(1) PROJECT FUNDING – RISKS AND OPTIONS
(2) MAXIMISING SOCIAL INFRASTRUCTURE FROM PLANNING

21st May 2015

David Forsdick QC
Landmark Chambers

Introduction

1. Project Funding Risks and Options:
   a. securing funding – pitfalls and how to avoid them
   b. termination of PFIs to secure better VFM and lesser options
   c. “Enabling” land releases and appropriation

2. Maximising delivery of necessary projects through planning:
   a. Masterplanning and delivery - pitfalls and how to avoid them
   b. CIL, Vacant building credit and contributions from small sites

Project Funding - Securing Finance Risks

Factual Context: New Government, 2014 Autumn Statement and 2015 budget

Fundamental Legal Context:

1. Govt can change its mind until signature
2. No substantive legitimate expectation - almost irrespective as to circumstances

A Salutory Reminder of 2010: Luton (BSF) and Cheshire East (EfW) – cancellation

Project Finance – Conditions Precedent and Long Stop Dates

The terms of funding: planning and other long stop dates.

"Quasi –Contractual" – does LA have any rights of LAs on failure to comply with the long stop dates

A Salutary Warning: Planning delays not fault of the LA

Minimising the Risks: Initial Financing

Initial financing:

1. Never forget that there is no certainty until the final sign off – everything up to that date is at risk. OBC and political pressure

2. Therefore:
   a. Speed of FBC and PN is vital
   b. avoid front-loading expenditure – only do that which is essential to get sign off;
   c. avoid entering into any binding commitments until actual sign off;
   d. if have preferred contractor, allocate risks of abortive costs at this initial stage at the outset (If VFM)
   e. Prepare for alternative financing strategies at the same time – land release?

Minimising the Risk – long stop dates

Key Message – avoid optimism/rigorously test assumptions/assume the unexpected

1. **Avoid optimism in project timelines – assume problems at each stage**
2. **Rigorously test timelines against foreseeable permutations of events and cumulative impacts on time lines.**
3. **Attempt to include provision for extension where delays caused by the SoS**
4. **Adopt but build on the standard HMT terms for LSDMake provision in PFI for allocation of abortive costs (based on VFM).**
5. **Stand back and look – what if?**

Where things start to go wrong:

1. **Regularly review timelines and seek early extension of funding if risk of non-compliance.**
2. **Do not leave it until LSD is passed or LSD impossible to meet.**

Terminating PFIs

The Temptation:

1. High financing costs in Unitary Costs which do not reflect current, exceptionally low, financing costs
2. Prudential borrowing costs so low that potential for major savings even after buying out the PFI contractor and all breakage costs.
3. The means – “termination for convenience clauses” or AVT.

Government Policy

1. Continued strong support for PFIs
2. Very concerned about wider implications for PFI scheme and for public finances of terminations
3. **3rd March 2015** Guidance to address the temptation
    a. Novel ,contentious and potentially repercussive
    b. Need for something substantial to have changed – PB rates alone not enough?
    c. Cost Benefit analysis of all costs to the whole public sector
    d. Other factors

Making a case for voluntary termination

CBA:

1. all costs of termination properly assessed with ranges
2. minimise costs by maximising deductions
3. all costs of providing services in house
4. proper assessment of the “risks” that will be transferred back to the public sector

VFM:

- Performance under the PFI
- Willing PFI Contractor
- Robust assessment of ability to provide services cost effectively in house
- Opportunity cost to the public sector of capital expenditure now.

“The relative priority of the termination” for the public sector as a whole – exceptional cases may be able to justify move to PB especially if there have been problems with the quality of services or disputes under the PFI

PFI – other steps to reduce costs (1)

"Making Savings in Operational PFI Contracts 2013" - working within the PFI terms to try to minimise costs:

1. At outset build as much flexibility for reviews of LA requirements as possible consistent with VFM
2. During life of PFI, limited scope for savings on the capital side but often major scope for savings on "soft" services; sharing costs; agreed changes to spec; taking out excess capacity
3. Underused - LAs often pay for services do not need and are not contractually immutably bound to accept.

PFI - Other steps to reduce costs (2)

- Performance Deductions
- CBT

PFI contracts robustly applied by private sector - to the letter. Strict enforcement of their rights.

Local authorities scope to do likewise (for whose relatively rare PFIs not going well):

- understandable reluctance to enforce given complexity;
- however, compliance team/ regular brainstorming sessions with lawyers for underperforming contracts can lead to ID of major avenues for savings/deductions/CBT
- external VFM review – is contractor doing what they are required to do; what they claim.
- extra-contractual concessions? Trying to make a difficult contract mechanism work?

For problematic contracts where VFM in question, LAs should consider strict application of the performance deduction and CBT routes. Massive scope for savings.

“Enabling” land releases and Appropriation – a legal minefield

- Circumstances: classic case POS or school extension
- TVG signs – still a good idea?
- “no longer required” – evidential hurdles
  - Consultation requirements
  - Conscientiously taking into account consultation responses
  - Rejecting claims that “still required”- hurdles

Section 2: Maximising social infrastructure from planning: MASTERPLANNING

<u>The issue:</u>

- large site allocation to meet 5 yrs HLS; needs to deliver social infrastructure – so Council has to deliver it to avoid para 47 – 49 issues but also has to secure SI from it. How to do both if multiple landowners not co-operating.

1. **Planning policy framework – MP and single application**
2. **Advance discussions/encouragement – but no equalisation**
3. **Piecemeal development - early applications- seeking to rely on existing SI capacity**
4. **Later applications contending SI not viable.**
5. **Pooling restrictions!**

Masterplanning (2)

1. Include SI in CIL to extent sensible (except consume own smoke)
2. Robust Local Plan comprehensive development framework; phasing plan for SI; needs based assessment for phasing and quantum of SI; need for each part of the whole to contribute proportionately to the total SI needed to secure viability of the whole – valid approach.
3. Advance discussions facilitation under threat of CPO? Finding other sites? Sticking to the comprehensive development requirement.
4. Requiring MP for first application
5. Early applications – s.106s and contributions to later phases- over-provision of X in <u>express</u> return for under-provision of Y to be provided in later phases

Vacant building credits

VBC The Issue: The initial guidance – net increase only contributes to AH on BF development. Major change to policy position. Major hit to LAs esp urban and esp London. Huge losses of AH obligations. 28/11/14. All to encourage BF development. Need? Viability already intrinsic to the policy requirements? Straitjacket?

The Quiet Climb Down. 26/3/15 some words added – crucial and serves to significantly limit the impact of the policy:

> *"The policy is intended to incentivise brownfield development, including the reuse or redevelopment of empty and redundant buildings. In considering how the vacant building credit should apply to a particular development, local planning authorities should have regard to the intention of national policy* [allows in local viability work?]
>
> *In doing so it may be appropriate for authorities to consider:*
>
> - *Whether the building has been made vacant for the sole purpose of redevelopment*
> - *Whether the building is covered by an extant or recently expired [PP]"*

CIL Rate Amendment

Changes to NPPG on AH and SI for 10 units or less

If lawful, necessarily make CIL calculations out of date – because assume policy compliant level of AH/SI.

LAs significantly affected by the policy change should consider changes to their CIL calculations to increase the CIL Rate for small developments if viable.

Developments less than 10

- assuming policy is lawful (pending any findings in West Berks), what can/should LAs do in planning decision making and plan making if faced with unmet AH/SI need and no local specific viability issues.

1. The Policy is plainly a highly material consideration – WMS/NPPG. Can expect to be accorded significant weight on appeal
2. However, it is not and cannot be a trump card – in the sense of overriding s.38(6)
3. Council with recently adopted LP based on viability and needs works which justifies less than 10 SI/AH – what then?

<u>Development Control</u>

4. Start with Local Plan. Give great weight to SoS's policy. Apply it on the facts of the individual case. If nothing has changed to undermine the council specific viability and needs work and if the Council cannot otherwise make up shortfall in AH/SI, lawful to decide to require AH/SI. On appeal, demonstrate the cogency of the viability/needs case underpinning the recent LP to try to persuade Inspector to place more weight on LP. Inspector's approach on s.78 – mixed.

<u>On Plan Making</u>

5. Take policy into account and give it great weight. Decide whether there are area specific considerations which mean that AH/SI burdens on small sites are not disproportionate on the facts

6. Persuade inspector.