



Winckworth Sherwood Second Regeneration Conference : 12th November 2009

BRIEFING

Winckworth Sherwood thanks all those who contributed to the success of its second annual regeneration conference on the 12th November 2009. Clearly these are challenging times for all those involved in regeneration. Our feedback suggests that the conference was appreciated for both providing key insights as well as a valuable opportunity to meet and share information and ideas with colleagues in the field.

The key theme of the conference was ensuring success; looking at current funding issues and opportunities, exploring what it takes to achieve delivery both initially and over time where delivery is phased and how to negotiate the procurement minefield.

Stephen Oakes, Development Director at the London Thames Gateway Development Corporation, chaired the conference and highlighted the impact of the challenging market conditions, noting that activity in the housing market was down to a third of its value compared to two years ago. Stephen noted the importance of social housing grant in delivering new homes but warned of the impact of a tougher grant environment. Stephen posed the question whether grant and land values would be enough in the future to get schemes off the ground, asking whether it was time for participants to start to look at long term equity investment.

Richard Beckingsale of RB Consulting and Urban Delivery expanded upon a number of points made by Stephen in relation to the wider economy and the challenges faced by the housebuilder market. Whilst the use of section 106 and cross subsidy remains a potential model that is likely to re-emerge in the future, market pressures mean that the public and private sectors need to consider alternatives to compliment this.

The economy has forced all parties to re-appraise and re-prioritise. The lack of finance has in many cases resulted in objectives being compromised although a number of authorities, RSL's and private sector delivery partners have maximised the potential for securing grant and bidding through the Kickstart initiative. In addition to those Homes and Community Agency (HCA) initiatives which were discussed, the Private Finance Initiative (PFI) continues to play a role in housing delivery. Round 6 intends to build upon the potential for linking PFI to traditional regeneration schemes although the challenge for many remains the funding of the high risk elements of a project – land assembly, decant and infrastructure provision.

A number of possibilities for enabling development were discussed with a focus on delivery through Local Asset Backed Vehicles (LABV), Tax Incremental Financing (TIF) or Enabling Funds.



Asset Backed Vehicles have proved to be a successful tool for those authorities able to assimilate the right package and mix of assets. The need for the vehicle to have the benefit of a secure income stream makes the Croydon model an attractive one. The vehicle allows the public sector to participate in an investment or development vehicle which itself is able to lever in debt (that the public sector might not otherwise be able to raise). The model itself builds upon structures that have existed for some time in the delivery of public assets/services and can save upon procurement costs (although the advantage of this should not be overstressed). In practice, with the right balance of control, assets and long term political will, this can be a valuable tool.

Tax Incremental Financing is a US based model which has support from both the existing Government and in principle approval from the Conservatives. For infrastructure provision that is likely to stimulate economic growth, local authorities could raise the necessary upfront funding if Central Government permitted the ring-fencing of future business rate receipts. However, it is unlikely to be as effective a tool for underpinning investment in residential schemes as the Council tax receipts that arise are likely to be used in funding additional service provision, rather than being available to meet outstanding liabilities.

In relation to Infrastructure or Enabling Funds, Richard Tinham and Andrea Squires (Winckworth Sherwood) have been working with the private sector and considering the issue of a publicly backed bond to fund early works. This would suit authorities faced with the challenge of de-risking

sites before taking them to market, that are able (either alone or in partnership with the Homes and Communities Agency) to underwrite a pre-agreed return on investment.

At the other end of the delivery equation, consideration was given to institutional buy to let, privately run shared ownership models and the potential for deferred receipts and longer term rewards.

The public sector must use the downturn to best effect. This means planning ahead for the return of the market, de-risking sites, establishing delivery protocols and ensuring that they can run an effective competition which embraces innovation. The private sector needs to engage and also to be creative. With increasing pressure on public sector finances, the traditional reliance on gap funding and National Affordable Housing Programme is likely to be eroded. Schemes which generate economic as well as physical benefits will be best placed to compete for that support which is available. The Grahame Park risk/reward example, which Richard and Anne negotiated from opposite sides of the fence, is a good example of how the public and private sectors can create new solutions which recognise each other's concerns but allow the delivery of their respective objectives.

As greater emphasis is placed on the local agenda, it is important that local authorities are given the flexible financing regimes, the resource capacity and the skills that are needed to deliver in such a challenging environment.



Andrea Squires, Partner at Winckworth Sherwood, highlighted the practical issues facing all those involved in regeneration. She stressed the importance of having a clear view at the outset of the strategic objectives of each of the main players as this would help to determine an appropriate legal framework to deliver a regeneration scheme. She explored various delivery mechanisms including: Sale Agreements (allied to the planning regime); Development Agreements (relying essentially on a contractual relationship); Formal Joint Ventures (Limited Liability Partnership, limited company, e.g. Local Housing Companies and LABVs); Strategic Partnerships (Local Education Partnerships, LIFT Cos); and Building Contracts (e.g. the Local Authority House Building Programme). The joint venture/partnership models offer flexibility where the needs are strategic and undefined but control through this route is less direct than under a contract as the Authority's shareholding is often only a minority interest. Even 50:50 shareholding doesn't give control it only provides an opportunity to veto. There is also a danger that it muddies the water with the local authority both procuring the scheme and delivering the solution.

Whilst funding may be a significant factor in deciding which route is chosen, Andrea warned of the danger of allowing short term procurement advantages to dictate strategic outcomes. A key question for local authorities was whether they should seek to achieve regeneration through a wholesale estate stock transfer or by what is commonly referred to as a "trickle transfer", namely the sale and development over time of sites to be developed. Whilst there were financial

incentives in the stock transfer route, control of regeneration outcomes also passed to the RSL and stock transfers generally remain unpopular with residents.

Advocating the consideration of incremental approaches using master planning and a dedicated framework of developer partners for sites that are too big or intrinsically difficult, Andrea examined in detail the various factors involved in successfully securing outcomes in all projects. Some key messages emerged: thorough preparatory work is essential to achieving a successful outcome; a robust procurement strategy should help to ensure the right partner is found; authorities should think carefully about incentives and adopting an appropriate sharing of risk and reward; a good commercial deal secured in contract is only valuable if performance is monitored and enforced; a flexible approach may be needed from time to time to secure delivery, in dealing with planning applications, the use of deferred charges and deferred consideration and in agreeing alternative phasing proposals.

Andrea also focussed on various aspects crucial to avoiding failure and considered current moves to strengthen security packages, look at local authority step in rights, focus on the use of exclusivity arrangements and to the parcelling up of sites into small packages.

Richard Tinham, also a Partner at Winckworth Sherwood, focussed on the procurement issues affecting regeneration schemes, particularly in the light of the recent Office of Government Commerce (OGC) guidance issued following the



Roanne case. Richard, whilst noting the need to observe the general EU principles of transparency, equal treatment and non-discrimination, analysed the particular features of a regeneration contract and where distinctions could be made between contracts caught by the Public Contracts Regulations 2006 and those that might not. A more detailed analysis of this guidance can be found in Appendix 1.

Richard discussed the use of framework agreements, concession contracts, public housing schemes and where a competitive procurement was to be adopted the choice of various procedures including the Negotiated Procedure and the Competitive Dialogue Procedure. Richard noted the impending implementation of the new Remedies Directive due to be fully implemented in the UK by 20th December 2009. This significant piece of legislation will for the first time render contracts found to have been awarded in breach of the Procurement Regulations liable to be set aside by the Courts. A thorough review of this legislation and its impact will be undertaken by Richard in a seminar at Winckworth Sherwood's offices in the New Year.

Finally, **Anne Dufton**, of Choices for Graham Park (part of the Genesis Housing Group) provided a fascinating insight into the Grahame Park project, which is now in its second phase of delivery. She reminded us of the importance of regeneration to those directly affected, the residents and local community. Keeping the community informed and involved in schemes was a vital ingredient in any successful regeneration scheme.

About Winckworth Sherwood

Winckworth Sherwood is passionate about helping its clients achieve effective solutions in all aspects of regeneration. Working on behalf of local authorities, registered social landlords, developers, contractors and builders, we have a unique understanding of what it takes for a scheme to be successful. We are involved in some of the largest schemes being delivered, namely, Grahame Park, Woodberry Down, South Acton, Canning Town and Silvertown Quays.

The conference was part of a series of conferences, seminars and events held by Winckworth Sherwood as part of its corporate social responsibility to add value to its clients and the wider community by encouraging the dissemination of ideas and forging of relationships to achieve efficient and effective solutions. We would be happy to organise similar conferences or seminars on these or other areas of the law for our clients or potential clients, so if you think there is an area which you think it would be useful to cover please get in touch. We would be happy to meet with you to discuss your individual requirements.

Please contact:

Andrea Squires
DT 020 7593 5039
asquires@wslaw.co.uk

Richard Tinham
DT 020 7593 5165
rtinham@wslaw.co.uk



APPENDIX 1

OGC Guidance on Development

Clarity or confusion?

In September's edition of E-Gen, we reviewed the relevance of the Procurement Regulations to development agreements entered into by local authorities (and other contracting authorities). OGC guidance on the matter following the French case of *Roanne* was expected and has now been published (see Information Note 11/09 dated 16th October). Whilst not pretending to be definitive or indeed comprehensive, the Guidance tries to help answer some of the questions that have been troubling local authorities and developers for some time. There is a sense however that this may be too little too late as the number and scope of procurement challenges increases and the EU position hardens. The Remedies Directive, due to come into force on the 20th of December, puts the risk of breach on the contractor as well as the authority as transactions can for the first time be set aside if a breach of the Regulations has occurred.

Key Questions

The Guidance identifies three key questions. If the answer to each of the questions is yes, it is likely the agreement will be subject to the Procurement Regulations.

1) Is there a work or works required or specified by a contracting authority?

To elaborate, the Guidance draws distinctions between different kinds of arrangements and whether any works being carried out would be works required or specified by the authority. Developers' proposals for a site to be acquired from the authority, whilst these may have influenced the selection of a developer, will not amount to works being procured by the authority if the specification is broad rather than detailed and the developer's autonomy in approaching the development is preserved. Works consistent with a freeholder selling part of its estate, i.e. works protecting the authority's retained estate, will not be caught. Works ancillary or incidental to the transfer or lease of land or property will not lead to the contract being subject to the Regulations. Works to be undertaken pursuant to a section 106 agreement or envisaged in any planning permission are unlikely to be relevant but there are some clear dangers here depending on the degree and scope of such works, so much so that OGC has indicated that they are looking at issuing further guidance in this area.

2) Is there an enforceable obligation (in writing) on a contractor to carry out that work or works?

A contract to carry out the works must be present. Whilst works which do not directly benefit the authority may still be works procured by the authority, there needs to be a clear mechanism for the authority to enforce an obligation on the developer to undertake them, with consequences



for failure. Works required to meet a statutory function or purpose of the authority are likely to qualify. The reprovision of public facilities which the authority controls will tend to lead to a conclusion that works are being procured. The degree and method of control (and whether that is achieved as a consequence of a statutory provision or as a matter of contract) will be a factor. The contract can be found in two or more documents (for example Principal Development Agreement and the Planning Agreement).

3) Is there some pecuniary interest for carrying out the work (not necessarily a cash payment)?

The existence of payments to be made to or consideration received by the developer for the carrying out of the works will lead to a conclusion that works are being procured by the authority. This will include direct payments as well as contributions to project finance or guarantees. The existence of grant, whether provided by the authority or not, and the extent to which any price to be paid for land is dependent on the success of the development, will continue to make this question a difficult one.

Further background on this can be found in the September update.

Challenges going forward

As transactions become more complex and the EU more inclined to attack procurement regimes, questions about the applicability of the Procurement Regulations will continue to be

difficult to answer. Decisions must be made on the facts of a particular situation and the overall purpose of a transaction will need to be examined. The hiving-off of contractual obligations is unlikely to save an arrangement being one which should otherwise be procured in accordance with the rules. As a guide however standard s106 obligations (with nomination arrangements for social housing, and specifications of finishes, layouts and detailed approvals all in the hands of the local authority) start to look suspicious.

Solutions

A number of us at Winckworth Sherwood are looking at arrangements to mitigate the negative effects of the Procurement Regulations and more detailed advice will be provided to clients.

The first and obvious point to make is that a competitive tender process is not made significantly more difficult or time consuming if it is procured in accordance with the Procurement Regulations provided the principles of fair treatment and transparency are observed. A well structured and appropriate procurement process will help authorities to maintain competition during the process and will give bidders comfort that the authority is committed to the outcome, information with which to make a decision about how and whether to bid and certainty that the contract is valid.

Bundling of projects and the use of frameworks may help to simplify and shorten the length of procurements. This can work well for specialist procurements, where there are a limited number of



suppliers, or where there is a regular demand for services (in its widest sense). Authorities should be careful though not to over rely on frameworks and to assess whether a need can genuinely best be served by panel suppliers, particularly given the market distorting affects that frameworks can have over time.

Joint procurements and strategic partnerships are likely to feature more in the future provision of public services and facilities. Identifying the “what” rather than the “how” may increasingly become the question on the minds of public bodies. The pooling of resources and skills should lead to a better outcome. Authorities will however need to think carefully about how they maintain control, whilst preserving flexibility and the scope for innovation. A new breed of developer is already emerging that works seamlessly with the public sector and ensures that best procurement practice is achieved throughout the whole of the supply chain.

If it is not already, procurement will be a question on the minds of everyone involved in property development and management, where any part of the output is for the benefit of, or supports a function of, the contracting authority.

Andrea Squires
DT 020 7593 5039
asquires@wslaw.co.uk