



COUNCIL CABINET **10 April 2019**

ITEM 2

Report sponsor: Greg Jennings, Director of
City, Development and Growth
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Bold Lane Office Development

Purpose

- 1.1 In September 2018, Cabinet approved the delivery of the Bold Lane Office Development project through a developer delivery model. The model for delivering Grade A offices at the Bold Lane site is being reported to Cabinet due to the recent Court of Appeal decision in the 'Faraday case' which has resulted in a broadening of the definition of "public works contracts" for the purposes of EU procurement regulations.
- 1.2 On 16 November 2018, the Court of Appeal issued its judgement in the case of *Faraday Development Ltd v. West Berkshire Council and St Modwen Developments Ltd* [2018] (Faraday). This judgement changed the settled position in respect of the interaction between development agreements and the Public Contract Regulations 2015 and has introduced uncertainty in respect of what had previously been considered acceptable structures for projects involving development agreements. The facts of the Faraday case are comparable with the proposed structure for the Bold Lane Project and therefore progress on the project has been paused to review the risks associated with continuing under the current delivery model.
- 1.3 This report sets out the impact of the Faraday case on the delivery of the Bold Lane project.

Recommendations

- 2.1 To cease the current process with Jensco Group.
- 2.2 To agree that officers should now explore delivery options for the Bold Lane project and bring an options report and updated business case back to Cabinet.

Reason

- 3.1 The Faraday decision has rendered the current proposed delivery model for the Bold Lane project unlawful and the Council is therefore unable to proceed.
- 3.2 Officers will review and assess the delivery options for the Bold Lane Office Development to deliver Grade A offices within the city centre and update the business case.

Supporting information

- 4.1 The recent Court of Appeal decision in Faraday has resulted in a broadening of the definition of “public works contracts” for the purposes of EU procurement regulations. Previously the courts had held that if there is no binding and enforceable obligation on a developer to develop the land, the relevant contract will not be a “public works contract” and the Regulations will not apply. Based on this, the Bold Lane developer delivery model was proposed to be structured with the Council simultaneously entering into two contracts with the developer: the first for the sale of the land; the second, an agreement for the Council to lease back the land in the event that the developer built out Grade A offices. The Council’s agreement to lease back the property was conditional upon the developer building the Grade A offices, and so it did not impose any positive obligation for the developer to build the offices; the developer was free to build something else if it wished to do so.
- 4.2 The Court of Appeal decision in Faraday has changed this analysis. The courts will now look at the transaction as a whole. Although a contract may only impose a conditional obligation, if the Council becomes bound by the contract upon fulfilment of a condition, then the courts are likely to view this as part and parcel of the whole transaction. In relation to Bold Lane, the Council would have been contractually obliged to lease the property in the event that the developer built out Grade A offices. Consequently, it is likely that the development would be considered to be a public works contract for which the Council should have conducted an EU procurement.
- 4.3 Although the facts of Faraday are not identical to the Bold Lane project, the proposed structure for the Bold Lane project is based on no enforceable obligations being imposed on the developer at the point of sale but with a future commitment by the Council to enter into an agreement for lease if the developer decide to build out Grade A offices on the site. Given the Court of Appeal’s ruling that the entire transaction must be considered for the purpose of analysing the applicability of PCR 2015, the proposed structure, with the future commitment by the Council to enter into the lease of the property is now considered to be unlawful given the Faraday ruling.

Public/stakeholder engagement

- 5.1 The Bold Lane preferred developers have been advised of officer’s intention to recommend to Cabinet that the current process is ceased.

Other options

- 6.1 The only alternative to not continuing with the current delivery model is to proceed with it. This option is not viable as the delivery model is now unlawful, given the ruling in Faraday, and can therefore not be pursued by the Council.
- 6.2 A future Cabinet report will set out and assess the options available to the Council to deliver the Bold Lane Office Development to agree the preferred delivery model.

Financial and value for money issues

- 7.1 There are no immediate financial implications of this report. The financial model for the project is self-financed through rental income and there is currently £6.398m on the capital programme. The future Cabinet report will include a review of the project business case and investment appraisal.
- 7.2 The project requires Regeneration Fund grant and loan support in the early years of operation to meet the void and borrowing costs. The call on the Regeneration Fund will be reviewed as part of the options appraisal.

Legal implications

- 8.1 The key legal implications in relation to the Bold Lane project are set out in section 4 of the report.

Other significant implications

- 9.1

This report has been approved by the following people:

| Role | Name | Date of sign-off |
|---------------------|--------------------|------------------|
| Legal | Emily Feenan | 1 April 2019 |
| Finance | Amanda Fletcher | 24/01/2019 |
| Service Director(s) | Greg Jennings | 1 April 2019 |
| Report sponsor | Catherine Williams | 24/01/2019 |
| Other(s) | | |

Background papers:
List of appendices: