

Strategic Review of New Homes Project Lewes District Council

Sandra Prail

1 July 2019

Background

1. I have been commissioned by Lewes District Council to provide an independent strategic overview of the way in which Lewes District Council handled the New Homes Project, a property development scheme with Karis Developments Ltd (and its subsidiary). My brief was to focus in the main, although not exclusively, on the period following its contract award including, but not limited to, commentary on the handling of litigation, communications with and support to members and generally lessons learnt to inform future ways of working.
2. In undertaking this review I have examined documents provided by the Council (listed in Appendix A) and I met with the former Leader of the Council (Andy Smith), Assistant Director Legal & Democratic Services (Catherine Knight) and current Chief Executive (Rob Cottrill).
3. This report is structured to provide a summary chronology of main events before setting out my findings on the issues raised in my brief.

Summary Chronology of Events

Pre Contract award

4. Lewes District Council (the Council) identified an opportunity to raise funds to allow the Council to build in excess of 150 Council homes across the District and to bring regenerative benefits to local sites. The intention was to gain residential planning permission on a range of sites and to sell the highest value sites to Southern Housing Group (SHG) for private market housing and other sites on the open market for private market housing. The capital receipt would allow the Council to build affordable Council homes on a third group of sites which the Council would retain.
5. In May 2012 the Cabinet authorised the tender for a private sector partner to assist in the disposal and /or development of a portfolio of Council owned sites. An EU negotiated tender procedure followed. In September 2014 Cabinet considered Heads of Terms and authorised the Chief Executive in consultation with the Leader of the Council and Leader of the Opposition Group to conclude negotiations and award the contract.
6. A Conditional Sale Agreement (the Agreement) was signed by the Council, SHG and Karis Development Ltd (Karis) on 30 July 2015. The Agreement defines Buckle and Normansal as key sites because they were expected to yield the highest capital receipts. There was a clear acknowledgement between the parties that the commercial viability of the project was dependent on these 2 key sites. The Agreement included a Ground Condition clause (providing for confirmation from each party that ground conditions at each of the properties is acceptable) and a Title Condition and Vacant Possession Condition (providing for confirmation from each party that the title condition has been satisfied in relation to properties the subject of the Agreement). The parties agreed that they would each serve written notice on the other within 5 months of the date of the Agreement confirming whether or not the Ground Condition and Title Condition had been satisfied. In the event the Ground Condition or Title Condition was not satisfied the Agreement provided for the service of notice to terminate the Agreement in relation to the relevant property or in the case of both key sites to terminate the Agreement.

APPENDIX 1.

Post contract award

7. Due diligence revealed a number of concerns about the sites including that the Buckle site, intended for the construction of an apartment block, was the subject of a restrictive covenant allowing only the construction of single storey dwellings (in order to preserve views). Although the existence of a restrictive covenant not to use the Normansal site other than as an area of public open space or public recreation and not to erect any buildings without consent was known to the parties before the Agreement was signed further checks revealed more beneficiaries of the covenant than expected and a second covenant.
8. In December 2016 the Council served notice under the Agreement that the Title and Ground Conditions on the two key sites had not been satisfied. Subsequently, the Cabinet in February 2016 authorised the service of notice of termination and notice was served on 3 March 2016 .
9. Karis responded by seeking compensation for alleged bad faith by the Council in terminating the Agreement. They brought a claim against the Council for £11.6 million initially alleging wrongful breach of contract and subsequently amending this to include an additional claim of misfeasance in public office on the part of the then Leader, Chief Executive and Assistant Director- Legal & Democratic Services. The claims were refuted by the Council. Cabinet at its meeting on 11 February 2019 agreed to ensure that individual members and officers were indemnified against any personal liability and legal costs which may be incurred during and/or following litigation proceedings in connection with Karis.
10. Legal proceedings were protracted including third party applications against three individual councillors and Eastbourne Borough Council. A number of procedural interim challenges by Karis were not successful. Following an exchange of evidence and the setting of a trial date for April 2019 Karis eventually withdrew its claims in full. In March 2019 Cabinet agreed the discontinuance of the litigation on the basis that the Council make no payment whatsoever to Karis, that Karis withdraws its misfeasance allegations and does not repeat them, that the project agreements are treated as lawfully terminated and the Council to bear its own costs of the proceedings.
11. The Council incurred preliminary costs of approximately £600k associated with the development of sites included within the project and legal fees of approximately £300k.

Scrutiny of Events

12. The Council has subjected itself to internal and external scrutiny of the way it handled the project. The objective of these exercises has been to learn lessons and to do so in an openly transparent way. Scrutiny to date has focussed on how the Council came to award the contract to the Karis consortium and how the project was subsequently managed.
13. BDO the external auditors for Lewes DC considered the New Homes Project as part of its use of resources audit work. It reviewed the Council's governance and decision making processes and was satisfied that the Council had followed its own internal processes in making decisions about the project and legal advice had been sought on key decisions made. It recommended good practice by earlier disclosure of potential development sites, public consultation in preliminary stages, updating the Property Strategy and Asset Management Plan and a more structured approach to carrying out due diligence. The report was presented to the Council's Audit and Standards Committee and Cabinet.
14. In December 2015 Cabinet approved the setting up of an all-party Working Party (chaired by an independent person) to look into the way that negotiations were conducted with regard to the Agreement. Its aims were to identify aspects of the project that went well and those that might have

been handled differently to identify lessons learnt. It made a suite of recommendations. The recommendations were grouped into the following themes – site selection, officer briefings to members, Group Leader role, scale and achievability of major projects, project governance, consultation, management of partners. Cabinet authorised the Chief Executive to produce an action plan in response to these recommendations (and those of the external auditor). This plan includes actions such as developing a new project management toolkit and updating the Asset Management Plan. I understand that all of these actions have been completed.

15. My review continues this open approach to transparent learning by pulling together the threads of earlier reviews and completing an independent consideration of events after the contract award.

Findings

Handling of litigation

16. From the documentary evidence that I have seen I am satisfied that legal advice was taken to inform all key decision making. For example, advice was taken on:

- the title difficulties identified on Buckle and Normansal, including the potential for lifting the restrictions;
- the service of the Ground and Title Condition notice;
- service of the termination notice;
- Cabinet reports;
- Karis's response to the notice of termination and drafting of the Council's response;
- Early Neutral Evaluation;
- general handling and tactics of litigation;
- settlement.

17. The Council's in house legal team instructed specialist external advisers and sought advice at each and every stage and I find the quality of the instructions that I have read to be professional and timely with a constant focus on minimising litigation costs. External legal advisers consistently advised that there was very little merit in Karis's claim for damages but the protracted correspondence and litigation was time consuming and inevitably costly.

18. I find the handling of the litigation to be professional and evidence based. The measured tone of correspondence stands in marked contrast to the more aggressive stance of Karis lawyers at times. The Council did not allow itself to be drawn into legal proceedings without a thorough assessment of risk and tactics. My documentary review revealed extreme pressure upon legal staff over a lengthy period (not least as the Assistant Director Legal and Democratic Services was the subject of a misfeasance claim) but this does not appear to have influenced decision making or the high standard of professional conduct.

Communication with and support to members

19. The documents I reviewed included internal correspondence between Councillors and officers after the signing of the Agreement. It is inevitably difficult to keep a wide audience apprised on all issues and expectations will differ. But my conclusion on the evidence that I have seen is that officers sought to keep members informed of key issues – for example councillors were notified of receipt of the legal claim and briefings were held to appraise members of progress and press interest.

20. Third party applications were pursued against three councillors. Each consented to a search of their private email accounts/phone records. The then Leader of the Council was also under

APPENDIX 1.

considerable pressure as he was the subject of a misfeasance claim (together with the Chief Executive and Assistant Director Legal and Democratic Services). From the evidence I have seen officers sought to reassure and support councillors through this difficult time and Cabinet at its meeting on 11 February 2019 agreed to ensure that individual members and officers are indemnified against personal liability and legal costs which may be incurred during and/or following litigation proceedings connected with Karis.

Use of emails

21. The documents before me show use by councillors of their private emails for Council business. There seems to be universal acceptance that this was often employed by individuals as a workaround to mitigate the problems being experienced by councillors with Council equipment and accounts. But this practice opened up an avenue of challenge for Karis and is recognised by the Council as a lesson learnt.

22. Lewes DC councillors have subsequently been issued with a lewes.gov.uk email address to use in connection with all Council business. IT equipment is offered to councillors or they can use outlook web access as an alternative from any device. Officers are satisfied that working practices have improved but this should be monitored and reinforced. Group Leaders should also ensure that members are aware of the need to use council equipment and accounts for Council business and the risks of not doing so.

Project management

23. Good project management is essential to ensure that the right people do the right things at the right time to deliver agreed goals. Following an appropriate project process throughout a project lifecycle manages risk and ensures successful delivery. Both the external auditors and the Working Group identified project management/ a more structured approach to due diligence as areas for improvement. This is a theme that I too have identified in my review.

24. The report to Cabinet that granted delegated power to enter the Agreement was I understand circulated as a late paper . It did not set out a clear description of project governance. It stated that title checks on the key sites had been carried out to check for any legal encumbrances but did not explain in detail the options for due diligence before and after entering the Agreement.

25. The report to Cabinet in February 2016 states that ‘the parties were not prepared to undertake the work and expense of carrying out ground condition surveys and detailed title investigations until such time as a binding agreement was in place’. Whilst there was a balance to be struck it seems to me the focus on early conclusion of the Agreement outweighed the need to undertake basic checks on the 2 key sites and that the benefits/risks of this approach were not comprehensively assessed or widely discussed.

26. It is positive that the Council has subsequently adopted a Project Management Toolkit. I have considered whether the application of the Toolkit would have made any difference to the events and decisions made. I consider that the New Homes project would have been defined as a corporate project (meeting more than 2 of the criteria in the Toolkit) and therefore would have required Corporate Management Team approval. This would have ensured that the three statutory officers (Head of Paid Service, Monitoring Officer and section 151 officer) were involved in decision making and provided opportunities for challenge. Applying the Toolkit Management Team would have turned its mind specifically to whether sufficient due diligence had/should be carried out. The due diligence checklist in the Toolkit identifies current restrictions on the land as an appropriate due diligence check before completing a business transaction. Whilst Management Team might have

APPENDIX 1.

determined that in the circumstances the proposed Ground and Title Conditions were appropriate the issue would have been one for discussion and the risks assessed. The Council has recognised that with hindsight greater time and attention might have been given by all parties to title issues before entering into the Agreement but that was not the way the parties chose to proceed. The application of the Toolkit would have provided an opportunity to discuss whether money and time expended on preliminary work on some sites would have been better targeted on viability tests on the 2 key sites to ensure that the Agreement had a reasonable chance of success.

27. The Toolkit would also have encouraged consideration of the governance of the project. A typical Project Board has a Project Sponsor (ultimately responsible for the project deliverables and its funding) and a project manager. In this case project management moved between a number of officers in its early life and at times I understand that the former Chief Executive undertook direct control of the project. Application of the current Toolkit would have highlighted this risk . It would also have focussed minds on the need for a Plan B – ie what would happen if the 2 sites were not viable?

28. My conclusion is that the application of the current Toolkit would be likely to have made a positive difference to the management of the New Homes project and ensured consistent best practice was adopted. It is positive that lessons learnt from the scrutiny of this project has delivered an improved corporate way of working.

Delegation

29. The authorisation to sign the Agreement was delegated to the Chief Executive in consultation with the Leader/Opposition Group Leader. Legal advice confirmed the lawfulness of this delegation and I have no reason to conclude otherwise. The Working Group did not consider such a delegation to represent best practice. I agree. The breadth of the delegation gave officers a mandate to progress, negotiate and conclude the Agreement without needing to consider additional dialogue with members through formal decision making channels. The delegation presumes an appropriate communication cascade at political level but places no obligation on members to do so and leaves officers without access to whether such communication has taken place. This kind of wide delegation creates a risk that member/officer dialogue will not be commensurate with the significance of the project. It also authorises the Chief Executive to act alone without reference to the other statutory officers (the Monitoring Officer and section 151 officer) which runs the risk of undermining those roles. I am reassured by the evidence before me that the pros and cons of such a delegation would be the subject of greater debate if similar circumstances arose today.

Training

30. It is positive that the Council has an induction training programme for new Councillors and that this includes a session on the use of email and social media. Regular reinforcing of the messages from this training will be needed by Group Leaders and Officers.

31. However, the Council does not undertake a skills audit of Councillors in order to inform their personal development. This means that decision making bodies such as Cabinet might be lacking in certain skills or not maximising existing skills. I recommend that the Council considers the skills base of councillors in order to identify any training or developmental needs. A training session focussing on effective decision making (including issues of liability) would in my view help to further strengthen governance and equip members with the confidence to consider best practice in decision making and robustly challenge officer recommendations where appropriate.

Conclusion

32. My review supports the headline conclusions of previous scrutiny findings. I am positive about the constructive steps taken by the Council to address lessons learnt and the Project Management Toolkit in particular has the potential to improve consistent corporate ways of working in key areas. I would encourage the Council to keep the monitoring of improvements under review and consider the introduction of member training in effective decision making to ensure that there is robust and confident challenge of officer recommendations through good governance and best practice project management.

Appendix A Document Library

Conditional Sale Agreement relating to a portfolio of properties in and around Lewes dated 30 July 2015

Notice of non satisfaction of Ground and Title Conditions – 22 December 2015.

Legal advice concerning notice of termination, January 21 2016.

Legal advice on Cabinet report February 2016.

Notice of termination of Agreement dated 3 March 2016

Karis response to notice of termination dated 24 May 2016.

Internal correspondence with Councillors including advising of Karis response and next steps, dated 26 May 2016

Instructions (dated 27 May 2016) and legal advice on Karis's response to notice of termination

Letter to Karis dated 10 March 2017 from Bevan Britten on behalf of the Council concerning mediation and early neutral evaluation.

Various correspondence with Cubism Law (acting for Karis)

Notification of Karis's intention to pursue claim for misfeasance in public office (8 Sept 2017)

Internal correspondence with members and officers including notifying them of proceedings and preparation of statements and Council press statements

Council without prejudice save as to costs 'drop-hands' offer to settle (dated 22 December 2017)

Notification from Karis of application for non party disclosure and correspondence between Cubism and Leader

Various statement and exhibits from Court proceedings including witness statement of Catherine Knight

Reports to Cabinet including 29 September 2014, 28 September 2016, 11 February 2019, 8 March 2019

Audit and Standards Committee report 26 September 2016 including external auditor review

Working Group report and recommendations and subsequent action plan

Legal instructions and advice concerning the extent of the delegation to negotiate the Agreement

Project Management Toolkit

Asset Management Plan 2017-2020.