

Wards Corner Review of s106 Obligations

Appendices 2 and 3 of the Report

By

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Appendix 2 – note of meeting with Bindmans clients and other traders 20 September 2019

1. Discussion on the previous Market Facilitator 's support of traders and promotion of their interests, and the market, at the current site in the light of the facilitator's submissions to the scrutiny panel;
2. Examples of breaches of the obligations, if any.
3. Examples of progress towards meeting the obligations, if any.
4. Discussion around the previous Market Facilitator 's support of traders and promotion of their interests in respect of a future move;
5. Discussion on the process to select a future Market Facilitator , including the draft job description and person specification, including selection criteria and trader involvement

I had sought to specifically exclude the following items from the discussions:

1. Previous and current applications and merits of the development
2. The CPO submissions and matters arising from that
3. Rent
4. Physical condition of the market

The outcome of the meeting

This is not a verbatim record of what transpired at the meeting, rather it is a summary of the key deputations which I have stayed faithfully true to.

Despite my best endeavours, a disproportionate amount of time was spent on the matters which I had specifically stated were not going to be part of the discussion. Further time was spent discussing the political reputational risk to the Council and the need to 'get rid' of the current market operator; matters which went beyond my remit.

- 10** John Halford from Bindmans, by way of background referred me to the following documents:
- 11** The Planning Sub-Committee Report in connection with the applications HGY/2012/0915 and HGY/2012/0921 drawing my attention especially to the text he had highlighted which was the summary of the report and paragraphs 8.4.3 and 8.6.2 to 8.6.11 and schedule 2 and 3 of Appendix 6 same report which deals with the summary of EqIA impacts and proposed responses. Furthermore my attention was brought to the Bindmans letter to the Council dated 15 August 2018.

My attention was also drawn to the following documents:

Responsibilities of Market Operator dated October 2008

Letter to Traders from D Walters of the Developer dated 31/07/2008

The later documents were sent to me by email after the meeting.

I took away the following key points from the meeting as submitted by the traders and their solicitor.

1. That the starting point for my review is to look at what was the Council attempting to do when it imposed s106 obligations. To achieve that, there was need for me to; look at both versions of the s106 agreements.
2. The officer report accompanying the 2012 planning application had an analysis of the market as it existed then and made several references to protect the interests of the existing traders by way of securing those protections through the s106 agreement.
3. The officer report for the 2012 planning application had an EqIA which identified risks and mitigations and the details of the Market Facilitator package whose aim was to ensure that the existing market and traders continue to trade.
4. There was no trader involvement in the appointment of Quarterbridge. Even though it is accepted that the appointment of the Market Facilitator is the Developer's prerogative, the whole process was opaque.
5. The traders want to know how the Council failed to foresee that the appointment of Mr Owen as a point person for both the market operator (MAM) and Market Facilitator (Quarterbridge) would result in a clear and obvious conflict of interest which was detrimental to the interests of the traders. If the traders had been consulted, then they would have pointed out that there was problem, as the Market Facilitator was meant to champion the traders causes, which was nearly impossible if the same entity was running a commercial entity.
6. Mr Owen, in whatever capacity, ultimately worked for the Developer. The assertion is borne out of the fact that he was the Developer's advisor prior to his 'opaque' appointment and subsequently had a lease underwritten by the Developer.

7. The investigation has to reach one of two conclusions: Either the s106 obligations have been breached by the Developer; or if the s106 obligations have not been breached, then the s106 agreement is not fit for purpose. If the Developer has complied with the s106 agreement, then the s106 cannot fulfil the intended purpose, namely the preservation of the market and traders.
8. At the first meeting of the Steering Group, Mr Owen said his role was to exclusively run a commercial business. Then after traders complained said that he was ready for war and had his boxing gloves.
9. The Steering Group was established to advance the aims and objectives of the s106 not to help MAM.
10. Mr Owen took away a unit from one trader and tried to take other units away from other traders. Mr Owen may say that he was doing that in his MAM role but that is not acceptable.
11. Mr Owen refuses to promote the market because he thinks it will close soon.
12. The traders were a united group and those who said otherwise had ulterior motives and or fearful of the consequences of speaking out.
13. Mr Owen's behaviour amplified the risks identified in the 2012 planning application officer report.
14. The previous market operator/leaseholder was better.
15. The draft job description and person specification was a helpful step in the right direction in order to address some of the shortcoming of the appointment of the previous Market Facilitator , however there are to fundamental problems; that the Market Facilitator is responsible to the Developer and reports to Mr Kiddle. It is difficult to see how a Market Facilitator answerable to the Developer can avoid conflict with the traders.
16. How was the s106 monitored? Word on the street is that it was not properly monitored.

17. The new Market Facilitator needs to be independent and have the confidence and trust of the traders. The traders should not be consulted just on the appointment process but also on the appointee.
18. The Council cannot disassociate itself from the appointment of Quarterbridge due its previous (2012) public announcement to that effect.
19. What can the new Market Facilitator achieve in the limited time left?
20. The problems at the market started before 2015 when the lease was sold and the traders were not aware who the lease was sold to, followed by MAM being assigned the lease while Quarterbridge had already been the Developer's advisors.
21. the Developer controlled who sat on the Steering Group and what was reported. They controlled every aspect.
22. A Council officer sat at the Steering Group meetings and did not take any action on the traders complaints. The Council has been unhelpful to the traders.
23. Mr Owen was unhelpful and dealing with him was difficult because one moment he was the Market Facilitator and the next he was the market operator.
24. the Developer, TfL and MAM want to demolish the market and that is why they do not want to change the carpet or fix the drains.
25. The s106 agreement needs to be clear as it is being interpreted in different ways.
26. MAM made the traders pay for parking permits.
27. MAM overcharged the traders on utility bills.
28. MAM wanted to operate an open air market next to the existing market to compete with the traders.

29. Evidence to the Scrutiny Panel resulted in Quarterbridge being removed as the Market Facilitator .
30. The Council needs to look at the evidence of the unethical practices of the market operator across the country and as result of that get rid of the current market operator as the reputational risk to the Council was profound.
31. There are now two groups of traders at the market as a result of the divide and rule tactics from Mr Owen.
32. The traders do not trust the Developer or the Council. There has to be an acknowledgement from both sides that there have been mistakes and traders should not have to deal with racist abuse.
33. Who is in charge of drafting s106 agreement? The traders engagement with the Developer in 2008 and the form that the final version of the s106 agreement took are different.
34. Rents have gone up at an unacceptable rate and the rent increases vary by trader with those who are opposed to Mr Owen having disproportionately higher increases.
35. While the rents have gone up, they have not been matched by the improvements to the physical condition of the market. The rent increases are not in the spirit of the s106 agreement.
36. Mr Owen sent emails about workshops which were attended by two or three traders and the rest of the traders did not attend as they do not trust Mr Owen. As a result of the non-attendance of those workshops, Mr Owen wasted the Mayor of London's money.
37. Does the s106 agreement permit the Developer to appoint a Market Facilitator who is answerable to the Council?

Appendix 3 Key Q & A

Key questions and answers include:

Q1: the Developer's control over the Steering Group

A1: The Steering Group is not a forum created by the s106 agreement, rather it was intended to be a vehicle used, in part, to deliver the aims and objectives of the s106 agreement and to fulfil the Developer's Community Engagement Strategy. This, in theory, is a laudable endeavour however it appears there are some, not all, traders who are not happy with the way it was constituted and conducted its business. It is not my intention to go into the forensic examination of why and what transpired at every meeting and apportion blame or fault. Rather it is my recommendation that the Developer reconstitutes the Steering Group with clearly defined terms of reference and have a democratic modus operandi. However I am mindful that no matter how the Steering Group is reconstituted, it will not satisfy those who are opposed to the approved development as a matter of principle.

Q2: Council officer involvement at the Steering Group

A2: I have not been provided with a clear role/responsibility of the officer who attended the Steering Group meetings. This represents a lost opportunity in addressing some of the matters and concerns which arose out of those meetings which the Council could have theoretically at least dealt with sooner. Notwithstanding that, it is my recommendation that the Council has some sort of observer/ex officio role.

Q3: The traders want to know how the Council failed to foresee that the appointment of Mr Owen as a point person for both the market operator (MAM) and Market Facilitator (Quarterbridge) would result in a clear and obvious conflict of interest which was detrimental to the interests of the traders. If the traders had been consulted, then they would have pointed out that there was a problem, as the Market Facilitator was meant to champion the traders' causes, which was nearly impossible if the same entity was running a commercial entity.

A3: I have not been provided with any information on how Quarterbridge became a named party in the s106 agreement, however:

1. At the time of drafting the agreement, there was no reasonable cause for the Council's solicitors to do a due diligence exercise on the company (Quarterbridge), let alone the individual directors of which Mr Owen was one.
2. The s106 agreement in so far as it relates to the appointment of Quarterbridge is not absolute. It reads... 'or such other Market Facilitator as may be appointed by the Developer from time to time'. The net effect of this is that in practical terms any due diligence on Quarterbridge would have been for all intents and purposes an exercise in futility as the Developer could have appointed any other Market Facilitator 'from time to time'.

Turning to the consultation, I am not persuaded that the traders were not consulted on the appointment of Quarterbridge as a Market Facilitator. The reasons for this assertion are as follows:

1. The timing of the consultation may not have been the best for the traders, but the traders were consulted pursuant to the application HGY/2017/1551 even though there was strictly speaking no legal requirement to consult on the DoV application as the application was not made under s106A(1)(b) of the TCPA 1990 (as amended). Rather the deed of variation was made under s106A(1)(a) of the TCPA 1990 (as amended) which meant that a formal application was not legally required. Despite the fact that the application was not legally required; it was nevertheless submitted. The consultation period for the application was initially scheduled to run for 14 days but in effect ended up running for almost 2 months including during the CPO Pre-inquiry Meeting of 3 May 2017 which the traders and their legal representatives attended. The Deed was further discussed at length during the CPO inquiry with the traders and their legal representatives in attendance.
2. The DoV application HGY/2017/1551 had two key documents upon which all the consultees had to respond to. There was the DoV Draft Heads of Terms and DoV Summary of Proposed Changes which named Quarterbridge as the Market Facilitator at paragraph 2.1.
3. There were a number of responses from the traders in relation to the consultation. However none of them challenged the appointment of Quarterbridge. As a matter of fact none of the responses, traders or not, which are on the Council's website objected to the appointment of Quarterbridge as a Market Facilitator.

4. On the Council's website pursuant to the consultation exercise relating to the DoV application HGY/2017/1551 there is a response from Monica Feria Tinta a barrister representing 36 traders. She did not respond to the substantive matters which were being consulted upon, rather focussed on the procedural matters relating to the consultation. However a further letter from the traders' barristers Monica Feria Tinta and Alistair Wooder dated 13 July 2017 which was copied to the Inspector and the Developer's solicitors responds to a greater detail about the draft Deed. Some of the suggestions were incorporated into the final version of the Deed. However there was no challenge or questions raised about the appointment of Quarterbridge in all those submissions. In simple terms, the appointment of Quarterbridge was not contested by any of the interested parties.
5. Similarly, albeit not on the website, whilst legal action was threatened on the Council's decision to vary the s106 agreement, no other legal challenge was made or threatened by the traders or their legal representatives on the grounds of Quarterbridge's appointment.

Q4: The s106 should be written out in simpler terms so that it cannot be interpreted in different ways.

A4: I have outmost sympathy with this view, however s106 agreements are ultimately legal documents written by lawyers and there is no way of writing them in a simpler manner to be understood by a lay person without rudimentary understanding of law. Turning to the different interpretation of the s106 agreements. This again is a valid point, as shown elsewhere in this report that there have been different, arguable, interpretations of some provisions of the agreement. Generally, s106 agreements tend to be fairly straightforward in terms of the obligations and trigger points.

The agreements are usually phrased in the format; after x, y has to happen or at point x a review will be carried out using a defined formula, which if it shows profits to be y then ABC has to happen.

That is generally not the case with this agreement especially with reference to the Market Facilitator clauses. I however have sympathies with the Developer's and the Council solicitors who drafted the agreement as it is clear to me what they were trying to achieve but their ambition unintentionally resulted in a degree of uncertainty.

Q10: Who is in charge of drafting s106 agreement? The traders engagement with the Developer in 2008 and the form that the final version of the s106 agreement took are different.

A10: The solicitors for the Council and the Developer are in charge of drafting the s106 agreement. I have only been provided with two documents from the 2008 engagement between the traders and the Developer which I have referred to above

in the background information sent to me after the meeting. The 2008 draft letter availed to me has some skeleton terms which were eventually included in the 2012 and 2017 versions of the agreement. In any event the 2008 consultation was in relation to the 2008 planning application not the 2012 application of which my review is concerned with. The 2008 draft did not, amongst other provisions, include a relocation site for the traders during the construction of the development. It is in my opinion that the 2012 agreement was a better version of the agreement which was further improved in 2017 especially as it comes to the protections afforded the traders and having a defined place of operation during the construction phase.

Q11: There was no trader involvement in the appointment of Quarterbridge. Even through it is accepted that the appointment of the Market Facilitator is the Developer's prerogative, the whole process was opaque.

A11: This has been addressed in Q&A 8.

Q12: What is the Market Facilitator going to achieve in the limited time left?

A12: I am not sure how much time is left before the construction phase, assuming that it is going happen at all. What I am certain of are the responsibilities of the Market Facilitator as set out in the s106 agreement. The Market Facilitator, will publicise the existing market, the new market and liaise with the market operator and Developer during the transition period. Furthermore the Market Facilitator will still be able to provide the assistance and advice to the traders.

The Market Facilitator's ability to deliver on those responsibilities is primarily a function of the calibre of the facilitator and the goodwill and benevolence of the traders to afford him metaphorical space to do so.

Q13: The investigation has to reach one of two conclusions: Either the s106 obligations have been breached by the Developer; or if the s106 obligations have not been breached, then the s106 agreement is not fit for purpose. If the Developer has complied with the s106 agreement, then the s106 cannot fulfil the intended purpose, namely the preservation of the market and traders.

A13: This is the *raison d'être* of this report.