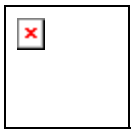
ST. HELIER WATERFRONT LEISURE COMPLEX LEASE: AMENDMENTS TO LEGAL DOCUMENTATION (P.129/2000) - COMMENTS

Presented to the States on 18th July 2000
by the Finance and Economics Committee



STATES OF JERSEY

STATES GREFFE

180 2000 P.129 Com.

Price code: B

Comments

The Finance and Economics Committee asks States members to reject the proposition that the States should charge the Policy and Resources Committee to instruct the Waterfront Enterprise Board Limited [WEB] that the draft legal documentation associated with the Leisure Complex transaction should be amended.

The Committee has taken legal advice, not only from the Solicitor General, but also from Mr. John Bisson. Mr. Bisson is the senior partner of Bailhache Labesse and the head of their commercial property division. He is also the legal adviser to WEB, the body appointed by the States as their agent in respect of the Waterfront. Having considered their advice, the Committee urges rejection of the proposed amendments for the following reasons.

The Committee is mindful in the first place that the legal documentation is itself the record of what has been negotiated between WEB and the Developer. WEB cannot unilaterally change a document which records a bilateral agreement. WEB can seek to negotiate a change in the terms of the agreement, but it cannot change the documents without first negotiating a change to the terms which the documents record.

It thus appears to the Committee that if the Policy and Resources Committee was to direct WEB to amend the documents, it would be directing WEB to do something which it is not in WEB's power to do.

Turning to the specific amendments, those listed as (a), (c) and (d) can be considered together as all three relate to the

provisions in respect of site investigations. Sub-paragraphs (a) and (b) propose amendments to existing provisions and sub-paragraph (d) recommends the insertion of an additional clause. According to the Report, the intention is "to improve the nature and security of the deal being proffered to the people of the Island". On the advice which has been given to it, the Committee is of the opinion that the proposed amendments do nothing "to improve the security of the deal" from the Public's viewpoint.

By way of background to sub-paragraph (d), the States should know that the Lease to the Developer includes a provision that the lessee takes the site as it is, with all defects, apparent or hidden, if there are any. This has the effect of transferring liability for any hidden defects in the site to the lessee for the term of the Lease, which is one hundred and fifty years. Any liability transferred to the Developer by an amendment of the Development Agreement, which is what is sought by the sub-paragraph (d) of the proposition, would only last for the term of the Development Agreement, which is ten years.

As regards sub-paragraphs (a) and (c), which would oblige the Developer to carry out site investigations, the position is that site investigations costing £80,000 have already been commissioned and paid for by WEB and have been made available to the Developer. Despite these investigations, the Developer, in view of the fact that the Lease would transfer to it liability for any defects which might exist, quite prudently sought the inclusion of a provision which would entitle it to make its own independent investigations if it wished to do so, and to withdraw from the agreement if those investigations showed that the site which the Public was offering was defective to an extent which would adversely affect the development.

While agreeing that it is reasonable that the Developer should have this option, there appears to the Committee to be little merit in making obligatory the duplication by the Developer of work which has already been done by WEB. The Committee is reinforced in this view by the consideration that these repeated studies would add to the cost of the leisure pool to the detriment of the public purse.

The Committee further feels that there is a potential problem arising out of the interrelation of the amendments proposed in sub-paragraphs (a), (c) and (d), which would make the Developer liable under the Development Agreement for any defect which is detected, or which could have been detected by a site investigation, and the provision in the Development Agreement which entitles the Developer to withdraw from the transaction if a site investigation finds material defects on the site.

It appears to the Committee that if the proposed amendments are made, the Developer is obliged to carry out site investigations, and the site turns out to be defective, the clause making the Developer liable for those defects will be ineffective because the Developer will be entitled to withdraw from the whole transaction under a different provision of the agreement.

The additional clause 12.5 proposed by paragraph (b) of the proposition would make the Developer itself liable in certain circumstances to reimburse to the Public costs incurred as the result of the fault of a third party, namely the building contractor.

This proposal should be considered against the background of the protection already conferred on the Public in relation to the quality of the design and construction by the Development Agreement as drafted. That protection is multi-fold and is as follows -

- There is the protection of clause 8.2, under which the Developer has a direct obligation to procure the carrying out of the works.

- There is the protection of clause 7.2, under which the Developer is held responsible for procuring the performance of the obligations and duties of the contractor.

- There is the protection of clause 7.4.1, under which the Developer must procure and deliver to the Public a direct covenant from the contractor.

- There is the protection of clause 5.3, under which the Developer must procure and deliver to the Public direct covenants from all the consultants.

In addition to all these protections, the existing clause 12 improves the Public's direct rights by requiring the Developer to pursue the contractor and the consultants on behalf of the Public should the Public chose not to do so itself. The Developer is prepared to take on this role if the Public wish and to recover what it can but it would be unwilling to pay for any perceived shortfall. To insist on this additional clause would be to act unreasonably.

The only circumstances in which the proposed amendment would add a modicum of further protection would be if the Public

had a claim against the contractor which the Developer was unable to recover in full because the contractor had become insolvent. In such a case the proposed amendment would, effectively, require the Developer to make good the difference, even though the claim was not based in any way on any default of the Developer.

On paper this may seem to have a superficial attraction, but it immediately gives rise to the question what grounds WEB could advance to the Developer to justify a requirement that it should take on potential future liabilities of the contractor, and how likely the developer would be likely to accede to the suggestion.

In a similar vein the deletions proposed in paragraph (v) (sic) of the proposition are unnecessary. The right of the lessee to redevelop the property during the 150-year term of the ground lease is axiomatic. It would make no sense for the Public, acting as landlord, to object to the redevelopment of assets which are built on its own land. This right was readily granted to the lessee and is provided for at clauses 3.5.1 and 3.5.2 of the lease. This proviso, which it is suggested should be deleted, is no more than a belt and braces provision requested by the lessee so that there will be absolutely no doubt as to the intentions of both parties. To believe that any lessee could commit to a term of 150 years without the ability to rebuild or redevelop would be naivety.

The Finance and Economics Committee urges members to reject these unnecessary and inappropriate amendments.