementation could have serious financial implications for the Council | <input type="checkbox"/> |
| Delays in implementation could compromise the Council's position | <input type="checkbox"/> |
| Considered or reviewed by Overview and Scrutiny Management Committee or associated Task Groups within preceding six months | <input checked="" type="checkbox"/> |
| Item is Urgent Key Decision | <input type="checkbox"/> |
| Report is to note only | <input type="checkbox"/> |
-

Wards affected: The site is based in Newbury but the recommendations in this report seek to ensure a more effective Council and it has broader implications for the operation of the Councils business.

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