

**IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)**

BETWEEN

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF SOUTHWARK

Appellant

and

**(1) THE INFORMATION COMMISSIONER'S OFFICE
(2) LEND LEASE (ELEPHANT AND CASTLE) LIMITED
(3) MR A GLASSPOOL**

Respondents

WITNESS STATEMENT OF SIMON BEVAN

I, Simon Bevan of 160 Tooley Street, London SE1 2QH say as follows:

1. I am the Director of Planning at Southwark Council. I make this statement in support of the appeal by Southwark Council against the Decision Notice issued by the Information Commissioner's Office with reference DN FER0461281. I am duly authorised by the Council to do so.

A. Introduction

2. In this witness statement I will set out the key points made in the correspondence with Mr Glasspool and the Information Commissioner in connection with Mr Glasspool's request for the viability assessment submitted by the Second Respondent (Lend Lease) in the course of its application for planning permission to redevelop the Heygate Estate.

3. I will explain Southwark Council's planning policy on affordable housing, in the borough as a whole and in the Elephant and Castle area, and the key aspects of the planning process in relation to the Heygate Estate development.
4. I will then explain the process which planning officers follow when they are presented with a viability assessment, including the expert analysis which will be obtained, the confidentiality of that process, and the process for balancing the need for members to make an informed decision against the need for the developer to maintain the commercial confidentiality of their business data. I will explain how that process operated in the Heygate case.
5. I will go on to explain the ways in which the planning process would be prejudiced if the content of a viability assessment was required to be made publicly available.
6. In addition I will explain why any perceived conflict of interest between the Council's roles as landowner and planning authority is misconceived. I will also explain that disclosure of the viability assessment is not capable of assuaging a perception of a conflict, nor concerns about value for money from the disposal¹, as it does not shed any light on whether best value for the land was in fact achieved.

B. Correspondence with Mr Glasspool and the ICO

7. The request for the viability assessment was received by the Council on 10 May 2012. The requested information was received on 16 May 2012. Therefore the information in the viability assessment could not have been more current at the time of the request.
8. The Council wrote to Mr Glasspool on 8 June 2012 refusing his request. A copy of this e-mail appears at [Open Bundle Tab D pages 3-4]. The Council relied on Regulation 12(5)(e) of the Environmental Information Regulations 2004 (EIR). As will be seen from section E below, at the time of the refusal the Council was seeking detailed expert advice from a third party, the District Valuer Service.

¹ Decision Notice paragraph 107

However the Council was well aware of the confidentiality of the information and its commercial sensitivity to Lend Lease.

9. Mr Glasspool sought an internal review of the decision on 11 June 2012. On 16 August 2012 the Council responded, confirming that the Council had considered the review and decided that the original decision should be maintained. A copy of the letter appears at [Open Bundle Tab D pages 11-14].
10. On 23 August 2012 the Information Commissioner's Office (ICO) wrote to the Council to confirm that Mr Glasspool had raised a complaint with the ICO about the Council's handling of the request. On 26 November 2012 the ICO wrote again to confirm that the matter was being investigated, and asking the Council to provide certain information. Copies of these letters appear at [Open Bundle Tab E pages 3-5 and 15-18].
11. The Council responded by a letter dated 29 January 2013, a copy of which appears at [Open Bundle Tab E pages 23-35]. The Council confirmed that it was sending the ICO a copy of the withheld information separately by courier, and would also provide a schedule explaining the exemptions which had been applied. (This schedule was sent in April 2013 owing to staff absences – see paragraph 23 below). The letter made clear the obligations of confidentiality attaching to the information.
12. In its letter the Council explained the ways in which the withheld information satisfied the criteria required by Regulation 12(5)(e) of the EIR, namely its commercial or industrial nature; the duty of confidence which applied to that information; that the confidentiality was required to protect an economic interest; and the prejudice to that economic interest which would be caused by disclosure. On the latter point the Council broke down the information by type and explained the ways in which disclosure would be harmful to Lend Lease's economic interests. I understand that the ICO has accepted that disclosure would prejudice Lend Lease's economic interests².

² Decision Notice paragraph 157

13. The Council also identified the public interest factors for and against disclosure. It recognised the general interest in transparency, but identified a number of key issues in favour of withholding the information. Principally these were that (i) disclosure would have significant adverse effects on the progress of the much-needed redevelopment, and would negatively affect the working relationship between Lend Lease and the Council; (ii) that the viability, legality and suitability of the proposed development comes under significant scrutiny through the planning process and compulsory purchase inquiry, and (iii) the analysis by the District Valuer Service, which, as a body independent from both Lend Lease and the Council, ensures that the reasoning and conclusions of the viability assessment are as robust and reliable as is possible. All of these processes satisfy the public interest in transparency and accountability without carrying the risks to the progress of development which disclosure of the viability assessment would entail.
14. The Council also dealt with the exceptions in Regulations 12(5)(c) (intellectual property rights) and 12(5)(f) (interests of person providing the information) of the EIR, in each case considering the specific public interest factors which applied.
15. As a general point the Council noted in its letter dated 29 January 2013 that, although it had so far responded to the request under the EIR, it wished the ICO to consider whether it would be more appropriate to apply the provisions of the Freedom of Information Act 2000 (FOIA) to the material relating to costings and the financial modelling.
16. On 3 March 2013, following an e-mail from the ICO dated 11 February 2013, the Council provided the ICO with a copy of the report from the District Valuer's Office dated 15 January 2013, in strict confidence. Copies of these e-mails appear at [Open Bundle Tab E pages 43-45].
17. The ICO raised a number of further queries with the Council. Copies of these queries appear at [Open Bundle Tab E pages 37-42]. For convenience the Council responded to all these together, in a letter dated 15 April 2013. A copy appears at [Open Bundle Tab E pages 47-62].

18. The Council clarified that the request had been received before the information was actually submitted to the Council by Lend Lease. Pausing there, strictly speaking the Council could have refused the request on the basis that the information was not held at the time of the request. However the Council took the view that this would be an unhelpful response, given that the information was received during the period in which the response was required, and refusal on this ground would simply generate a further identical request which would have to be considered substantively. Therefore the Council did not contest the point.
19. The Council explained the planning policy framework giving rise to the submission of the viability assessment, the Council's policies regarding affordable housing, and the ways in which these requirements are weighed against other policy objectives – this is explained further in section C below.
20. The Council also pointed out a number of key differences between this case and that of the Waltham Forest Decision Notice which the ICO had referred to.
21. Further the Council provided information about the costs incurred by the Council in connection with the project and the structure of the Regeneration Agreement entered into with Lend Lease – this is explained further in the statement of my colleague Jon Abbott.
22. Finally the Council explained that the information contained in the viability assessment covered a very significant period, and the assumptions and projections remained commercially sensitive, particularly whilst the development remained in a conditional phase.
23. On 26 April 2013 the Council wrote again to the ICO enclosing the Schedule of Redactions referred to in paragraph 11 above. A copy of the letter appears at [Open Bundle Tab E pages 63-66]. The Council confirmed that much of the main body of the report could be disclosed, along with Appendices 1-3, 5 and 21. The enclosed Schedule explained the reasons for withholding the balance of the information, by reference to the Regulations which it believed were applicable, and the information set out in the letter dated 29 January 2013.

24. The information which the Council was willing to disclose was sent to Mr Glasspool by a letter dated 28 May 2013, a copy of which appears at [Open Bundle Tab E pages 77-206].
25. The ICO's Decision Notice was issued on 16 July 2013. The ICO decided that the entirety of the viability assessment should be disclosed, broadly on the grounds that whilst the disclosure would cause harm to Lend Lease, the balance of the public interest was in favour of disclosure. The Council believes that this decision was wrong, for the reasons given below and in the statement of my colleague Jon Abbott.
26. The ICO stated in paragraph 45 of the Decision Notice that the viability assessment had been withheld in its entirety. This is obviously incorrect in light of paragraphs 23-24 above.

C. Planning policy on affordable housing and viability

27. In 1995, recognising the unique problems associated with the Elephant and Castle area, it was designated by Southwark Council as an area requiring regeneration. Proposals were put forward in 2002 to pave the way for a major redevelopment: these led to the publication in 2003 of a draft development framework.
28. This was adopted in February 2004 as Supplementary Planning Guidance, which promoted the demolition of the Estate and the delivery of a low carbon mixed use town centre, made up of residential, commercial, leisure, business, and public spaces. The consultation on the SPG won the support of 80% of the local community. These objectives formed part of the Southwark Plan which was adopted following a public inquiry in 2007.
29. The London Plan issued by the Greater London Authority (GLA) in 2011 identifies a number of "Opportunity Areas" which are described as "brownfield land with significant capacity for new housing, commercial and other development linked to existing or potential improvements to public transport accessibility". The GLA estimated that regeneration of the Elephant and Castle Opportunity Area was capable of delivering 5,000 jobs and 4,000 new homes

between 2011 and 2031, as can be seen from the extract at [Open Bundle Tab F1 page 1].

30. Southwark Council's Core Strategy 2011 sets out the Council's strategic planning framework for the borough. It also targets 5,000 new jobs and 4,000 new homes for the Elephant and Castle area, and in addition about 45,000 square metres of additional shopping and leisure space. It further states that, in the Elephant and Castle Opportunity Area, at least 35% of new homes should be affordable, and includes a target of delivering at least 1400 new affordable homes in the Opportunity Area between 2011 and 2026 [Open Bundle Tab F1 pages 3-4A].
31. In this context, "affordable" means the following types of accommodation: "social rented" (owned by the Council or registered providers of social housing, and let at "target rents" of about 40% of local market rents); "affordable rented" housing (i.e. housing let by the Council or registered providers at up to 80% of market rents); and "intermediate" housing (which includes a range of types, of which the Council tends to favour shared ownership housing). As noted in the statement of my colleague Jon Abbott, the Council recognises that rents at or near 80% of market rates would be beyond the reach of most Council tenants, and therefore it seeks to set lower capped rents on "affordable rented" homes through the planning process (see for example the report to the Council's Planning Committee dated 20 December 2011, at [Open Bundle Tab F1 pages 5-11]).
32. The commitments in the Core Strategy were reiterated in the Council's Elephant and Castle Supplementary Planning Document 2012 (SPD) [Open Bundle Tab F1 page 13]. The SPD states that, of the affordable homes, 50% should be social rented and 50% "intermediate". This split was decided upon because the Council's policy is to help create mixed and balanced communities where possible.
33. As noted in the statement of my colleague Jon Abbott, the Heygate redevelopment will contribute between 587 and 617 affordable homes to the Council's targeted figure of 1,400 between 2011 and 2026. In addition 77 affordable homes were completed in the Opportunity Area in 2011/12, and, in addition to the affordable homes on the redeveloped Heygate Estate, a further 68 affordable homes have been approved but not yet built in the Opportunity Area.

34. In addition, the GLA has approved the inclusion of the affordable homes delivered to replace those on the Heygate Estate (referred to in the statement of Jon Abbott as "Early Housing" sites) for the purposes of the target in the Core Strategy. Of these, 277 affordable homes have been completed, and a further 232 are under construction or about to be started. Taking these homes into consideration, the total number of new affordable homes will be 1,117 - 1,147, and only 253 – 283 further affordable homes will need to be delivered by 2026 in order to meet the target in the Core Strategy.
35. It can therefore be seen that while the number of affordable homes on the Heygate Estate itself will reduce, the number of affordable homes in the area will increase substantially, in line with the Council's policies.
36. Further the Council was fully entitled to consider the particular circumstances pertaining to that scheme when considering the level of affordable housing which would be required as a condition for granting planning permission. Indeed this is required by national and strategic planning policy.
37. The National Planning Policy Framework (NPPF) issued by Central Government in 2012 specifies at paragraph 173 that Councils should not subject a development:
- "to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking into account the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable".*
38. This is reflected in the London Plan, which requires that the maximum reasonable amount of affordable housing should be sought, taking into account the need to encourage development, and to promote mixed and balanced communities [Policy 3.12, Open Bundle Tab F1 pages 15-16].

39. The Council has long recognised that the obligation to deliver affordable housing must be balanced against the need to help development to proceed, for the benefit of the whole community. Its Supplementary Planning Document 2008 on Affordable Housing states that, if a party making a planning application suggests that it is unable to provide the amount of affordable housing required by policy, the Council will require the applicant to submit an open book financial appraisal to support that position [Open Bundle Tab F1 pages 19-20]. This is known as a "viability assessment". If this is not done the Council will refuse the application, but nevertheless the submission of a viability assessment is not a legal requirement of making a planning application and is done on a voluntary basis.
40. In essence a viability assessment contains the projected costs of, and revenues from, a proposed development, including a reasonable level of profit. The developer will argue, on the basis of this assessment, that the Council's requirements for affordable housing and other planning policy obligations mean that the scheme is not sufficiently profitable for the developer to be able to proceed. The provision of the viability assessment allows the Council to probe and test these assertions, so that it can consider whether to relax its planning requirements in that particular case, in order to enable the scheme to be delivered.
41. None of the Council's planning officers has the expertise to analyse a viability assessment, however. The Council planning officers refer all viability assessments, without exception, either to the District Valuer Service, or to the Council's internal Property Valuation team.
42. As the information contained in a viability assessment is always commercially sensitive, it is usual for the developer to supply it, and the Council to receive it, on a confidential basis³.

D. The role of the District Valuer Service (DVS)

43. The Valuation Office Agency is an executive agency of Her Majesty's Revenue and Customs. DVS is its commercial property services arm. DVS provides

³ See DN paragraph 34.

valuation advice to a number of clients in the public sector. It has particular expertise on issues of viability arising in the context of development and planning negotiations. DVS does not make a profit beyond charges for its case worker time based on published hourly and daily rates. DVS does not act for private sector clients so that there is no risk of a conflict of interest.

44. DVS will interrogate the data supplied by the developer in order to assess whether their projections are robust – it will check for areas in which projected costs have been overstated, projected revenues understated, or required profit levels set too high.
45. DVS has been involved with a large number of large-scale and complex development viability reviews, and so has built up a bank of market intelligence which is invaluable in assessing a particular proposal. In addition DVS has access to data on stamp duty paid on all property transactions together with comprehensive descriptions of sold property, and details of all land sales, which form a unique database of transactions for use in assessing the capital values of different types of property and land. Further DVS has access to confidential market information including prices paid by Registered Providers of social housing, development profit requirements, and the level of ancillary costs incurred by developers, which are not publicly available, but can be used provided that the source of the data is not disclosed. All this means that DVS is able to provide a very robust and impartial analysis of the developer's viability assessment.
46. The above is explained in DVS' letter to the Council dated 10 October 2011, a copy of which appears at [Open Bundle Tab F1 pages 21-30]: it will be noted from the accompanying Standard Terms of Business that DVS undertakes to respect the commercial confidentiality of the data to be analysed [Open Bundle Tab F1 page 36]. The Council accepted those terms of business without amendment.
47. In many cases DVS will ask the developer to provide further information to support the projected figures and suggest changes to the assumptions and projections made by the developer. The developer will often amend some of the

raw data in the viability assessment so that the consequences of DVS's recommended changes can be demonstrated and discussed.

48. Council officers will not be directly involved in the discussions but they will be aware that the discussions are happening and DVS will provide updates on progress and his emerging conclusions. The process will often take several months.
49. Once DVS has reached a conclusion on the developer's financial model, it will provide a report to the Council. As that report will deal with the highly confidential data supplied with the viability assessment, and provide information on the recommended approach to the assessment of the viability arguments, the Council keeps DVS's report strictly confidential also.
50. If DVS has concluded that the applicant's viability assessment does not support the contention that the Council's policy requirements cannot be delivered, the planning case officer will notify the developer that the application will not be recommended for Planning Committee approval. It will then be up to the developer to re-examine its business plan and decide whether it wishes to continue with the application. The developer may go back to its development partners and attempt to renegotiate aspects of its business plan, in order to improve the profitability of the scheme. (In cases where the Council is selling the land, the developer may contact the regeneration and development team to discuss the terms of the sale/lease: planning officers would have absolutely no involvement in such discussions. For the avoidance of doubt, it should be noted that no planning officers were involved in any discussions throughout the negotiation of the terms of the sale of the relevant land.)
51. If it wishes to proceed, the developer would revert to the planning department with a revised proposal which would then be considered in light of the DVS's report. Further negotiations may take place between the planning officer and the developer until a final form of the proposal is arrived at.
52. The planning case officer will then prepare a report to the Planning Committee. This is a public document. The report will give the members of the Committee sufficient information to decide whether to approve the application, but officers

take care to ensure that commercially sensitive information is not disclosed in the report.

53. In this context, it may be noted that, in some cases, individual members of the Planning Committee have expressed the view that, within the framework of the Council's duties of confidentiality, they would wish to review either the viability assessment, or the DVS's report. In response, on 17 September 2013, the Planning Committee approved a protocol for dealing with individual requests for sight of the confidential data. A copy of the protocol appears at [Open Bundle Tab F1 pages 39-42]. As can be seen, the protocol states at paragraph 2.3 that:

"where [commercially confidential and sensitive] information is provided on a confidential basis the Council is invariably under a duty not to disclose that information to anyone else unless allowed or required to do so by law".

The report also notes at paragraph 2.4 that it would seem unlikely that members of the Committee would need to know the details of the viability assessment in order to reach a decision, and that:

"More relevant will be the findings of the Council's own valuer (in many cases the Valuation Office) following an independent assessment of the scheme's viability and which draws conclusions upon the appraisal prepared on behalf of developers. These findings will inevitably contain references to the confidential information in the original appraisal and its confidentiality must be similarly protected".

54. The protocol also refers to the East Staffordshire case in which it was held proper for the Committee to make its decision based on a summary of the viability information which had been subjected to independent scrutiny (paragraph 4.2) and that the officers' report should summarise the gist of the material without disclosing commercially confidential data (paragraph 4.3).

55. The protocol states that in circumstances where an individual member wishes to see such information this must be requested with reasons from the Head of Development Management who will notify the member in writing of his/her

decision with reasons (paragraph 5.2). In circumstances where s/he concludes that the member should be given access to the information, the Head may impose reasonable conditions to preserve the confidentiality of the data (paragraph 5.3) and the protocol confirms that the commercially confidential data must not be disclosed at or discussed in the open session of the Planning Committee.

56. This protocol describes the Council's approach to confidentiality and demonstrates that it has been acutely aware of its obligations to the holder of the confidential information, and of the likely commercial sensitivity of such information. It has taken steps to enable individual members, where they so wish and where appropriate, to see the material without compromising that confidentiality; and without altering the basis (i.e. independent scrutiny, summarised in a public report by officers) on which the Committee may take the decision.

E. The Heygate planning application and DVS involvement

57. A number of meetings took place in 2011 and early 2012 between representatives of Lend Lease and Council planning officers. The minutes and email records show that the parties discussed, among other things, the Council's policy on s.106 contributions and the timing of implementation of the Community Infrastructure Levy (CiL), the appointment of an expert to examine Lend Lease's viability assessment, possible ways of structuring affordable housing provision, the parallel negotiations with the Greater London Authority / Transport for London, and the level of "section 106" contributions.

58. The Council had been aware since the signature of the Regeneration Agreement that Lend Lease's proposal for the development included an element of affordable housing which was less than that required by the Council's policy, and therefore that the viability of the scheme would be an issue. The Council briefed DVS in the Summer of 2011, and it was agreed in October 2011 that DVS would advise the Council on the main Heygate Estate and the development to the East of Rodney Road which was being dealt with separately [Open Bundle Tab F1 pages 21-37].

59. The minutes show that one of the meetings in late 2011 was attended by a representative of DVS, in order for Lend Lease to explain the financial model which they had developed and their key concerns in relation to the viability of the project. After the meeting DVS emailed Lend Lease with information which the viability assessment would need to cover in order for the Council to make an informed decision. It is quite normal for the Council to give guidance to the applicant on the information which the Council will require in the course of negotiations on planning conditions.
60. A number of other planning requirements were also discussed by the Council and Lend Lease during 2012 and early 2013 (these discussions did not involve DVS). For example, Lend Lease agreed to provide, or make financial contributions towards: strategic transport improvements; affordable retail units; a public park; new roads and cycle routes; extended bus services and stands; lighting; landscaping; health provision; and play facilities for older children. This is on top of the statutory payments to the Mayor of London through the CiL. All these contributions are required to be funded through the scheme's profits, and it is the planning officer's role to try to achieve the best overall package of contributions, including the provision of affordable housing, in the public interest.
61. (Further the project is unusual in that in addition to these planning obligations Lend Lease will also fund and deliver the infrastructure and energy requirements of the development: it is essentially building an entire town centre, at its own risk. Many of these elements would normally be provided by the Council, so in this case the revenue from the residential units needs to fund this work in addition to the section 106 and CiL contributions as well as the developer's profit margin.)
62. Lend Lease submitted its outline planning application for the main Heygate Estate on 2 April 2012. It proposed demolition of all existing structures and construction of a mixed-use development comprising a number of buildings of a range of heights between about 4 and 100 metres, with planned uses including residential, business, leisure and community uses. A plan showing the proposed development in outline is at [Open Bundle Tab F1 page 43].
63. The proposal on affordable housing was that Lend Lease would deliver as much affordable housing as was financially viable, with 50% of the affordable units

being rented and 50% shared ownership housing [Open Bundle Tab F1 page 45]. Consultation on the application commenced on 12 May 2012.

64. Mr Glasspool, the requester in this case, made three responses to the consultation on the outline planning application, copies of which appear at [Open Bundle Tab F1 pages 53-62]. First he submitted a short response on 28 May 2012, followed on 16 July 2012 by a written response dealing with the issues of environmental impact, public realm, transport and social impact. (Mr Glasspool's reference to "1200 affordable homes" appears to relate to the total number of homes built on the Estate (1,212), of which 179 had in fact been bought by leaseholders including himself.) Mr Glasspool also submitted a representation on the proposed level of affordable housing which was submitted in identical terms by 51 other residents of the Elephant and Castle area, and read: *"To lose 1200 affordable homes on the Heygate estate in the middle of a housing crisis is not right. Southwark needs all the affordable homes it can get. A future "viability" test is entirely inadequate and belies the consistent promises throughout the applicant's "consultation" process. Even if 25% 'affordable' is to be included, the Council's policy will not have been followed. Throughout the consultation process the public has been misled about affordable housing provision"*.
65. On 16 May 2012, Lend Lease submitted to the Council a viability assessment in support of its contention that meeting the Council's policy requirement of 35% affordable housing would render the development unviable. The following information has been provided to me by Ms Bridin O'Connor (the planning officer dealing with the application) following her review of the case file and her email records.
66. Lend Lease's planning agent (DP9) handed three identical discs (with an accompanying covering letter dated 16 May 2012) over to Ms O'Connor at a meeting held at the Council's Tooley Street offices. A copy of DP9's letter appears at [Open Bundle Tab F1 page 51]. The letter stated "this Viability Assessment is submitted on a private and confidential basis as it contains information that is commercially sensitive. It does not form part of the formal planning application". I believe that this created a legal obligation on the Council to keep the viability assessment confidential. However, from the previous

discussions, outlined above, Lend Lease was aware that the Council would supply a copy of the information to the DVS in confidence in order to receive expert advice.

67. (I am also aware that the Council owes a contractual duty of confidence to Lend Lease in respect of the Viability Assessment, as confirmed in the Council's response letter to Mr Glasspool dated 16 August 2012 [Open Bundle, Tab D, pages 7 – 14].)
68. One disc was kept on the Council's planning file; one was passed to the Council's Property Valuation team, and one was passed to the valuer at DVS who was handling the case, Chris Kench.
69. As noted above, the DVS' Standard Terms of Business confirm that DVS undertakes to respect the commercial confidentiality of the data to be analysed. The viability assessment was clearly marked as confidential and as noted above the Council is fully aware of its duty of confidentiality. I believe that in the circumstances in which the information was passed to the DVS, it was clear that it contained matters which the relevant officers of the DVS knew were confidential, both to Lend Lease and the Council and, indeed, that any reasonable person would have known that they were confidential, both to the Council and Lend Lease. Further I have been informed by Lend Lease that Charles Solomon of DVS signed a non-disclosure agreement in relation to the viability assessment.
70. The viability assessment comprised a narrative report, a number of appendices, and a large spreadsheet showing the detailed projected costs and revenues associated with the project. It was marked "Strictly Private and Confidential". The document was saved as 23 files comprising the main viability assessment (Chapters 1 to 12) together with 22 Appendices. All the files were in pdf format with the exception of Appendix 22 which was an Excel spreadsheet of the Financial Appraisal Model and was password-protected. I am informed by Ms O'Connor that Helen Goulden (Planning Team Leader – Strategic Applications) obtained the password from Lend Lease but was still unable to access the

spreadsheet as the Council's computer systems were not compatible with the version of Excel used. All the pdf files could be viewed.

71. The information contained in the viability assessment has not been disclosed by the Council to any person who is not an employee of the Council or of the DVS.
72. On 7 June 2012, Lend Lease submitted to the Council an updated version of the viability assessment. Again three identical discs (and an accompanying covering letter) were submitted. The submission also included a letter (dated 6 June 2012) from Savills explaining the amendments and additional appendices. This superseded the 16 May 2012 submission. The 7 June version of the viability assessment was also marked "Strictly Private and Confidential". A copy of the letter from DP9 appears at [Open Bundle Tab F1 page 63].
73. The files on the disc followed the same format as before with an updated Viability Report and 22 Appendices. All the files were in pdf format with the exception of Appendix 22 which contained the financial model on an Excel spreadsheet. Again, the model could not be opened as the file was incompatible with the Council's computer systems. All the pdf files could be viewed.
74. None of the information has been disclosed by the Council to any person who is not an employee of the Council or of the DVS.
75. Mr Kench and his team then carried out a rigorous interrogation of the assessment submitted by Lend Lease. They quickly identified a number of areas which they wished to probe further, including the way in which the value of the land should be assessed, build costs, inconsistencies in the valuation of the affordable housing, the required profit levels, and projected increases in sales values. These issues were discussed by DVS with Lend Lease and their advisers. DVS updated Council officers on progress by email and in meetings.
76. DVS provided a draft report to Ms Goulden and Ms O'Connor on 16 July 2012. The report confirmed that DVS had:
 - a. Reviewed the viability assessment;

- b. Carried out market research into all the key elements affecting viability, including sales values, land values, build costs, fees, profit levels and finance;
 - c. Applied the evidence within the developer's financial model; and
 - d. Undertaken analysis of a number of different scenarios and market conditions.
77. The report provided a comprehensive analysis of the viability assessment. It described the site and surrounding area, and the planning permission sought. It explained the way in which a development assessment should be carried out. It explained that, in view of the fact that the project was likely to go on for 10 years or more, the developer had estimated its likely costs and revenues over time, rather than at "day one", using a model which allowed for different assumptions about trends in costs and revenues to be inserted.
78. The report explained that the developer's advisers had assessed the viability of the scheme by reference to a required level of profit as a proportion of the gross development cost. DVS was of the view that this was too crude and not appropriate for this type of development.
79. DVS advised that a more appropriate method for a long-running, phased project such as this was the "Internal Rate of Return" (IRR). This compares the present value of the expected cash flows, plus the projected market value of the completed project, against the current market price of the opportunity: the IRR is the percentage required to make the investment value equal to the price. If that percentage is higher than the return for a similar opportunity, or the cost of financing the opportunity, a development is normally seen as worthwhile.
80. DVS considered that the developer's IRR requirement was too high, and advised that the DVS had adopted a lower benchmark target IRR.
81. DVS considered that a number of the projections in the viability assessment were too conservative. For example, the projected values of the units in the high-rise blocks were too low, professional fees too high, and the cost of finance higher than DVS would have expected. DVS also noted that a "Development

Management Fee” had been added, which in effect operated as additional profit and should be recognised as such. DVS also considered that the projected increase in sales values was over-conservative, though of course market conditions were somewhat different than in the previous property cycles. In addition he concluded that there was scope for Lend Lease to make further savings in the development costs over the life of the project.

82. On the Affordable Housing proposal, DVS noted that Southwark’s requirements were comparatively onerous: for example, it set low salary thresholds for shared ownership units, and promoted social housing rather than “affordable rented” housing – these requirements tended to depress the capital values of the units. However DVS considered that the value per square foot adopted by the developer for the social rented homes was too conservative, having regard to the increase in quality of the new homes. DVS was largely satisfied with the conclusions on the retail units, though it considered that the supermarket may have been undervalued.
83. DVS considered that the developer’s assumptions in relation to other matters such as car parking were reasonable and amendment would have limited effect on the overall viability of the scheme.
84. Overall, however, DVS was broadly satisfied with the viability methodology, and concluded that, having run a number of alternative scenarios to deal with the concerns mentioned above, the scheme would not be viable with an affordable housing component of 35%. However DVS concluded that further information was necessary to clarify certain outstanding points.
85. The draft report was shared with Lend Lease on 23 July 2012. Lend Lease undertook to provide certain further information needed by DVS in order to finalise the report. This was provided on 7 August 2012 and Mr Kench provided his comments to the Council on 14 August: progress had been made but issues remained outstanding, particularly around the projected development costs and the appropriate level of profit and how that should be calculated. Discussions continued between DVS and Lend Lease / its advisers and on 19 September 2012 Mr Kench provided a further update to the Council.

86. He advised that the position on development costs had broadly been agreed, and that Savills were looking at different ways to structure the affordable housing provision. However he advised that, even adopting the lower level of profit which he considered reasonable, there was still a significant gap, and that this would justify provision of less than 25% affordable housing if it enabled the development to be delivered in an acceptable timeframe.
87. Lend Lease's planning application for the Heygate Estate was revised on 28 September 2012. The application for permission to carry out the demolition works was removed and made the subject of a separate application. The outline application for the redevelopment works was amended to include improved design, an increase in the maximum number of residential units to 2,469 (a net increase of up to 1,362 on the current total), and an updated affordable housing strategy, among other things.
88. The revised proposal for affordable housing was in summary that 25% of the total number of units would be affordable housing (the maximum total number had been increased as noted above). 50% of the affordable units were to be rented: the larger units of 3 and 4 bedrooms would be offered at social rent levels (about 40% of market rent) to support families, whilst the smaller properties of 1 and 2 bedrooms were to be offered at no more than 50% of market rent. The remaining 50% of the affordable units were to be intermediate homes offered on a shared ownership basis [Open Bundle Tab F1 page 65]. Half of these units would be offered to households meeting the Greater London Authority income thresholds, and half at the lower income thresholds set by the Council.
89. Consultation on the revised application was conducted between 12 October 2012 and 2 November 2012. Again there were a huge number of responses. Mr Glasspool responded to this consultation also, via the Heygate Leaseholders Group for which he is the spokesman. A copy of this response appears at [Open Bundle Tab F1 pages 69-74]. Mr Glasspool noted that the minimum target of 25% affordable housing had now been included in the housing statement, but argued that it was still not compliant with Southwark's policies, and that the "affordable rented" product was beyond the reach of most of his former neighbours on the estate.

90. During October 2012 DVS requested an updated version of Lend Lease's financial model and a copy of the calculations relating to the value of the affordable rented and intermediate units. Savills sent the revised model to the DVS on 7 November 2012.
91. The GLA was also in discussions with Lend Lease, about Lend Lease's contribution to transport improvements. At this time the GLA was also asking for this revised data, which was being analysed by its advisers DTZ.
92. Following provision of further information by Lend Lease, DVS provided an updated version of its report to the Council on 16 November 2012. DVS's final conclusions were that the scheme was clearly unviable with an affordable housing component of 35%. The report noted that, whilst there remained disagreements between DVS and Lend Lease, DVS had concluded that there would be a profit gap if the Council insisted on delivery of this proportion of affordable housing (i.e. a deficit in profit which would be required to be closed in order for the scheme to be delivered). DVS concluded that Lend Lease's offer of 25% affordable housing was reasonable in these circumstances and even at this level of affordable housing there was still a profit gap. In recommending the acceptance of the 25% affordable housing offer DVS suggested that there should be some level of safeguarding by way of a review mechanism linked with delivery.⁴
93. As can be seen from the paragraphs above, Lend Lease's proposal and assumptions were subject to expert and rigorous analysis by DVS on behalf of the Council.
94. A number of planning officers prepared a report to the Planning Committee on the proposed development. A copy of the report appears at [Open Bundle Tab F1

⁴ Mr Glasspool referred at paragraph 22 of his Response to the approach to viability taken in connection with the neighbouring Tribeca Square site. I do not see the relevance of this. The developer in that case, Delancey, is not a "development partner" of Lend Lease and there is no reason to link the two applications.

pages 75-274]⁵. In drafting the report the officers were mindful of the fact that the financial information submitted by Lend Lease, and interrogated and reported on by the DVS, was highly confidential and commercially sensitive. Therefore the officers drafted the report in such a way as to convey the key information to the Planning Committee, whilst preserving the confidentiality of the underlying data, in accordance with the Council's usual practice.

95. The report recommended at paragraph 1 that planning permission for the development be granted, subject to certain conditions, signature of a "section 106 agreement", and approval by the Mayor of London.
96. The report noted at paragraph 149 that the level of affordable housing was below the target in the Council's planning policies. The report explained that Lend Lease's viability assessment had been scrutinised by the DVS and that his advice was that the financial appraisal presented a reasonable account of the viability of the scheme. Whilst there were differences of opinion as to the scale of the profit deficit, the DVS was of the view that a policy requirement of 35% affordable housing would render the scheme unviable (paragraph 150 of the Council's report). The report confirmed that Lend Lease's conclusions were based on the agreed sale price for the land; but even if the "existing use value" of the land was adopted, which was a lower value and therefore should improve profitability, the scheme was still unviable and incapable of supporting the Council's policy requirements for affordable housing (paragraph 152).
97. The report explained the particular difficulties facing the developer, including for example the high up-front costs, and long lead-in period before construction and sale could begin, which would increase finance costs (paragraph 151), the imposition of the Community Infrastructure Levy in 2010, and the withdrawal of funding for affordable housing from the Homes and Communities Agency (paragraph 161).

⁵ Online at

<http://modern.gov.southwark.gov.uk/documents/g4301/Public%20reports%20pack%20Tuesday%2015-Jan-2013%2018.00%20Planning%20Committee.pdf?T=10>

98. The report confirmed that Lend Lease remained committing to delivering the 25% affordable housing required under the Regeneration Agreement, in spite of the risks associated with achieving this (paragraphs 153, 162). It stated that the planning officers' view was that the package was sufficient to satisfy the policies in the Core Strategy and London Plan. It also noted that the development together with the Council's programme of development of its own sites in the area would mean that the requirement to replace the number of affordable homes on the existing Estate would be satisfied (paragraph 163) and that the area would benefit from the mix of tenures in the affordable housing element (paragraph 164).
99. The report also noted that there was a mechanism to review the affordable housing package, if the start of the project was delayed by 2 years (in case of an upturn in the property market), or if grant funding became available in the course of the programme (paragraphs 153-155).
100. In addition it explained that the affordable housing would be delivered evenly across the project (unlike in many others where it tends to be built towards the end of the project) and that the proposal was to build a higher proportion of larger, family homes, and shared ownership homes, in the early phases (paragraph 157).
101. The report also dealt with the issues of car parking and biomass energy referred to by Mr Glasspool in his response in this appeal.
102. The report noted at paragraph 226 that the Southwark Plan required development to be car-free, except for spaces for disabled drivers and car clubs. The report noted that DVS had accepted as reasonable Lend Lease's belief that the additional interest which these parking spaces would generate would help to increase the viability of the development. The report also noted that the detailed provision for each plot would be dealt with in the future detailed planning applications. The report also noted actions which the Council was taking to discourage car use, such as the provision of free car club membership (paragraph 228).

103. The report considered the requirements for clean energy in detail, at paragraphs 400 to 416. As can be seen, the issues principally concerned the use of emerging technology to deliver the greatest possible reduction in emissions, and the impact that the number of large lorries servicing the plant on a daily basis would have on the amenity of residents. Viability was not raised as an issue.
104. The application was considered by the Planning Committee on 15 January 2013. A copy of the minutes appears at [Open Bundle Tab F1 pages 275-279] and a copy of a report from the local LondonSE1 website (<http://www.london-se1.co.uk/news/view/6545>) appears at [Open Bundle Tab F1 pages 281-285].
105. The Committee was attended by a large number of members of the public, including Mr Glasspool, and there was a lively and prolonged debate of all the issues, including the provision of affordable housing. The meeting had to be adjourned at one point as interjections by members of the public were making debate impossible.
106. The Council's report was presented by Ms O'Connor. She explained the benefits of the proposed scheme, and the delivery of at least 1,069 replacement affordable homes through the redevelopment of the Estate and the Council's programme of developing its own "Early Housing" sites. She explained that Lend Lease's viability assessment showed that the scheme was only viable with 9.4% affordable housing, but Lend Lease was committed to providing 25% as agreed and was taking on the risk of finding the additional money to deliver this.
107. Following the debate, which lasted for 6 hours, the Committee passed a resolution to approve the planning application, conditional upon Lend Lease entering into a legal "section 106 agreement" recording the developer's obligations, and referral to the Mayor of London.
108. The Mayor of London has the right to take responsibility for planning decisions which are of potential strategic importance for London. Before taking such decisions itself, the Council must send to the Mayor all the representations received, the report to the Planning Committee, and a statement of the conditions

and planning obligations which it proposes to impose. This was done in relation to the Heygate application on 21 February 2013.

109. The Greater London Authority confirmed on 27 February 2013 that the resolution had been approved and would not be called in for further consideration [Open Bundle Tab F1 page 287]. The GLA's planning report dealt with the issue of affordable housing at paragraphs 15 to 24. The GLA noted that the proposed mix of tenures was consistent with the London Plan's policies regarding mixed, balanced communities, and estate renewal.

110. The report also noted that both the Council and the GLA had had Lend Lease's viability assessment analysed by third party consultants. The report explained that both consultants had concluded that the scheme was not viable at present and would become less so as the affordable housing requirement increased towards 35%, owing to factors such as the scale and length of the development and the associated increase in finance costs and delay in starting to sell units. The report also noted that Lend Lease was committed to satisfying its obligation to provide 25% affordable housing, and that the proposed section 106 agreement contained mechanisms to improve the offering if market conditions improved or public subsidy became available. In light of all this the GLA concluded that the proposal was consistent with the London Plan's policies on affordable housing.

111. The section 106 agreement was signed on 27 March 2013. The total value of Lend Lease's contractual financial contributions and on site / in lieu works is more than £42 million. Using the Council's standard "toolkit" for calculating the appropriate level of contributions, Lend Lease would have been required to make contributions totalling just over £27 million. The agreed package of contributions represent a very good overall deal for the Council and the residents of Southwark: further detail can be found in my proof of evidence for the Compulsory Purchase inquiry at [Open Bundle Tab F1 pages 370A - 418A], paragraph 6.25.

F. Disclosure of the Viability Assessment is not in the public interest

112. As set out in this statement, and that of my colleague Jon Abbott, there is of course great public interest, in all senses, in the proposed redevelopment, as its impact on the local community will be huge. The Council recognises that the fact that the delivery of affordable housing will fall short of the Council's policy objective is a disappointment to many residents.
113. I also recognise that some residents would like to perform their own analysis of the viability assessment submitted in this case, and perhaps in others too, although it should be noted that the assumptions on which the calculations are based are complex and reliant on specialist knowledge – whilst this would be readily available to Lend Lease's competitors and suppliers, it would be far more challenging for members of the public to understand and analyse the data.
114. Whilst I recognise the public interest in transparency and accountability, I do not believe that publication of this type of document is in the public interest.
115. I have seen Lend Lease's evidence as to the ways in which the Heygate redevelopment would be adversely affected if this type of information had to be made public. I believe that this evidence is convincing and, as described above, the Council takes the necessary steps to ensure that the information does not get into the public domain.
116. I believe that, if viability assessments had to be made public, developers would be extremely unwilling to provide the type of open book financial appraisal required by the Council, because of the grave impact which disclosure would have on the developer's negotiating position on numerous aspects of the project. As regards costings, I believe that this information would be analysed by the developer's suppliers and sub-contractors, and would skew those parties' approach to negotiations, leading to worse outcomes for the developer. I expect that this would be relevant, and alter behaviours, during the build stage of the project. As regards projected sales values, I believe that if these were disclosed it would help purchasers to negotiate prices down towards Lend Lease's published assumptions in that case. This information would remain relevant through to the conclusion of the project.

117. If the Council was provided with less financial information by the developer it would mean that the Council would be unable properly to investigate assertions that the development would not be viable if the Council's policy requirements had to be adhered to. As a result in many cases the Council would have little alternative but to refuse such applications. This would in many cases lead to appeals, which, being public processes, would also be hampered by the fact that the developer would be unable to provide a full rationale for its proposal.
118. This lack of information would impair the decision-making processes of both local planning authorities and planning inspectors, and would lead to severe increases in the time and cost associated with obtaining planning approval, which is not in the interests of our residents or of sustainable development.
119. Further, in some important and high profile schemes, the Council would feel constrained to accept a planning application which was not policy compliant, notwithstanding that it had not received sufficient information properly to assess the viability arguments, because it was so important to the future of the local area. Again it is very much against the public interest for planning authorities to have to make decisions whilst "in the dark" about the underlying financial position.
120. Over the past ten years there has been a marked increase in the sharing of detailed financial information between developers and planning authorities, to enable fair and robust decision making. In particular, recent years have seen the development of planning policy in the London Plan and the Southwark Core Strategy that specifically mention viability as an issue. At the same time there have been movements in the property market and development industry that make fully policy compliant schemes increasingly rare. Viability is, therefore, almost invariably an issue in the consideration of planning applications today when this was not the case a few years ago, and the process of sharing detailed financial information has been developed in order to enable planning authorities to deal properly with this issue. If this information was no longer protected by confidential treatment, all the benefits of that transparency and openness of dealing would be lost, which would be very much a backward step.

121. As the resources available to local authorities diminish more and more, Councils are increasingly reliant on partnerships with the private sector to deliver the regeneration which is needed across London. These private sector firms operate in a commercial marketplace in which there is a need for all players to develop their business plans in commercial confidence. This obviously creates a tension when it comes to the application for planning permission, as the public wishes to be informed about the negotiations of planning obligations. I believe that the provision of confidential advice, which informs the recommendation to the Planning Committee, strikes the best balance between informing the public and preserving commercial confidentiality so that development can proceed where appropriate. There is a public interest in knowing that a viability assessment has been subjected to expert analysis by an independent body on behalf of the public authority; and in knowing the broad outcomes of that investigation. This is weightier than the general public interest in disclosure, in my view, and also meets the substance of that interest.
122. Arguably all viability information could be passed straight to the Council's external advisers. However the DVS as a public body is also subject to the rules on freedom of information. It would not be a solution for the Council to use a private firm (which is not subject to FOIA or the EIR) to analyse viability assessments instead of the DVS. There are very few private sector firms which would have the expertise to offer the service, and they do the bulk of their work for developers. Therefore their reports would be treated as tainted by a conflict of interest by Council officers and members, so that again an increased number of applications would be turned down, leading either to development stalling or to costly and time-consuming appeals.
123. The DVS, on the other hand, is truly independent of the development industry, and as noted above its statutory remit gives it access to an unparalleled bank of information with which to test these analyses.
124. I understand that Lend Lease believes that one solution to the difficulties which would be presented by an adverse decision in this case would be to use "data rooms" on the developer's premises which the expert valuer would attend to interrogate and analyse the viability assessment. However this would mean

that the valuer would have much more limited time to carry out its analysis, and the information which valuer could include in the report to the planning authority would be very limited. Therefore the value of the analysis to the Council would be much reduced.

125. Therefore it is in the public interest that public authorities and applicants should have access to a process in which viability assessments can be received, discussed and assessed on a confidential basis.

126. Further the confidential sharing of detailed financial data contributes to a good working relationship between the Council and the developer, so that problems arising in the course of the development, whether on the planning or on the regeneration side, can be worked through more easily. There is a public interest in preserving that trust.

G. The Council's role as landowner and planning authority

127. The ICO has found at paragraph 67 of the Decision Notice that disclosure of the viability assessment is necessary in order to assuage any public perception that the Council may have acted inappropriately, as a result of a potential conflict of interest. I do not believe that such a perception is justified.

128. First, there is no real conflict between the two functions of the Council. Both the regeneration and planning functions are striving to achieve similar goals, which often require hard choices as resources are limited. For example, when negotiating the sale of the land, the Council will need to weigh up the need to obtain the best possible land price, against the fact that the developer in a project such as this will be facing high upfront infrastructure costs and a long-term (and hence more risky) sales process, and therefore will want the Council to share some of that risk by taking part of the consideration as profit-share, or overage.

129. This judgement is made even more difficult as the Council will not be seeking a capital receipt from the scheme in isolation. It will also be seeking other public benefits and wider social, economic and environmental outcomes such as affordable housing, jobs, parks, infrastructure and so on, all of which

increase the costs for the developer and hence have a bearing on the price which the purchaser is willing to pay.

130. Similarly, the Council as planning authority is seeking to achieve the best possible package of additional social benefits which it can achieve from the planned development at the same time as ensuring (as noted above) that it does not place such a burden on the developer that the planned projects grind to a halt or become mired in unnecessary planning appeals.
131. Therefore both planning teams and regeneration teams must make difficult decisions about the structure of the regeneration agreements and the planning agreements which are entered into. It must be understood, however, that these decisions are made by different people, at different times, and each of the decisions is made independently on the basis of the information which is current at the time of the relevant decision.
132. For example, as noted in the statement of my colleague Jon Abbott, in this case, the regeneration agreement was negotiated between 2007 and 2010. The structure of that agreement was based on the conditions prevailing at that time – including, for example, the availability of much higher grant funding for affordable housing.
133. When it came to the time to make the planning application in 2012, the underlying circumstances had changed, for example by the reduction of grant funding. When considering the application for outline planning permission (and the applications for detailed planning permission which follow) the Council's planning officers will look only at the information which is current at the time of the application, as I have described above. In this case, the Council was satisfied, on the advice of the DVS, that the development would not be viable if the Council's policy requirements were insisted upon. But the terms of the Regeneration Agreement were simply not an issue – if the DVS had advised that the development was viable with 35% affordable housing, the Council would have insisted upon that, notwithstanding the fact that this was more than had been agreed under the Regeneration Agreement. It would then have been a matter for Lend Lease to decide whether it wished to proceed.

134. Furthermore the information contained in the viability assessment does not shed any light on the issue of whether the Council achieved "best value" for the land itself. It sets out the developer's projected costs, revenues and profits from the proposed development. The price paid for the land is one of a huge number of cost factors which can be built in to those projections. The viability assessment does not explain whether the land price was in fact a good or a bad deal for the developer. For example, in this case the viability assessment provides an estimated "Existing Use Value" for the site. However, this is based on a large number of assumptions about the cost of refurbishing the Estate, and the value of the different types of units, none of which would necessarily have been applicable at the time that the regeneration agreement was negotiated. Further, this does not take into account a huge number of factors which will be relevant when the Council is negotiating the land price, including the wider social and economic benefits which the development is expected to deliver, the risk profile of the development, the history of the site, the availability of alternative means of regenerating the area, and so on.

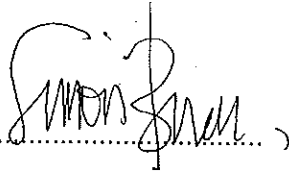
135. Furthermore, as noted in this statement and that of Jon Abbott, there has been a great deal of scrutiny of this "vast scheme", as the ICO put it in the Decision Notice, paragraph 69. The Council has sought the views of local residents in a huge variety of ways. All the development documents mentioned in my statement have been the subject of public consultation, and in some cases public inquiries as well. Officers have submitted numerous public reports to Committees and Cabinet detailing the plans for the area and for the delivery of affordable housing for the existing tenants, as well as desperately needed new housing stock. The residents of the Estate have been involved in discussions with the Council throughout the regeneration and re-housing process. There was full consultation on the original and revised outline planning applications. The viability assessment was subject to scrutiny by experts on behalf of the Council and the GLA. The report to the Planning Committee was a public document and was the subject of detailed debate at the Committee meeting. The proposals received yet further scrutiny at the Compulsory Purchase inquiry.

136. I believe that this degree of public involvement means that it is not necessary also to disclose to the public the confidential commercial data of the

private developer operating in a competitive market, with all the risks for this and other projects which have been described in these proceedings. I also believe that this more than satisfies the vision in the NPPF, referred to in the Decision Notice, paragraph 73.

137. For all these reasons, I consider that the balance of the public interest lies in withholding the viability information presented by the developer.

138. I believe that the facts stated in this witness statement are true.

A handwritten signature in black ink, appearing to read 'Simon Bevan', is written over a horizontal dotted line. The signature is stylized and cursive.

Simon Bevan

Director of Planning, Southwark Council

9 January 2014