OS139
FOR DECISION
WARD(S): ALL

THE OVERVIEW & SCRUTINY COMMITTEE – 10 FEBRUARY 2016

AUDIT COMMITTEE – 10 FEBRUARY 2016

SILVER HILL: INDEPENDENT REVIEW

REPORT OF CHIEF EXECUTIVE

Contact Officer: Simon Eden Tel No: 01962 848313

RECENT REFERENCES:

None

EXECUTIVE SUMMARY:

This report covers the independent review of the Council's actions in respect of the Silver Hill scheme undertaken by Ms Claer Lloyd-Jones.

It suggests a number of areas which Officers consider Members may wish to probe in discussing the review with Ms Lloyd-Jones.

The review makes a number of recommendations. These recommendations will be put to Cabinet along with any comment or additional recommendations from The Overview & Scrutiny and Audit Committees. Cabinet will then make its own recommendations to Council.

RECOMMENDATIONS:

That Members of The Overview & Scrutiny and Audit Committees consider any comments on and recommendations arising from the independent review of Silver Hill which they wish to make to Cabinet and Council.

THE OVERVIEW & SCRUTINY COMMITTEE – 10 FEBRUARY 2016

THE AUDIT COMMITTEE – 10 FEBRUARY 2016

SILVER HILL: INDEPENDENT REVIEW

REPORT OF CHIEF EXECUTIVE

DETAIL:

1 Introduction

1.1 In February 2015 a Judicial Review concluded the Council had acted unlawfully in authorising variations to the Development Agreement for the regeneration of Silver Hill without first seeking procurement through open competition. That finding is now the subject of an appeal, and so the judicial consideration of the issues raised is not complete. It is possible an appeal judgment may come to different conclusions. However, the 2015 finding remains the position in law unless and until that appeal changes matters.

1.2 In March 2015 the Council decided to commission an independent review of the Council's decisions which led to that JR finding, the terms of reference are attached at Annex 1. The then Leader appointed Claer Lloyd-Jones to undertake that review. Ms Lloyd-Jones has read relevant papers and interviewed Council Members, Officers and others. Her review and recommendations are attached at Annex 2. It is now for Members to decide how they wish to respond to those recommendations, which she will be presenting to The Overview & Scrutiny and Audit Committees.

1.3 Unusually for a commissioned review, the appointed consultant did not formally report to an Officer. Whilst Ms Lloyd-Jones sought comments solely from the Chief Executive on points of factual accuracy, she was anxious to maintain independence and her final review does not reflect any comments on her findings from Officers or others interviewed. A number of submissions have been received from those objecting to the scheme, not all of which have been shared with the Council. A response to those submissions has not been sought.

1.4 It is important that the Council is able to accept the recommendations of this report in a constructive manner. However, Officers are concerned that there are some inaccuracies and unsubstantiated assertions, particularly where Officers and advisers have not had an opportunity to provide a comment on events as portrayed to Ms Lloyd-Jones. A number of the statements made by witnesses interviewed are presented without challenge. As a result, some parts of the report appear to be unbalanced, although these areas of the report are, in the most part, not reflected in the review's recommendations. Members may wish to consider these concerns at Committee.

1.5 The report was commissioned to guide the Council on where it might make improvements, and its findings need to be based on the fullest evidence if it is to assist us as it should. There are several key aspects of the report which have significant implications for the Council's subsequent actions, and therefore require absolute clarity. Evidence on these matters needs to be provided to help in understanding the implications of the review's findings.

2 Key Issues

2.1 There will be many issues that will arise as Members discuss the review. A much more detailed commentary could be given on matters raised in the review to ensure the fullest perspective. However, Officers consider that there are five important matters which should be drawn to Members' immediate attention:

a) Commissioning and Interpretation of Legal Advice from Paul Nicholls QC – the review says, on p.21 that "*it is forgivable to think that the Council had geared the whole episode* [of seeking advice from Paul Nicholls QC in June 2014] *to getting the advice it wanted*". One interpretation of this is that the Council had in some way sought to distort or otherwise bias the advice offered by Counsel.

It is perfectly normal for a client (in this case the Council) to propose a course of action, and wishes to be assured it is legal. In that sense, Winchester did have a particular view, reflecting Members' desire to progress the scheme. Counsel is, however, obliged to offer advice as they see the law, not as their client wishes it to be.

For the Council to have "*deliberately geared the whole episode*…" it would require that the instructions to Counsel were insufficient and inaccurate, for Counsel to have acted unprofessionally (under pressure from his client) in offering partial advice or for that advice to have not been presented clearly and accurately to Members.

Members will wish to ascertain whether Ms Lloyd-Jones found any evidence to support any of these occurring.

Officers have shared a copy of the draft report with Mr Nicholls. He does not share the review's interpretation of the situation, and his comments are attached at Annex 3.

b) Legal Advice from James Goudie QC, Nigel Giffin QC and Paul Nicholls QC – the review contrasts the advice received from Counsel in 2008-10 with that received in 2014, suggesting the latter was "*out of line*" with the earlier advice. Page 23 suggests the advice from Paul Nicholls QC "*disagreed*" with earlier advice. It will help Members understanding of the position to probe the relationship between this advice, taken from different Counsel at different points in the evolution of the scheme.

Both Mr Goudie and Mr Giffin did not advise that no variations should be made to the scheme but did advise caution on the principle of further variation. However, in the light of specific variations then proposed both Counsel advised that the Council could proceed on the facts of what was proposed.

The 2014 advice from Mr Nicholls was also based on specific proposed variations. Counsel was also aware of earlier advice given to the Council by Mr Giffin (in March 2010). Mr Nicholls' advice also recognised that material change could constitute a new contract. However, he considered the specific circumstances of the variations proposed, including the clause permitting variation, in the context of EU procurement law, and offered advice accordingly. Mr Nicholls' comments at Annex 3 address the contention that his advice differed from that given earlier.

At paragraph 7.7 the review suggests in the light of the earlier advice from Nigel Giffin "*all senior officers and senior members….were capable of spotting that something was wrong, but no-one did*". That suggests that the Council should have ignored the advice from Mr Nicholls and, in effect, concluded it was wrong. Members will wish to explore whether Mr Nicholls' advice, in recognising the implication of material changes but determining the changes proposed were not sufficient to constitute a new contract, ran directly counter to the earlier advice about the risks of material change. They will also wish to consider whether that advice should have been rejected, although the review recognises this is a judgement of "*hindsight*".

c) Skills and Experience of Council Officers – the final paragraph of p.32 suggests that "*Neither the Council, nor its officers, was equipped in skills or experience to have negotiated a successful outcome to this situation* [that of rejecting changes to the 2009 scheme]".

There are aspects of the report which implicitly challenge Officers' professionalism, and it is of concern that they have not been given the opportunity to comment as part of the review process and before conclusions were drawn. Members may wish to probe the evidence as to what skills and experience it is suggested are lacking, and were not procured. They may also wish to discuss whether there is any evidence to support Ms Lloyd-Jones's assertion that the Council did not resist changes because of this alleged lack.

Members will note that the majority decision of Cabinet and Council in 2014 was that they wished to proceed with the 2014 scheme, and that this decision was informed by internal and external legal, surveying and financial advice confirmed that this option was available. Officers would contend that all discussions on the scheme were informed by full professional advice on options available.

d) The Role of the Reference Group – the Reference Group set up by Cllr Keith Wood (then Leader) is implicitly criticised for not taking a fair view of risk and driving forward change in an anti-democratic manner.

The Group was an Informal Policy Group of the Cabinet, set up by the Leader to enable cross-party discussion on key issues of concern to the Council. IPGs are a perfectly legitimate part of the Council's democratic processes. It is not a decision-making body. Their focus was on aspects of the design of the scheme, many of which were raised by Members and not the developer.

Whilst, like all such policy groups, it did not meet in public, any recommendations it made were fully debated in open meeting before being accepted or rejected by the Council. The minutes of the Reference Group clearly record that legal advice would be sought once the full scope of possible variations was known. To have sought advice without that clear picture would have been premature and possibly misleading.

e) Observations made without context or support – there are several points at which the review offers comments or observations, the purpose of which is unclear. It notes, for example, on p.16 that "*Some said the Council was being bought*", and on p.35 says "*I have found no evidence of corruption or impropriety amongst members and officers. This does not mean there wasn't any, merely that the existing declaration regime is not as rigorous as it could be*".

These no doubt reflect comments made by some interviewed. However, any accusation of impropriety is serious, and Members may want to probe whether those making such suggestions offered any evidence to support them. Should such evidence be presented, then it would need to be thoroughly investigated. In its absence, however, it would be wrong for anyone to interpret Ms Lloyd-Jones's findings as casting any doubts over the probity of Members or Officers.

2.2 As the review notes, this has been a long running project, so many Members will not have been present for all the many debates held. The review suggests, on p.33 that "*there is an absence of internal challenge and debate on Silver Hill*". Elsewhere it is suggested risks were not drawn to Members attention.

2.3 That must be a matter of judgement for Members. To assist with catching up or refreshing memories Officers will circulate by e-mail links to the relevant reports and minutes of meetings where Silver Hill was discussed between 2009 and 2015. Copies of the advice procured from Counsel and referred to above will also be available for reference.

3 Review Recommendations

3.1 The review makes a number of recommendations. Many reflect work already in hand or steps underway. These recommendations will be put to Cabinet in the light of comment from The Overview & Scrutiny and Audit Committees. Cabinet will then make its own recommendations to Council.

OTHER CONSIDERATIONS:

4 COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

4.1 The Independent Review, the way in which it is interpreted and the response to it are important in maintaining the Council's reputation and ensuring continued efficiency, effectiveness and probity in all we do.

5 RESOURCE IMPLICATIONS:

5.1 The cost to the Council of the Independent Review has to date been £66,000.

6 RISK MANAGEMENT ISSUES

6.1 Some of the review's recommendations have a direct bearing on the Council's approach to risk management.

BACKGROUND DOCUMENTS:

Ms Lloyd-Jones gives a full list of documents she used as background to her review. Some will remain exempt in view of the possible Court of Appeal hearing or threat of legal action by SW1 in the event of termination of the Development Agreement

ANNEXES:

Annex 1 – Terms of Reference for the Independent Review

Annex 2 – Independent Review undertaken by Claer Lloyd-Jones

Annex 3 – Comment from Paul Nicholls QC

Silver Hill Independent Review: Briefing Note

The Proposed Independent Review

Winchester City Council is seeking an independent review of the decision-making process which guided a major regeneration project in the centre of Winchester. Specifically, the review is to consider the changes to elements of the scheme and the way in which advice taken on the impact of those changes informed Members' decision-making.

In the light of the outcome of a Judicial Review which found the Council should have sought to re-procure a revised scheme, the Council is being challenged to demonstrate that it took proper advice to support a decision to agree variations to the scheme without initiating a fresh competitive procurement process. It is also being asked whether that advice was properly put before Members, and was taken into account in making the decision to accept the variations.

In summary, the review is to consider whether:

- Appropriate advice was sought;
- Advice was correctly interpreted and clearly presented in reports put before elected members; and
- The advice given was taken into account in decision-making.

We have concluded that the best way of addressing these challenges is to invite an independent third party to review the process that the Council went through in obtaining advice and ensuring that the advice received was put before Members when they took decisions. It will be for the reviewer to decide what matters they need to consider in understanding how the current position was reached, the Council is placing no boundaries on the review.

That review is likely to begin with the advice sought to support the decisions taken by Cabinet and Council in July/August 2014 and subsequently ruled unlawful, but need not be limited to that if other matters are considered relevant in the light of the detailed judgement handed down following the Judicial Review. Members have specifically requested that the reviewer considers:

- The sequence of events which led to departures from the development brief first agreed by Council, and advice taken on those changes;
- The reasons underlying changes to the Council's approach to the provision of affordable housing and the removal of the bus station from the revised planning application submitted in 2014, both of which were criticised in the Judgment;
- Statements made to the 2012 CPO enquiry relating to the scheme approved by the Council's Planning Committee in 2009.

The review is likely to begin with a close scrutiny of the relevant files and correspondence, but may also include interviews with officers and Members as deemed necessary.

The Council is separately examining its approach to the management of major projects in the light of these events.

Conduct of the Review

It is proposed that an independent reviewer be sought through the Local Government Association. The LGA will be asked to identify two or three individuals with the relevant skills and experience to consider all aspects of the processes leading to the decisions which the Judicial Review has overturned.

The appointment will be made by the Leader on behalf of the Council. He will seek comment from the Leaders of the other political Groups, together with the Chair of The Overview & Scrutiny Committee and Chair of Audit Committee before making an appointment.

The reviewer will be provided with a room in the Council Offices, and have access to Council files, electronically stored documents and the e-mail system. They will be offered necessary administrative support.

The reviewer will have the opportunity to meet with Officers and Members as they see fit. Whilst these are not formal interviews, should either party wish the discussion can be recorded.

The brief for the review outlined above is a starting point. It will be for the reviewer to consider any matter they believe relevant to the Cabinet and Council's decisions which were the subject of the Judicial Review.

The Report

The timescale for the review will be agreed with the Leader, although it may subsequently vary depending on the matters which the reviewer believes merit consideration. The Council hopes it will not take more than three months.to complete the review and report back to the Council its conclusions.

The reviewer will be asked to present their conclusions and any recommendations in a report. The final draft of that report will be shared with all those involved to check for factual accuracy.

The final report will be presented to the Audit and Overview & Scrutiny Committees for their consideration, before being passed to Full Council with any comments the Committees wish to make. It will be an open report, save for any matters the reviewer considers merit confidentiality.

Background

In 2004 the City Council entered into a Development Agreement with Thornfield Properties (Winchester) Limited to regenerate a large and run-down area of Winchester Town Centre known as Silver Hill. In 2009 the Council granted planning consent for a mixed use redevelopment including approximately 95,000 sq.ft of retail space, 287 residential units, 330 public car parking spaces, a new bus station, some office space and public realm improvements.

In 2010 Thornfield Properties plc entered administration and their subsidiary company Thornfield Properties (Winchester) plc was acquired by Henderson Global Investors (now known as TIAA Henderson). This gave Henderson the right to develop out the scheme. In 2012 the Council made a Compulsory Purchase Order to enable assembly of land and property rights necessary to undertake a development.

Henderson concluded, and the Council agreed, that with changes to the property, housing and retail markets the scheme needed updating. They had also been advised by Stagecoach, the major local bus operator, that they no longer required a bus station in the form approved. After a thorough review, revised proposals in the form of variations to the scheme approved in 2009 were brought forward. The revised scheme included 148,000 sq.ft of retail space, 184 residential units, 279 public car parking spaces, an on-street bus interchange and alterations to the public realm. These variations were considered and approved by Cabinet and Full Council in July 2014. The revised scheme was awarded planning permission by the City Council's Planning Committee in December 2014.

In the autumn of 2014 a City Councillor sought leave for a Judicial Review of the Council's approval of revisions to the scheme consented in July on the grounds that it did not achieve best consideration, that it involved state aid and that the Council had not complied with EU Procurement Directives. Leave was refused but, on appeal, granted for the third ground – procurement. The case argued was that, in agreeing to variations to the 2009 scheme, the scheme was substantially altered and should have been subject to a full procurement exercise.

In February 2015 the Court upheld that challenge and the Council's decision to approve the variations to the scheme was quashed. The Council has decided not to appeal the judgment, although Henderson have sought leave to appeal.

Dear Mr. Eden,

I set out my comments in relation to Claer Lloyd-Jones report as follows.

At page 4, Ms. Lloyd-Jones said that I did not think EU law was as relevant to the variations clause and at page 22 suggested that my advice 'skated quickly over the European law points' and 'failed to recognise or mention that the validity of the variation clause was, itself, subject to European law ...'.

That is not correct. My advice was solely based on EU law. In domestic law, there would have been no problem relying on a variation clause. An issue only arose because in EU law a change to a contract might be regarded as a new contract which had to be the subject of a procurement exercise. In giving my advice, I relied on the European Court of Justice case of Pressetext, the case which Mrs. Justice Lang described as the leading case in the area. When I met Ms. Lloyd-Jones, I took her through that case to show the basis for my advice.

I do not agree that my advice was inconsistent with the advice of Nigel Giffin QC which I saw. (Reference is also made to advice from James Goudie QC which I did not see.) Ms. Lloyd-Jones refers in her executive summary to advice given by Mr. Giffin in November 2010. That advice was not contained in the papers that were handed to me, those papers having been printed by my clerks from e-mails sent by Mr. Bone. The only advice I saw was the note of a conference with Mr. Giffin in March 2010. That does not contain the passage quoted by Ms. Lloyd-Jones which is said to be inconsistent with my advice.

I do not believe my advice is inconsistent with the advice of Mr. Giffin QC given in March. That advice was dealing with changes to the contract but a different issue, namely changes to the contracting parties. The variation clause in the case with which I was asked to deal was concerned with the contents of the development (such as the bus station, the amount of retail space and affordable housing). Mr. Giffin's advice of March 2010 was not concerned with that. Indeed his advice did not rely at all on the variation clause which would not in any event have been relevant to the changes he considered. Had his advice touched on the variation clause, he would have had to deal with it in providing his advice. But he did not refer to it for that purpose because it was not relevant to the question he was asked. He did, however, make passing reference to the variation clause in that conference when he said:

"NG advised that in his view the DA does provide a large degree of control to the Council and includes step in rights to build. There are a fair amount of provisions

contained within the DA where the Council has an absolute right to grant consent to changes and it does appear that this is very much a Council led scheme"

That seems to me to be a reference to the variation clause and, whilst Mr. Giffin was not advising as to its effect or its application to any proposed change and I do not suggest he was expressing any concluded view in relation to the variation clause, he did recognise that the contract contained the right to give consent to changes.

I therefore do not agree that my advice can be criticised for being inconsistent with advice I had not seen.

I have now seen a copy of the November advice. The passage which Ms Lloyd-Jones quotes is a passing comment, and in any event not expressed in definitive terms, in an advice which overall concluded that the proposed changes about which Mr. Giffin was asked to advise did not amount to new contracts. I do not agree that it is fair to describe my later advice as inconsistent with Mr. Giffin's November advice. But since I did not see that advice, my own analysis cannot be criticised for contradicting his.

This is a case which shows that different views can be reached on questions of law. My opinion was that the Council could rely on the variation clause. Mrs. Justice Lang disagreed. I much regret that she reached a different view, but this case shows the way in which different lawyers and judges can reach different opinions.

Ms Lloyd-Jones explains that the first judge who looked at this case, Mr. Justice Dove, concluded that Mr. Gottlieb's case was not even arguable. A test of 'arguability' is a low one, but this judge concluded that the claim did not even surmount the test of being fit to go to a hearing. Mr. Justice Lindblom granted permission at a hearing. I do not know whether he expressed any views such as whether the case was just arguable or whether it was strong. Mrs. Justice Lang allowed the claim. I would note in passing that in doing so she relied in part on commentary contained in a textbook published after I had given my advice. The Court of Appeal has now given permission to appeal against Mrs. Justice Lang's decision. The effect of that is that it is recognised to be arguable that the Judge was wrong. We do not, of course, know whether the appeal will succeed or fail and I do not know with what level of conviction the Court of Appeal concluded that the case was arguable. But the history of this case shows that different judges can come to different views.

My own opinion was in part based on what Mr. Giffin QC described as the 'Council-led' nature of this scheme. I recall a discussion in the conference about the way in which the development agreement worked. It can be seen from the terms of the contract that the development was not one set in stone from the outset but one which envisaged

changes. Thus the starting point was that the developer would produce initial scheme designs (clause 4) and that it was from the outset envisaged that there would be changes to those drawings (clause 5). Some of those would require Council approval. It was expressly stated that there could be changes to the Required Elements (set out in clause 5.3) which included matters such as parking spaces, retail space, affordable housing and the bus station. Thus it seemed to me that the whole development was premised on the basis that there would be such changes. The question was whether such variations were permitted as a matter of European procurement law and my opinion, in the light of Pressetext, was that they were.

There have been later cases dealing with variations. In one, called Edenred [2015] UKSC 45, the Supreme Court dealt with a case in which National Savings & Investments ('NS&I') had a contract with Atos to run operational services in connection with its savings and investments business, dealing with receipts and payments and managing numerous savings transactions. The government decided to introduce a new means of making tax relief available to parents who pay for child care via a special bank account called a childcare account. The government decided to ask NS&I to manage child care accounts and NS&I decided to amend its contract with Atos to require Atos to provide services in connection with childcare accounts. Edenred challenged that decision on the basis that it was an unlawful variation to the contract and should have been the subject of a separate tender. The Supreme Court rejected the claim that this was a substantial modification of the contract which required a tender. The Court also referred to a variation clause. The Court of Appeal had held that the clause permitted the variation. The Supreme Court inclined to the view that that was right but in the event did not decide the case on that basis.

The Edenred case of course depended on its own facts. It also was decided after I gave my advice and indeed after Mrs. Justice Lang's judgment. But it does show that even significant contract variations may be permissible where they were envisaged by the original contract.

One matter which Ms Lloyd-Jones has not specifically addressed seems to me to be worthy of consideration. I did not act for the Council on the judicial review claim. Indeed I was not even told about it. The case was argued by David Elvin QC. I note that Ms. Lloyd-Jones queries the selection of Mr. Elvin QC but I do not think it is right to say that he is not an expert in European law.

The matter which may be worth exploring is whether the Council took any further advice on the merits of its case once permission to apply for judicial review had been granted and whether Ms. Lloyd-Jones considers that it should have done. Once permission had been granted, the position had changed. The Council was now faced with a case which

a Judge had said was arguable. In that case, some local authorities might have sought advice as to the strength of their position. A reason to do so is that matters had moved beyond an abstract question to a particular, formulated claim and an authority might wish to consider the strength of that claim.

Was Mr. Elvin QC asked to advise? Even if not asked to do so, did he express any opinions as he was preparing the case? It would have been necessary for him to draft grounds of opposition to the case and later a skeleton argument. His grounds of opposition would have been relevant to Mr. Justice Dove's decision to refuse permission. It seems likely that in the course of doing these things he would have had to come to a view about the merits of the Council's argument, even if was not specifically asked to advise. If the position were that he had expressed doubts about the strength of the defence, the Council could have changed its mind and conducted a procurement before even the judicial review claim was heard.

Another matter which the Council may wish to consider in terms of its own position is how it would have reacted had my advice been in different terms. If, for example, I had said that there was an argument on the variation clause but it was a 50/50 case, what would the Council have done? Would it have proceeded on the basis that there was a 50% chance of success?

I hope that is of some help, but please let me know if you would like any more comment from me.

Yours sincerely,

Paul Nicholls

Paul Nicholls QC

Matrix

Griffin Building

Gray's Inn

London WC1R 5LN