

6 November 2014

By post and email

London Borough of Hackney
Planning and Regulatory Services
2 Hillman Street
London
E8 1FB

Our ref C2/DUTCHCLA/4572920
Matter ref 1V1881/000014

FAO: Russell Smith, Senior Planning Officer

Dear Sirs

**INFORMATION REQUEST FROM THE HACKNEY SOCIETY AND THE EAST END PRESERVATION SOCIETY
BISHOPSGATE GOODSYARD PO/14/02011 (THE "APPLICATION")**

We act for Bishopsgate Goodsyrd Regeneration Limited ("**BGRL**"), the Applicant in respect of planning application PO/14/02011 which seeks planning permission for the comprehensive redevelopment of the Goodsyrd (the "**Proposed Development**").

1. Request for disclosure of information

We understand that the Council has received a request from The Hackney Society and The East End Preservation Society pursuant to the Freedom of Information Act and the Environmental Information Regulations 2004 (the "**Regulations**") to provide the Financial Viability Assessment in respect of the Application (the "**Document**"). We understand that the request has also been submitted to London Borough of Tower Hamlets and, therefore, we are copying this letter to Tower Hamlets. References to "the Council" in this letter apply equally to the London Borough of Tower Hamlets.

This letter mirrors our letter of 4 November sent to Amy Thompson at the London Borough of Tower Hamlets in relation to an earlier Information Request sent to Tower Hamlets relating to the Application.

This letter sets out our reasons as to why the Document benefits from an exemption in the Regulations, and should not, therefore, be disclosed.

2. Exemption - Regulation 12(5)(e)

The Regulations set out a number of exemptions, being circumstances in which information should not be disclosed pursuant to the Regulations, notwithstanding a request for that information. In particular, Regulation 12(5)(e) of the Regulations states:

"a Public Authority may refuse to disclose information to the extent that its disclosure would adversely affect...the confidentiality of commercial or industrial

information where such confidentiality is provided by law to protect a legitimate economic interest."

In order to ascertain whether the exemption is engaged it is established that four tests need to be satisfied:

1. *Is the information commercial or industrial in nature?*

This element of the test is clearly met in this instance as the information contained within the Document relates to commercial activity, being the construction of the Proposed Development and subsequent disposal of the residential and commercial units forming part of that development.

2. *Is the information subject to confidentiality provided by law?*

We consider that the common law duty of confidence applies to the Document. The Document was clearly marked as being private and confidential and as being exempt under the Freedom of Information Act and Regulations. It was made clear in the covering letter to the Council when the Document was sent to them that BGRL viewed the Document as containing commercially sensitive information and that it was being shared on a confidential basis. The Document itself states "Private & Confidential" on each page and includes a confidentiality statement at the front.

3. *Is the confidentiality provided to protect the legitimate economic interest?*

Legitimate economic interest includes retaining/improving market position, ensuring competitors do not gain access to commercially valuable information and protecting bargaining positions. It has been held that the interest of the confider, in this case BGRL, are relevant in deciding whether this element of the test is engaged. For the reasons set out below, maintaining confidentiality of the Document is essential to protect the legitimate economic interests of BGRL:

Purchase and sales prices, rentals, discount and yield information

The Document sets out the pricing strategy for ground rents at the relevant property, for which no contracts have yet been negotiated. Similarly, annual rents and rent-free periods for commercial leases have also not yet been negotiated and disclosure of this information would provide potential competitors and commercial tenants with an unfair advantage over BGRL. Disclosure of the Document would reveal details of BGRL's finances which competitors and commercial tenants could exploit in any negotiations.

The document sets out the pricing rationale and value expectations for the residential and commercial property components. Disclosure of this information could be used by competitors to their unfair advantage on competing schemes and would be detrimental to BGRL's commercial interests.

In relation to residential sales values, the timing of sales, if known in advance, could be used by bidders and suppliers involved in the construction phase. Potential buyers could also apply commercial pressure in negotiations with the BGRL at those times to negotiate a lower price than they would otherwise contemplate if they did not have knowledge (which, without disclosure, they would not have) that the BGRL needed to confirm all sales by a specific deadline. Disclosure, in this instance, would give buyers an unfair advantage to the

detriment of BGRL who would be denied the opportunity to negotiate on a level playing field.

In a recovering market the value of this information is considerable, and competitors can be expected to scrutinise any information that is disclosed. It is highly likely, therefore, that the disclosure of the Document would result in the identified economic detriment to the interests of BGRL.

Fees Costs and budget information

The Document provides figures for build costs, fit out costs, maintenance costs, management costs and repair costs. None of the main contracts for the development have been let and all remain to be negotiated. In addition, other commercial agreements with adjoining landowners need to be agreed. All of these future negotiations would be seriously impacted by the release of the Document which contains assumptions relating to the value of such contracts and deals. The other parties to the negotiations and tenderers, if they had access to the assumptions, would have a very unfair negotiation position, the end result of which would be that the overall viability of the development would be adversely impacted. In addition, protracted negotiations on these contracts and deals will add risk to the timely delivery of the development and much needed housing.

The same would hold true for information relating to professional, marketing and disposal fees and information on profit margins, financial costs and target returns.

Future applications:

BGRL is a joint venture and the joint venture partners have other interests in the borough. Any future planning applications or site acquisitions would be prejudiced were the information contained in this viability assessment for the site made public as it would provide those objecting to the applications with information that they otherwise would not have (and do not hold in relation to competitors also considering submitting such applications). Further, it would enable competitors to use the disclosed information in relation to the site to the benefit of their own applications placing them at a competitive advantage to BGRL. This would have a knock on effect and would be to the detriment of BGRL's economic interests and the promotion of regeneration schemes within the Borough.

4. *Would the confidentiality be adversely affected by disclosure?*

It is self-evident given the details above that disclosure of the Document would entirely undermine its confidential nature.

Accordingly, in light of the above all of the relevant tests are satisfied and we therefore consider that the exemption contained in Regulation 12(5)(e) of the Regulations is engaged.

3. **Exemption - Regulation 12(5)(f)**

Regulation 12(5)(f) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

"the impacts on the person who provided the information where that person:

- (i) was not under, and could not have been put under, any legal obligation to supply it and that or any other public authority;*

- (ii) *did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and*
- (iii) *has not consented to its disclosure."*

In order to ascertain whether this exemption is engaged it is necessary to establish that the following four tests have been met:

1. *Was BGRL under a legal obligation to provide the information?*

It is clear that BGRL was under no legal obligation to supply the Document. It did so to inform discussions relating to affordable housing and other viability matters. Had it chosen to, though, it need not have provided any viability assessments, and could have relied upon negotiations with the Council to reach an appropriate position on contributions and affordable housing. Therefore, whilst there are good commercial reasons for providing the Document, there was no legal obligation to do so.

2. *Is the Council entitled to disclose the Document, save for pursuant to the Regulations?*

As set out above, it was made abundantly clear to the Council that the Document was being shared on a confidential basis and that the Council had no right to disclose the Document, save to specified entities as agreed with BGRL, including the Council's appointed independent expert.

3. *Has BGRL consented to the disclosure?*

BGR has made it clear in all correspondence to date and further reiterates in this letter that it does not consent to disclosure of the Document.

4. *Would disclosure adversely affect the interests of BGRL?*

For the reasons set out above in respect of Regulation 12(5)(e) disclosure of the Document would have a detrimental effect on the interests of BGRL.

Accordingly, it is clear that the exemption in Regulation 12(5)(f) has been engaged.

4. **Public interest test**

Pursuant to the Regulations once certain exemptions are engaged there is then the need to consider the public interest test to ascertain whether the public interest weighs in favour of disclosure of the information. In this regard it is of particular relevance that the Document is still to be subject to independent scrutiny on behalf of the Council prior to the Application being determined. Whilst it is in the public interest to ensure that appropriate levels of affordable housing and/or affordable housing contribution are secured as part of the planning process, this will be achieved as part of the independent verification process and determination of the Application and it is for the Council to ensure that appropriate provision is made. Given that the Council, being the decision maker as to the required level of provision, has full access to the terms of the Document, the limited public interest served by the disclosure of the Document would clearly be outweighed by the harm to BGRL.

5. Refusal to disclose

It is clearly demonstrated that there are numerous arguments against disclosure relating to the adverse impact that this would have upon BGRL's commercial position and the implementation of the development should planning permission be granted. It has been demonstrated that there is limited public interest in disclosing the Documents given that the Council has full access to all information required to determine the appropriate level of affordable housing contribution. The Document should not be disclosed.

6. Recent decisions relating to similar viability assessments

It is noted that there have been a number of recent decisions from the Information Commissioner and First Tier Tribunal considering the disclosure of viability assessments and, in particular, a number of decisions where it has been determined that those assessments (or parts thereof) had to be released.

It is important to note that First Tier Tribunal's decisions are not binding on itself or others when considering subsequent requests for the release of information and previous decisions do not, therefore, need to be followed. The Tribunal's decisions are merely indicative as to how other future First Tier Tribunal decisions may be made.

Similarly, the Information Commissioner is not bound by other ICO decisions, although they do provide guidance.

Each case must be considered on its own merits with a full analysis of the relevant legal tests. Just because a particular type of assessment was released in respect of one development (meaning either the requisite test to engage the exemption could not be satisfied in that case or that the public interest test weighed in favour of disclosure) it does not mean that it would be appropriate to disclose similar types of assessments in respect of every other development.

Furthermore, even if previous decisions were binding, the Proposed Development is a very different type of development from the Haygate development in Elephant and Castle (which has been the subject of a recent First Tier Tribunal decision) in that it does not involve the expenditure for public funds or the disposal or use of public land. There is, therefore, substantially less public interest in the assessment being released. Additionally, the Proposed Development is at a very different stage in the development process. In respect of all recent decisions requiring disclosure of documents (including those relating to Earls Court) the relevant planning applications had been determined and the local planning authority had completed its own independent analysis of the required level of affordable housing provision. Given that the Application in this case has only just been submitted it would be entirely inappropriate and, for the reasons set out above, would be of limited public interest to disclose the Document at this stage. The potential commercial harm is also significantly greater in this case than in the other analogous cases referred to in the request given the early stage in the planning application process and the fact that no contracts have been let for the Proposed Development.

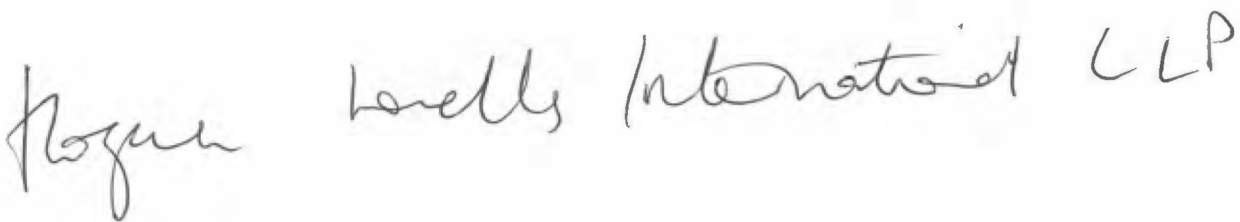
7. Summary

In conclusion, for the reasons set out above it is our firm view that the exemption found in Regulation 12(5) of the Regulations is engaged and a public interest test weighs in favour of the information not being released. The Council should, therefore, not disclose the information requested.

In the event that following consideration of the contents of this letter the Council considers that the Document (or any part thereof) should be released, please revert to us and set out clearly the information within the Document that the Council does not consider meets the requisite tests and/or any public interest arguments in favour of a disclosure. This will enable us to provide any further representations as necessary.

Please acknowledge safe receipt of this letter.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Hogan Lovells International LLP', is written across the middle of the page.

Encs

cc Amy Thompson, LB Tower Hamlets