IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

EA/2016/0012

MR JEREMY CLYNE

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

LONDON BOROUGH OF LAMBETH

Second Respondent

Hearing
Held on 21 April and 10 May 2016 at Field House
Before Mike Jones, Andrew Whetnall and Judge Claire Taylor.

Decision
The appeal is unanimously upheld for the reasons set out below. This decision is to be treated as a substituted Decision Notice.

Within twenty working days of the date of promulgation of this decision, the requested material is to be disclosed to the Appellant with the exception of the period that a developer intended to offer a discount or the rent-free period as refereed to in paragraph 10 of this decision.

Reasons

Background

1. In 2010, the London Borough of Lambeth ('Council') granted planning permission for the redevelopment of a site in Streatham that had been known locally as the Megabowl site. This included provision for 20% of residential units to be for affordable housing, a theatre space and communal housing. The project did not progress.

2. In 2014, London Square purchased the site. It subsequently submitted an application to amend the 2010 planning permission with proposals that included increasing the number of residential units and parking, decreasing the amount of affordable housing and changes to the proposed design of the theatre.

3. The Council's planning policies contained a target of 40% affordable housing for those larger development schemes that did not benefit from a public subsidy. Applicants proposing to develop below the 40% level, had to demonstrate to the Council's satisfaction that it was not economically viable to deliver more. The applicants' reports would be independently evaluated by external viability assessors.

4. In December 2014, London Square submitted a financial viability study ('viability assessment'). At the time the Appellant made his request for information, BNP Paribas ('BNPP') had recently produced an independent viability assessment ('viability review') for the Council, and the Council was assessing other planning aspects of the scheme.

The Request

5. On 18 February 2015, the Appellant requested from the Council the following:

> *'…London Square, developers of the Megabowl site in Streatham, have written to me that the Council has produced a viability study (prepared by its consultants BNP [Paribas]) for their scheme ...*
>
> *Please would you send me a copy of this study.*
>
> *In making this request I am mindful of the recent Tribunal Decision (Royal Borough of Greenwich v IC Additional Party Shane Brownie obo Greenwich Peninsula Residents EA/2014/0122) and the conclusions of Judge NJ Warren including the statement: "The objective of the EIR is to allow the public and in this case the affected community to have relevant factual information in time for them to participate effectively in environmental decision making.*
>
> *In the alternative that the developers have themselves prepared a viability study and supplied that to the council, please would you send that to me.'*

6. The Council treated this as a request for both the developer's viability assessment and the independent viability review. On 12 March 2015, the Council confirmed that it held the requested information but required an

extension from 20 to 40 days to respond to the request '*due to the complexity of issues attached to the request information*'.[1]

7. On 29 June 2015, the Council provided the information relying on regulations 12(5)(e) *(confidentiality of commercial or industrial information),* 12(5)(f) (*interests of the person who supplied information)* and 13(1) *(third party personal data)* EIR as entitling it to withhold the information that it redacted. (In the interim, the Appellant had been chasing the Council, concerned that London Square's application was shortly to be before the Council's planning applications committee. This eventually met on 7 July.)

8. The following day, the Appellant responded stating that he saw no substantive difference between his request the circumstances in *Royal Borough of Greenwich v Information Commissioner (EA/2014/0122 – 'Greenwich')* in which the Tribunal had held that similar information should be disclosed. The Appellant complained that the information was both late and incomplete.

9. Matters progressed but the Council did not hold an internal review at the appropriate point. The Appellant complained to the Information Commissioner ('IC') whose Decision Notice of 17 December 2015 *(Ref. FS50587306)* found that:

    a) the Council had correctly applied regulation 12(5)(e) in relation to certain information such that it did not consider regulation 12(5)(f); and
    b) save for two items, it had wrongly relied on regulation 13 to withhold other information which was now ordered to be disclosed.

10. The Appellant now appeals this decision, challenging whether regulation 12(5)(e) applies and if so, where the weight of public interest lies. He does not seek information on the period that a developer intended to offer a discount or the rent-free period.[2] During the course of the hearing, the Council accepted that the development profit rate of 17.5% for the private residential and commercial elements had already been published and as such its disclosure was no longer in dispute.[3]

The Task of the Tribunal

11. Our task is to consider whether the decision made by the Commissioner is in accordance with the law or whether any discretion it exercised should have been exercised differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint.

12. We have received a lengthy bundle of documents including the requested information and submissions from the parties. We have reviewed all of these even where not specifically reviewed below. The IC did not attend the hearing. In summarising evidence and submissions below we have added our own headings for ease of reference.

[1] In line with regulation 7 of the Environmental Information Regulations 2004 ('EIR').
[2] Referred to in paragraphs 44 and 58 of Mr Lee's statement.
[3] See page 537 Open Bundle: Report to Council's planning applications committee July 2015 in respect of 2014 Scheme and related arguments at para. 67 of Mr Lee's statement, 'Developer's profit on private elements of the scheme'.

The Law

13. The parties agree that as this appeal concerns 'environmental information', it falls within the EIR rather than the Freedom of Information Act 2000. This is because the appeal relates to 'measures' likely to affect the 'elements'.[4]

14. The Council relies on two exceptions to the general duty to disclose requested information.[5] These concern the confidentiality of commercial information and the interests of the supplier of the information. They are set out in reg.12 EIR, which so far as is relevant here provides:

> *"(1) Subject to paragraphs (2), … a public authority may refuse to disclose environmental information requested if -*
>
> *(a) an exception to disclosure applies under paragraphs (4) or (5); and*
>
> *(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.* □
>
> *(2) A public authority shall apply a presumption in favour of disclosure…*
>
> *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -…*
>
> *(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;* □
>
> *(f) the interests of 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 to 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…"*

15. Accordingly, our task is to determine the following:

a) ***Does regulation 12(5)(e) apply?*** According to the Respondents, there are four elements to consider here[6]: *(i) Is the information commercial or industrial in nature? (ii) Is confidentiality provided by law? (iii) Does the confidentiality protect a legitimate economic interest?* □*(iv) Would the confidentiality be adversely affected by disclosure.* □

b) ***Assessing Public Interest:*** If the exception applies, in all the circumstances of the case, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

c) ***Does regulation 12(5)(f) apply?*** The Council gave very limited arguments specifically addressing this exception and only sought for us to consider regulation 12(5)(f) if we found that the provisions in regulation 12(5)(e) in relation to elements (i) and (ii) set out in paragraph of 15a) above were not met in this case. Since we find that they are met and regulation 12(5)(e) is 'engaged' in this case, we have not considered this issue further.

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[4] See Reg. 2 'environmental information' (a) and (c) EIR.

[5] Reg. 5 EIR sets out the general duty to disclose information.

[6] This follows Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010), which we see no reason not to adopt.

16. Regulations 12(2) makes clear that when considering regulation 12(1), we must apply a presumption in favour of disclosure.

Evidence

17. We are most grateful to the witnesses for their time and detailed testimony in this case which involves some complex material.

18. The Appellant is a former councillor and gave testimony that included:

Importance of Site The closure of the Megabowl had been a big loss to the area, as it had been popular with young people and families. The lack of community and cultural facilities had been reflected in council policy which resisted the loss of community facilities. The redevelopment of the site had been seen as an opportunity to redress the balance by incorporating some facilities that reflected these needs. There was no other development sites in Streatham where this opportunity would reoccur.

a) The planning permission granted in 2010 to develop the site allowed less affordable housing than was Council policy. There had been a lot of objections because it was predominantly residential and did not reflect the community's or Council's aspirations for the site. He had been a councillor at the time and had only been allowed briefly to inspect the viability assessment where he was struck by what appeared to him to be '*some very ballpark and inflated figures for elements of the build*.' During his time, people's preferences for the site were for arts and community facilities and retail.

b) When London Square bought the site, it sought planning permission to make major reductions to retail space and the size of the proposed theatre. The affordable housing was to be reduced to 15.8% on a per unit basis and 16.9% on a habitable room basis compared to the policy requirement of 40%. The Council recorded 77 objections and 6 representations in support of the planning application - although a couple who stated they objected had been wrongly included as supporters. The main focus of objections was on the proposals for the theatre.

Transparency

c) There was a tide flowing strongly in favour of disclosure. The London Borough of Islington recently produced a Supplementary Planning Document on Development viability stating that it had rarely been demonstrated that disclosure would cause an adverse effect outweighing the public benefit of disclosure. It stated that information submitted as part of and in support of a viability assessment should be treated transparently and available for wider scrutiny, where the council would allow exceptions for this in very limited circumstances and only in the event that there was a convincing case that disclosure of an element would cause harm to the public interest to an extent that is not outweighed by the benefits of disclosure. That council anticipated very few exceptions.

d) The Appellant stated that the development was being marketed to investors in Malaysia and the UAE where it was suggesting the development was a prime example of the London house price surge, fuelled by an influx of foreign investors, and that prices could go through the roof. Despite London Square's website declaring that sales would not be launched until early Summer, a launch in Malaysia last October was already reported. The South China Morning Post had singled out the development in an article on Chinese buyers looking for a safe investment in UK property as a "store of wealth" and saying there was strong interest from Chinese buyers in the London Square scheme in Streatham. The article quoted the UK chairman of international property consultancy CBRE as stating with regard to the London Square scheme: "*Overall CBRE is predicting house price growth of 31 per cent across London between 2015 and 2019, with areas like Streatham in the vanguard*".

19. Mr Anthony Lee is a senior director at BNPP and highly experienced expert on financial viability and had worked on the viability review. He gave testimony that included:

a) The Council's policy is to seek the maximum reasonable affordable housing to be provided, having regards to the circumstances of each site. The developer's commercial objective is likely to be to seek to minimise the provision of affordable housing. If more than a particular amount of residential units has to be given over to affordable housing, the developer will say the scheme is not viable. The issue is whether that critical point from 'viable' to 'unviable' has been reached.

Modelling viability

b) To model viability, the 'residual land value' ('RLV') of the scheme and benchmark land value are established. The higher the benchmark land value, the less the amount by which the RLV will appear to exceed it and the lower the amount of affordable housing the scheme will appear to be able to support.

c) The RLV is the value of the completed development less the costs of building the scheme. To reach this, the developer makes assumptions about the projected final selling prices and costs of the scheme. The benchmark land value is the 'threshold' value which is necessary to incentivise the landowner to sell the site. It may be calculated using the value of the existing use of the site (generally taking into account extant planning permissions), or the market value of the land, or some other value.

Review mechanism

d) In time, a scheme may perform better than originally projected, generating a surplus. A council will likely seek to negotiate a review mechanism so as to apply the surplus to increase affordable housing provisions up to 40% (or 50% for schemes with public subsidy). In the Megabowl scheme, there was no review mechanism included once the development had been started. (Under national policy, the Council could not impose review mechanisms, but rather had to

negotiate for them. It was quite often accepted by the developer if wanting to procure a speedy planning consent.)

Openness

e) The Mayor of London's Housing Supplementary Planning Guidance and the London Borough of Wandsworth's Planning Obligations supplementary planning documents ('SPDs') set rules on how to assess viability.

f) London Boroughs of Islington and Southwark have also prepared their own SPDs. There was currently a draft consultation 'London Borough Viability Protocol'. If the final protocol is published, it will be for authorities to decide the extent to which they will follow it. It has been prepared by officials from across London's local authorities and includes a section 'Openness'.

In response to questions

g) He explained that openness was 'fine up to a point' but needed to be balanced to enable developers to set boundaries so as not to suffer commercial harm as otherwise they would tailor their reports to be more generic, providing less useful information. He thought that the boroughs with SPDs recognised this and acknowledged that in certain cases material would need to be withheld. He did not think any harm had come from information being disclosed pursuant to the *Greenwich* case. However, that had more generic or higher level information than was redacted in this case.

h) He was happy to consider views from the public that took an evidence-based approach genuinely engaging with the material rather than cherry picking. He was doubtful that they would bring anything new given that trained experts had already considered the material.

i) He explained that viability assessments were almost only valid on the day they were written. They relied on the inputs where both the housing market and building costs changed quickly. The review mechanism could ensure that viability was updated at a certain stage, but did not come into effect if the developer did not start building within a certain period.

j) As regards whether disclosure would assist any public interest in indicating the extent to which the site would provide for those on average incomes, he considered there were other ways of informing that debate which a developer would have less issues with and noted that the greater the requirement for affordable housing, the greater the need to make more from the remaining units. The purpose of reviewing viability was to maximise affordable housing and not drive down other unit prices or address housing supply overall.

k) As regards BNPP's work related to the viability review, this had been a lengthy process and not a rubber-stamping of the viability assessment. This was evidenced by the fact that the developer had seen BNPP's role as obstructive.

l) In response to a question he stated that construction costs and house prices had increased by 49%.

m) When asked whether disclosure of the requested information would have imperilled the development to such an extent that it would not have gone ahead, Mr Lee stated that it was difficult to say with any certainty that it would imperil the scheme to such an extent that it would stop it from going ahead, but it was difficult to say disclosure would not have caused commercial harm even if it the scheme had proceeded to the extent that harm it might have meant a lower profit margin.

Overseas Investment

n) As regards the Appellant's evidence concerning overseas investment such as Malaysia, he explained that it was very common and overseas investors were taking up more properties. During the recession, the overseas market had made up most of the market. He thought that developers would not have started schemes were it not for overseas buyers who tended to let out properties who bought for investment.

20. David Joyce is a senior Council officer responsible for, amongst other things, determining planning applications and planning policy. He gave testimony testimony that included:

Affordable housing policy

a) Affordable housing is accommodation intended for occupation by lower income households. It can be rented, owner occupied or held as shared ownership. Intermediate housing is homes for sale and rent provided at a cost above social rent, but below market levels.

b) The broad thrust of central government planning policy is that local planning authorities should ensure that new residential development makes provision for the needs of a range of household types, including lower income households. The Greater London Authority's ('GLA') London Plan sets out a development plan for the Greater London area that includes provisions for affordable housing. The Council's current planning policy seeks 40% affordable housing for those schemes that receive no public subsidy.

c) At the hearing, he explained that affordable housing needs were as high as 70% and that provision was far below the 40% target. However, this development was small and was of little relevance to the larger need for affordable housing as it concerned small numbers.

Openness

d) Of 33 London boroughs, only two had brought forward a different approach in SPDs. However, the general direction was towards transparency and wanting to be as transparent as possible, he supported particularly given that the Council had double the planning applications that it did three years earlier and defending information requests was a strain on resources. The London Borough viability officer group was well-attended and grappling with issues of viability.

Megabowl site

e) In 2009, an application was submitted for the comprehensive redevelopment of the Megabowl site. The planning applications committee rejected the application, concerned that the new buildings would have an overbearing effect on neighbouring properties.

f) In 2010, the Council granted planning permission for a revised redevelopment. The amendments reduced the residential units from 262 to 243; increased community use floor-space and amenity space for occupiers; and changed details of the design and appearance, including setting the proposed buildings back further from the main road frontage.

g) Some years later, London Square had had informal discussions with planning officers and subsequently acquired the site. In mid-2014, it conducted a formal pre-application consultation. In December, it submitted an application to revise the scheme. On 7 July 2015, committee unanimously approved the application. The application was then referred to the GLA who did not intervene to prevent planning permission being issued.

h) The revised proposal increased the residential units from 243 to 259; reduced the retail floor-space by a little over 50%; reconfigured the proposed theatre and community floor-space to provide a single flexible theatre/community space that was approximately 50% less floor-space; increased residential car and cycle parking; provided private amenity space for the residential units; and increased the size of most residential units.

i) At the date of the request, public consultation indicated that the level of affordable housing, whilst a concern, was not a dominant issue.

j) It was inevitable that there would be some changes to the existing planning obligations as between the 2010 and 2014 schemes. Circumstances had changed - for instance, works had already been done to the local station and Transport for London was no longer seeking a financial contribution in that respect. He did not consider that the developer was seeking to 'water down' a package of planning obligations or reduce the public benefits soon after acquiring the site for no satisfactory reason. It was putting forward a viable scheme in the prevailing market conditions.

k) He considered that the proposal contained improvements, e.g. in the usability and location of the theatre; additional car and cycle parking spaces; provision of private amenity space to each residential unit; and design changes incorporating a set-back from the pavement edge. The overall package of financial contributions totalled £1.934 million, which represented an increase of £139,000 above the 2010 consent and the fit-out costs of the theatre/community space increased from £45,000 to £408,000.

l) The affordable housing was reduced from 45 to 37 units. However, importantly, there were 7 more social rented units where the Council had assessed the greatest demand would be for this.

m) The original planning obligations had been entered into in 2010, such that there was a locally significant area of land that remained not in active usage or generating benefits to local residents or local businesses.

n) At the point when Mr Clyne's request was made, BNPP and their counterparts advising London Square had not worked through the points of difference in their assessment of the viability of the scheme and certain matters were still being negotiated by officers. It was eminently likely that the position of one or other party could change. London Square argued that because the requested material could not be said to represent the final position, it was damaging to the developer for something that was not finalised to be made available to all. Further discussion between BNPP and London Square resulted in four intermediate affordable units in addition to the 37 social rent units, where BNPP had assessed there to be a surplus.

o) He had not accepted that the fact that the planning application was still in the fairly early stages and the information requested might not be the final position would be sufficient reason by itself to refuse the request. A developer might want to be able to try out different scenarios and have a frank exchange of views with the Council or its advisors without the fear that information contained in those exchanges could become publicly available and potentially misapplied or taken out of context. However, if viability information was only ever disclosed after a planning application had been determined, that would affect the ability of third parties to make representations based on that information.

p) Whilst the viability reports may contain information that a third party might want to use so as to challenge the proposal, this was not the purpose for which the information was submitted.

q) The Council decided to withhold:

i) **Affordable housing sales values.** Affordable units would be purchased by registered providers and thus represent expenditure of public money.

ii) **Construction costs:** disclosure would potentially interfere in the tender process with bids adjusted to correspond to the information. This is particularly acute where a scheme is likely to be actively progressed. There was no reason in this case to think that the scheme would not be brought forward if planning permission were to be granted. He had considered that there had been a real risk that the development would not go ahead if the requested material had been disclosed due to prejudice in disclosing construction costs.

iii) **Other costs** e.g. letting and sales costs of the finished floor-space: the issue here is also the potential for interference in the letting of contracts for the relevant professional services, because potential providers would know what the basis of advice from BNPP about how the market for different types of developer had in mind to pay

for the relevant service and so would be able to structure their pricing proposals accordingly.

iv) He explained that the Council had lots of stalled sites and were keen not to hold up development where disclosure of the information could cause the development not to progress.

Delay in complying with EIR

r) It took longer than was ideal to receive detailed representations from London Square. He did not consider that he could properly proceed to disclose or withhold material without waiting for their full response because they had said from the outset fairly vigorously that they opposed the disclosure of any information. Whilst the Appellant had been pressing for a response, London Square had to be afforded a full opportunity to set out their reasons for not wanting the information to be disclosed. He had taken a cautious approach because he also needed to be guarded against costly litigation from the developer for breach of confidence.

Appellant's Submissions

21. The Appellant's submissions included the following:

Does Regulation 12(5)(e) apply?

a) The information would not adversely impact the commercial interests of the developer or not to the extent maintained by the Respondents. The Council relied on the evidence from Mr Lee who repeatedly stated that if information were disclosed it "may" or "may tend to" lead to particular adverse consequences. *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106 - at* paragraph 24*),* found that the exception statements that harm 'could' or 'may' be caused were insufficient evidence of harm or prejudice.

b) The IC had not substantiated why disclosing the information would severely prejudice to the economic interests of the developer and somehow endanger the whole development. Any company negotiating with the developer would do their own calculations in actual market context. As recognised in the Greenwich decision '*the market price for an asset at a later point is more likely to be determined by a purchaser's estimate of the value of the asset, and the number and purchasing power of potential buyers, than any information on the price paid or the expectations as to price or ambitions for profit levels of the vendor*.'

Public Interest

c) **Transparency and EIR:** There was a tide flowing strongly in favour of disclosure illustrated by the SPDs and recent planning decisions. In line with the Greenwich case, the public understanding of the issues failed at the starting line if pricing and other assumptions were concealed and discussion of the 'point in time' nature of viability models is frustrated. The objective of the EIR is to allow the public

and affected community to have relevant factual information in time for them to participate effectively in environmental decision making. That intention is served by exposure of sufficient information to allow a fully informed interrogation of the recommendation. The redactions had not allowed sufficient information.

d) Viability assessments were coming under increasing scrutiny. The Benchmark Land Value would have a huge impact on the deemed profitability of the site. Outputs were highly sensitive to input values such as construction cots, fees, developer profits and lower estimates of development value. It is critical for sensitivity analysis to assess how robust the residual land values are. Particularly in a period of rapid house growth, the values can radically change in the time taken for a development to complete. The use of current sales values can result in significant under-valuations as can the range in construction cost indices.

e) When it was possible to interrogate the house price data and profit assumptions, the Greenwich and Southwark viability models produced very different figures and scope for affordable housing.

f) A private sector project is still meant to deliver affordable housing and other benefits to compensate for change of use.

g) That the Streatham site was a significantly smaller scheme than cases in Greenwich and Southwark does not detract from the principles of transparency and openness. Whilst the reduction in affordable housing was only eight units, the development had become vastly more profitable since 2010 when the market had been depressed and the original low percentage of affordable housing had been agreed. The house values had increased substantially in recent years. The development would have a 'tremendous impact on the character of the local area' and the public had a legitimate interest in knowing how the developer established it could not satisfy the Council's core strategy requirements.

h) **Concerns over robustness of assessments:**

   i) The profitability had become considerably greater than 2010. The Appellant had given evidence that house price growth in London outstripped the rest of the country and that Streatham had achieved some of the highest house price growth in response to people being priced out of neighbouring areas. Therefore reducing affordable housing in that climate was a legitimate public concern.

   ii) Since in this case, there was no review mechanism, the viability assessment needed to be all the more robust and shown to be so.

   iii) If viability assessments were uniformly reliable and robust there would not be such a problem with non-disclosure.

i) He considered that disclosure would give the public confidence that the decisions taken were reliable and in the public interest where there had been concern and scepticism about the whole planning

process and where property values had increased considerably such that he would have expected a higher level of affordable housing rather than a reduction.

j) The disclosure was relevant within the broader and considerable debate around whether viability assessments were fit for purpose and the increasing demand for the public to understand what was going on and whether the correct approach was being taken. It was important to understand what was going on and had he been given the information within the proper timescale he might have been able to procure expert advice to properly interrogate the figures and participate in the process at the planning application committee stage.

IC's Submissions

22. The IC's reasoning in its Decision Notice and submissions included the following:

a) Having regard to the first tier tribunal decisions in *London Borough of Southwark v Information Commissioner and Lend Lease (Elephant and Castle) Limited (EA/2013/0162, 9 May 2014* - 'Southwark'), and *Greenwich*, it considered that the four conditions in Regulation 12(5)(e) EIR will almost certainly be satisfied by viability assessments and reviews such as those at issue in this case.
b) This viability review contained information of the same nature as the viability assessment.

The information is commercial or industrial in nature

c) The requested information contained detailed about the projected costs and revenues associated with the disposal of commercial and residential units, and the resulting financial surplus. This was commercial in nature as it relates to a commercial activity, i.e. the sale and purchase of commercial and residential units.

Confidentiality is provided by law

d) The common law of confidence applied because (a) the information has the necessary quality of confidence because it was not trivial - it went directly to the core of the developer's business strategy - and was not in the public domain; and (b) it was shared in circumstances importing an obligation of confidence. The viability assessment was submitted to the Council on the basis that it was a confidential document and the Council agreed to accept it on that understanding. This expectation of confidentiality was expressed on the front page of the viability assessment, albeit it was not possible to contract out of the EIR.

Confidentiality is protecting a legitimate economic interest and the adverse effect of disclosure

e) The test here was that disclosure of the information *would* have rather than *might* have an adverse affect on the legitimate economic interest of the developer, which the confidentiality is designed to protect. The risk of some harm occurring needed to be more probable than not.

f) The redacted information included, among other items, the average sales value per square foot of affordable housing, the total assumed Gross Development Value, individual selling prices of particular units by unit size and a breakdown of sale prices estimated total construction costs, and letting legal fees. London Square's was concerned of the risk that disclosure would enable competitors or other interested parties to exploit the information to the disadvantage of London Square. At the time of the request, negotiations with valuers were ongoing and it was vital, in London Square's view, that its bargaining position was not undermined if the development was to be successfully delivered. The IC was satisfied in this case that the withheld information was relevant to London Square's future negotiations with regard to the disposal of the Megabowl site. It therefore followed that the release of the various items of viability information would leave London Square at a disadvantage. In other words, disclosure would have an adverse effect.

g) The confidentiality would be adversely affected by disclosure if the first three conditions were met.

Public interest

h) The IC identified the public interest in favour of disclosure were:

i) The importance of transparency where a council's decision relates to a development that will have a significant impact on the local environment and community. Viability information had a particular significance in allowing the public to interrogate the reasons a developer considers it is unable to fulfil the requirements of a public authority's core planning strategy.

ii) The proposed development in its current form was not universally welcomed and, (quoting Greenwich at para.37), "*the objective of the EIR is* to *allow the public and in this case the affected community to have relevant factual information in time for them to participate effectively in environmental decision making*".

a) The IC identified the public interest in favour of maintaining the exception the points put to it by the Council as including:

i) Whilst the overall number of affordable units proposed were less than within the 2010 planning permission, the Council considered there were other improved aspects of the affordable housing offer. The nature and scale of the changes were not in any way comparable to those in the Greenwich and Southwark cases.

ii) It was important to secure affordable housing in the form of social rented units.

iii) The 'Megabowl' site had continued to lie undeveloped with buildings in a state of disuse and there was a general consensus that the area needed to be put to use as soon as possible. The Council considered that the value of the development was further augmented due to a number of wider improvements made in the 2014 scheme compared to the original proposals.

iv) The decision on whether to grant or refuse planning permission was considered by Members and not determined by officers under delegated authority.

v) The Council considered the tender process had considerable commercial importance for the developer such that it was significant that there was potential for distortion.

23. The IC noted that it had been accepted by the Council that the timing of the request and the fact that the assessment of the information was still ongoing at the time of the request was a neutral factor as there was also importance in public participation being able to happen at the time of the planning process. The public had a legitimate interest in knowing how the developer established it could not satisfy the Council's core strategy requirements and, equally, the independent review carried out on the developer's analysis. Where the Council had argued the 2014 scheme represented a purely private sector project, it did not consider that this would offset the real concerns a local resident may have about the future of the site.

24. Where the Council had argued the scale of the development was relatively modest although prominent in the local area, the IC nonetheless considered that the effect of the development on the local area would not be insignificant.

25. In balancing the public interest, the IC was guided by three factors identified in the Southwark case that it stated had been of such importance that they dwarfed other considerations. These were: (a) the project must not be allowed to fail or be put in jeopardy; (b) the importance of public participation in decision making; (c) the avoidance of harm to the developer's commercial interests.

26. The 'critical and weighty' consideration that swayed the balance of the public interest for the IC was that he considered there to be a real risk that disclosure would prejudice the economic interests of the developer and the nature and severity of the prejudice meant that the release of the information was likely to affect the ability of the developer to deliver the development proposals successfully.

27. In the IC's later submissions, it was argued:

a) That the nature and scope of the information redacted from the viability assessment and review was limited and was confined to some numbers in the two documents.
b) London Square's ability to negotiate would be so badly affected if certain parts of the requested information were disclosed that the proposed development would be jeopardised. This would not be in the public interest, in particular because the site had fallen into disuse.

c) The facts of this case were distinguished from those in *Greenwich*, not least because although the viability assessment related to a proposed amendment to a grant of planning permission, the Council explained that it was not the case (as it had been in Greenwich) that the

developer had acquired an interest in the site and immediately decided to renegotiate existing planning obligations.[7]

Council's submissions

28. The Council's submissions included the following:

a) The request occurring at a time when the planning proposal had not been finalised or submitted to the planning committee.

b) The disputed information would have been very useful to those with whom London Square would be negotiating, in particular as regards the sale of the properties on the Megabowl site. Disclosure would have distorted competitive negotiations and prejudiced London Square's bargaining position. It would have been likely to prejudice London Square's revenues and thus its profits from this project.

c) That weakening of London Square's commercial position would have imperilled London Square's proposed redevelopment of the Megabowl site.

d) With reference to *FCO v IC and Plowden [2013] UKUT 275 (AAC) at paragraphs 12- 13,* it considered that the Tribunal had no sound basis on which it could reject that evidence to accept Mr Lee's evidence, given his expertise and the cogency of his explanations.

Public interest

29. The Council asserted the following points in relation to the issue of public interest:

a) The factors in favour of the disclosure were comparatively weaker, even taking into account the presumption in favour of disclosure under the EIR. Whilst there was legitimate public interest in transparency about such developments and planning applications, it was very difficult to articulate a cogent public interest case for disclosure in relation to the material.

b) Whilst the Appellant stated that there was a need for public scrutiny of the of the soundness of withheld figures, the planning process, already accommodated such scrutiny: Council officers and then independent experts such as Mr Lee had interrogated such points and then accounted to the Council's planning committee at the public meeting in July 2015 for their evaluations. The Appellant had not explained how, in concrete practical terms, he or any other member of the public could realistically use the disputed information to achieve some meaningful public good over and above what had already been delivered through this scrutiny and accountability process.

[7] The IC subsequently corrected this point noting that London Square had conducted informal consultation in 2013. It was not clear the extent to which they still sought to rely on this point, given that the London Square had purchased the site and then sought to alter the planning permission terms.

c) The focus of Mr Clyne's public interest case was not on affordable housing, but rather the theatre facility and the disputed information would shed no light on this.

Our Findings

30. Submissions placed much reliance on decisions made by the First-Tier Tribunal or the IC in other cases. The IC regarded previous cases as indicating that the four conditions in regulation 12(5)(e)EIR would 'almost certainly' be satisfied so as to 'engage' the exception for viability reports. The Appellant placed emphasis on the 'direction of travel' pointing to a few Councils adopting SPDs and other information rights cases. Neither decisions of First-Tier Tribunals or the IC create case-law create binding precedent and may only on the facts be persuasive. We must look to the facts of this particular case.

31. The Council has encouraged us to look at the specific categories of redacted information in order to reach our decision. We turn then first to the specific arguments provided in relation to the categories of data that the Council had considered sensitive on the advice of Mr Lee.

Private residential values broken down by individual unit size/location within the development

32. Whilst Mr Lee did not consider Private residential values as an average per square foot to be sensitive (given that the projected price in the viability assessment would have become historic by the time of the sale in perhaps 2 or 3 years), he thought the average selling prices broken down by size of unit was. This was because it would tend to reveal the developer's pricing strategy – such as giving a prospective purchaser information on the premium that the developer considered the units on the higher floor will generate relative to units on other floors and where units of different sizes were located in the development. Whilst prices would change, the relativity would not such that someone could work out roughly how much a property would cost at another time if knowing the price of another property.

33. The Appellant considered that the average values were unlikely to affect the developer's negotiation with prospective commercial occupiers because the developer could hold out for whatever rent they thought the local market would bear for the space. We agree with the Appellant.

Affordable housing average value per sq. foot

34. Mr Lee explained in his written statement that where the developer would contract with a registered provider ('RP') to dispose of affordable housing units in a single transaction prior to commencing building and the market would be much more constrained than for private residential units with four or five possible RPs interested in taking on the affordable units, or fewer. He considered that the location of the affordable housing might affect the number of RPs who were interested in taking on the units where shared ownership units were being provided. This was because the RP had to be able to sell shares in the units and be mindful of the fact that the development was located in (say) Streatham or Upper Norwood where the

market may be thought to be less strong than in say Waterloo or Vauxhall. Location was generally not relevant if the units were to be provided for rental only, as the RP will know that there is a substantial demand for this tenure type, irrespective of where the units are located within the borough.

35. This argument here seemed more theoretical than applied to the circumstances of this case. In this case, there were only four intermediate affordable units and the remaining 37 units were for social rent, such that there were potentially only a maximum of 4 units for sale. The Appellant rightly made the point that whilst Mr Lee had stated that the location of the affordable housing "may" affect the number of RPs interested, there was no evidence to show this particularly where location was generally not relevant where the units were for rental purposes. Additionally, it seemed to contradict the general premise that there was a great demand for affordable as made clear by Mr Joyce's testimony.

36. In his oral testimony, Mr Lee stated that there could be six or seven RPs, which differed from potentially thousands of buyers for the private residential market. Whether six or a thousand, we would expect that the principle of supply and demand would be far more determinative in bidding than the figure entered in the viability assessment that represented the relevant figure at the point it was produced.

37. Mr Lee explained that the RP contract would take place early on and considered that if the RPs were aware of the figure the developer expected to receive, this would cap the amount that the RPs were willing to offer, which may be lower than the amount that they would otherwise have been prepared to pay. Typically, the profit margin a developer expected to make on affordable housing would be 6% as an industry standard figure and reflected the reduced risk of delivery the affordable housing. This argument seemed unconvincing since there was an industry standard figure of what was expected to be made, and in any event the point of the affordable housing was not to maximise profit. The Appellant had referred us to the First-tier Tribunal Southwark which we agree with as it seems to support or compliment this point stating at paragraph 57: '*It is true that a certain element of commercial negotiation is likely to be involved in such a transaction. On the other hand, there is a countervailing public interest in ensuring that social housing providers obtain a reasonable dea*l'.

38. Mr Lee explained that values for affordable housing units were less likely to be subject to fluctuations over time than private residential units. Therefore, information on projected sales values of affordable housing would retain its currency for significantly longer periods of time into the future than would be the case in respect of private residential units. Again, this did not seem of particular relevance here where the vast majority of units were intended to be for rentals and that in any event Mr Lee had already explained that the input values in viability assessments were almost only valid on the day they were written, for instance because of building costs that in this climate rapidly changed.

39. Mr Lee explained that revealing the intended disposal prices of affordable units, or information that would tend to enable the intended disposal prices to be calculated (such as, as in this case, the number of intermediate shared ownership units that could be provided for a specified amount) would

prejudice the developer's ability to negotiate the best price for the sale of the units to RPs. Again, any harm in disclosing the figures seemed minimal where the maximum number of units for sale was four, they were in anyway to be sold below market value, and the outcome of negotiations would be far more likely to be affected by more than one RPs negotiating for the same contract and their own assessments of what to bid.

40. We note Mr Joyce's comment that affordable units would be purchased by registered providers and thus represent expenditure of public money, but we cannot see why this would indicate an interest in withholding the information where the Council's argument has been that disclosure would benefit RPs to the detriment of the developer (which we in any event do not accept).

The Gross development value ('GDV')

41. Mr Lee explained that the issue as regards a single global figure for GDV across such a scheme would be whether revealing that figure would enable other figures that are commercially sensitive to be calculated or reliably estimated. We have not found any of the particular values identified to have strong commercial sensitivity.

Marketing budget

42. Since the marketing budget in the viability assessment was expressed as a percentage of private [residential] GDV, Mr Lee considered this too to be sensitive. Our finding therefore is the same as for GDV.

Construction costs

43. Mr Lee explained that typically, the developer would tender the build contract and potential contractors would receive details of the scheme (e.g. dimensions of buildings, materials to be used, specification of internal fit out etc.), price it up according to their own internal pricing mechanisms and submit tenders to build the scheme. If the developer revealed to the market what they expected to pay for the build, that would inevitably influence the amount that bidders would submit in the tender process where they would all align their tenders with the developer's known estimate of costs and the developer would then lose the benefit of a competitive tender process. For instance, if the developer revealed that they expected to pay £5M for the build, a contractor who considers that they could carry out the works for £4.5M would be bound push up their tender price to much closer to £5M.

44. The Appellant argued that it was not clear why construction companies would follow figures contained in an assessment put together some time before for the purposes of calculating affordable housing. He thought it would be more likely that potential contractors would do as stated by Mr Lee and '*price it up according to their own internal pricing mechanisms*.' He thought that even if the data in a financial viability assessment were considered by construction companies to reflect the actual cost there was no reason to expect that contractors would align their tenders with that estimate.

45. We find the Appellant's arguments more compelling. Whilst we consider the Council's arguments in relation to construction costs stronger than for other categories because the build contracts would be negotiated sooner to the time of the viability assessment, nonetheless Mr Lee had made clear that data in viability assessments became very rapidly outdated, and in any event

we consider it far more likely that under a competitive tender process it would be unlikely for competitors to chose to align their tenders with figures in the viability assessment but rather to tender competitively. (Even if we were wrong on this point, we would consider the public interest in seeing the full material requested so as to see as full a picture as possible, would still indicate disclosure of this material.)

Professional fees

46. Professional fees such as for architect were argued to be sensitive because by virtue of having been expressed in the viability assessment as a percentage of construction costs, their disclosure would reveal the amount of those construction costs. Our finding on construction costs is set out above.

Projected costs: contingency percentage

47. Mr Lee explained that revealing the amount of a contingency could act as a signal to tenderers of an expectation that costs were going to increase and that therefore that there is some 'wriggle room' in which to seek to re-negotiate after contractors have been selected. It would also be relevant to tenderers to know whether the actual contingency that the developer has allowed for is greater or lesser than the industry standard figure.

48. It was explained to us that a developer would want to maximize profits and uncertainty would help to do this. We accept this and that there was some commercial sensitivity to the figure. However, it would be surprising if the figure presented in the viability assessment affected any payment of contingency or had a decisive impact on the payment of contingency amounts. For instance, payments would determined under the build contract terms that were negotiated on a commercial basis. In any event, Mr Lee's arguments did not seem a compelling given that it seemed to be standard industry practice to have a contingency percentage and that there tended to be an industry standard figure.

Projected costs: Letting and sales agent and legal fees ('agent fees')

49. Mr Lee explained that it would be relevant to potential providers of those services to know how much the developer expects to pay and the developer would be prejudiced by the disclosure of this information for the same reason as applies in respect of disclosure of construction costs or other services for which bids will need to be invited. Mr Lee considered these fees to be less linked to movements in the market. Further, sales fees would usually be calculated by reference to private residential GDV and lettings fees would usually be calculated by reference to the first year's rent.

50. The Appellant thought that it was not clear why the market would not decide and that figures used are in any case likely to be industry standard, and if not it is in the public interest to know why not. Our view is that whilst the data in the viability assessment might be of interest to agent fees, it would seem far more likely that the determining factor for agency fees was supply and demand within the particular field and not influenced in any significant way by the disclosure of this data. For instance, legal fees were more likely to be set by firms according to their own established charges with knowledge of what other legal firms might charge and where there were adjustments it was more likely to be based on the state of the legal market rather than data in the viability assessment.

Benchmark land value

51. Mr Lee considered that as the viability assessment indicated that the figure that was put forward for the benchmark land value derived from an actual bank valuation, it would be commercially sensitive, because it would reveal the terms on which a bank might lend by revealing the terms the bank was valuing on. In this case this would indicate the bank's valuation of the extant planning consent. We note that the viability assessment states: "*This figure was based on an updating of a bank valuation carried out by Savills. We have further updated this figure by applying Investment Property Databank's Monthly Property Index*.' There is no suggestion that the information reveals the actual lending terms of the developer's bank such that this remains confidential. Nonetheless, it may have a degree of commercial sensitivity, but not to an extent that it could cause significant harm to the development or imperil it.

Surplus/deficit figure

52. Mr Lee explained that the viability assessment presents a figure which the developer says is the amount, if any, that is left over after inputting the benchmark land value. Where that figure is below, or at, zero, then there would be no further surplus that could be applied to additional affordable housing over and above the amount that the developer has already allowed for. He stated that knowledge of whether the relevant figure is in surplus or deficit would, depending on what other figures were revealed, enable the quantum of withheld information, in particular relating to projected build costs, to be estimated. For instance, if a third party knew that the developer stated the scheme to be in deficit by a certain amount, and also knew or could estimate what the gross revenue of the scheme was, they could make a reasonable effort at estimating what the build costs will be, although they will not be able to deduce the exact figures, because of the number of other variables in play, a well-informed third party would be able to infer the likely quantum of withheld information.

53. If a third party knew that the scheme was in surplus by a certain amount, then that information can be used to infer the likely amount of the costs of the scheme. Therefore, information that it is considered would tend to reveal other information that is withheld because it is commercially sensitive may also need to be withheld.

54. We were not compelled by this argument because in Mr Lee's hypothesis, a party could only estimate the build costs, where standard construction costs are already available. In any event, our reasoning for construction costs above similarly applies. Mr Lee also stated that revealing the surplus/deficit figure could also be potentially damaging where for instance a deficit figure might put a bank off lending. On the facts, we did not find this very plausible. It would be unlikely if a bank were lending significant sums to rely on data produced for the purpose of viability assessment.

Other: Performance measures

55. Mr Lee was also concerned that due to the software used ('Argus') in the viability assessment not being designed to model profit at varying rates for different elements of the scheme; where profit levels for affordable housing and private housing differed, the performance measures that appear in this case are unreliable and could appear misleading unless the reader is familiar

with how Argus operated. We found this to be a similar argument to that made that the public would not necessarily have the skills to interpret the data appropriately and therefore could form a misleading picture or 'cherry pick' from the data. If the Council were concerned about misleading data it was their prerogative to explain the issue when releasing the data. In any event, we consider that the public comprises a full spread of skills and as stated by the Appellant, a motivated person can make use of viability reports by procuring advice.

56. In short, we have not seen anything that we can accept supports the Council's conclusion that disclosure of the information would have imperilled London Square's proposed redevelopment of the Megabowl site by weakening its commercial position. We note that there were similarly argued reasoning as to why the development profit rate should also be withheld. However, it was pointed out at the hearing that it had already been disclosed by the Council in papers for its planning committee. There was no evidence that the profit figure was disclosed in error, and in reality we are doubtful that its disclosure caused any significant prejudice for instance in benefitting funders as argued.

57. We turn now to whether we find regulation 12(5)(e) to apply, taking into account paragraphs 14 and 15 above, that sets out our understanding of this part of the EIR.

Issue 1: Does regulation 12(5)(e) apply?

58. First, we consider that all material requested is most clearly commercial in nature. This is because it concerns financial matters such as projected costs and revenues associated with the developer's proposed commercial activities.

59. Second, we accept that there is a common law duty of confidentiality concerning the material. This is because it has the necessary quality of confidence as it is by no means trivial information and the developer expressed an expectation of confidentiality.

60. Third and fourth, we come to whether the confidentiality protects a legitimate economic interest and would be adversely affected by disclosure. The IC's guidance '*Confidentiality of commercial or industrial information (regulation 12(5)(e))', states at paragraph 38: "Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income*"[8]. The guidance is not binding but we have found it helpful.

61. We consider that the common law confidentiality protects a legitimate economic interest in the requested material, which reveals how the developer has priced the scheme. Disclosing the requested information to the public may conceivably attract attention which the developer may then have to invest time in dealing with, and may provide competitors or those involved in

[8] See https://ico.org.uk.

future negotiations with information that could be of some interest and value to them albeit we consider that it would be highly unlikely to affect negotiation outcomes to the detriment of the developer. We are persuaded here by Mr Joyce who explained that developers tended to be very secretive about pricing schedules. We would accept that where confidentiality protects a legitimate economic interest, disclosure causes an adverse effect for the developer because it would be by disclosing the confidential information, albeit, we consider the adverse effect to be limited extent. We accept the Council's arguments here that from a commercial perspective a risk of harm has an effect on financials or the way the business is run and as such is harm itself.

62. We note that whilst the Appellant does not accept that regulation 12(5)(e) applies or is 'engaged', he did not advance arguments specifically addressing all four elements of the exception set out above, and only the IC fully addressed the matter.

Issue 2: Assessing the Public interest

63. We consider the public interest in disclosing the requested information significantly outweighs that in disclosure for the reasons.

64. The public interests that favour disclosure are: □

Transparency and participating in Decision Process

i) There is much importance in transparency of viability assessments and reviews in allowing the public to interrogate the reasons a developer is unable to fulfil the core policy strategy on 40% affordable housing (subject to viability). The EIR objective is to allow the affected community to have relevant information in time to participate effectively in environmental decision-making, which would include before the planning permission was finalised. The Appellant claims interest in seeing that viability reports are fit for purpose, and we have some sympathy with this where according to Mr Lee's testimony they are assessed at a fixed point in time and may rapidly become obsolete and where as in this case there is no mechanism for review once the development has started.

ii) In this case, the level of affordable units fell significantly below that level, and was less than the 2010 planning permission since when London property values had significantly increased. Whilst the Council considered that this was to be counter-balanced by certain improvements in the composition of the affordable housing element, there is a strong public interest in understanding why the policy in general is falling short of its targets. Redacting data would not provide the full picture. It is in the nature of the policy that funding affordable units while sustaining developer's target profits tends to lead developers to seek higher prices, including from overseas buyers, from the remainder of the scheme. Disclosure of intended disposal values gives a clearer picture of the overall affordability of the scheme, and the match between unit values and local household incomes can be seen more clearly than if average unit values only are disclosed. Whilst the Council

considered the scheme to be small such that inevitably the number of affordable units would be small, the scale of the scheme is not itself a reason why the proportion of affordable units offered should be lower, and provision fell well below the 40% policy or the 70% assessed need. There is no obvious reason why there should be different transparency standards for smaller schemes than for large.

iii) There is no suggestion that the Council had made a bad decision where it considered the 2014 scheme to in some ways be an improvement on that of 2010. The committee unanimously favoured it and the GLA did not object, and the development was a private sector project. However, this does not detract from the importance in transparency in this particularly important area. We were unimpressed by the suggestion that few members of the public could understand the disputed information or be able to make valid representations because of the technical nature of viability assessments. Expert opinion can be brought to bear. There is a deficit if only developers and planning departments have access to the information needed to form an opinion. Further, some of the information said to be sensitive or difficult to understand (for example that flats on higher floors or with better outlook can command a higher price) seems to be commonplace and generally well understood.

iv) We note that the value of receiving the requested information is not lessened by either the planning application having gone through a thorough consultative process and was decided by the planning committee, or BNPP having conducted an extensive and expert independent review of viability. There is no doubt that affordable housing is of high public interest, and a premise of Information Rights is that there is value in the public having full opportunity to receive and review the information underlying policy choices and decisions.

v) The site is of importance and interest to the community and will have a significant impact on it and the local environment. The proposed development in its current form was not universally welcomed.

vi) Whilst much of the local feedback to the Council related to the theatre proposals, this does not reflect the very serious and important interest in London in affordable housing and housing supply. Those affected are less likely to be responding to a local council in relation to an individual planning application. (It is noted that the Council made much of the point that the disputed information would not have helped much with the Appellant's position that the space and layout of the theatre was unfit for professional use. However, the Appellant made much wider points at the hearing concerning affordable housing and housing supply and in relation to the public interest in having the requested material disclosed.)

65. We consider that the public interest favouring withholding the information is that it constitutes the developer's confidential information revealing how the developer has priced the scheme for the purpose of the viability assessment. We consider this public interest to be significant because of the importance of respecting confidential information. However, on the facts of this case, it is vastly outweighed by the interests in disclosure set out above.

66. We note the argument that greater requirements of openness would result in developers making reports more generic and less useful. Our task is to consider the application of the EIR on the information request in this appeal. We do not think disclosing this request would have resulted in developers providing information of less use to the Council, because the Council is required to satisfy itself that a greater level of affordable housing would not be possible, and the developer would need to provide sufficient information for it to do so.

67. We fully accept that there was an importance in the development proceeding both for affordable units and general supply of property. However, we do not accept that disclosing the information at the relevant time would have in any way endangered the development from proceeding. This is because of the assessment of Mr Lee's arguments set out above from paragraphs 32 onwards. Mr Lee's testimony was very hypothetically based and necessarily speculative. It seemed to us that it did not support the conclusion that the development would be jeopardised and that London Square's ability to negotiate would be so badly affected if certain parts of the requested information were disclosed. We do not think that disclosure would have prejudiced London Square's bargaining position. Mr Lee had made clear that viability reports were so quickly outdated and in any negotiations would be far more likely to be driven by competitive processes and the economics of supply and demand.

68. We were not persuaded by the Council's argument that *FCO v IC and Plowden [2013] UKUT 275 (AAC) at paragraphs 12- 13 obliged us to simply* accept Mr Lee's evidence. This did not follow from our reading of Judge Jacob's decision. We certainly did not find Mr Lee's arguments to support the IC's conclusions that disclosure would jeopardise the development, nor did we consider they supported a finding that they would prejudice the developer to any great extent that would justify the withholding of the information when taking into account the pubic interest test. Further, it is not inconceivable that expert opinions can at times be wrong or differ.

69. Our decision is unanimous.

Other

70. We note that the Council went to extensive and commendable efforts to reach what it considered the right decision having balanced competing interests. In being careful to ensure London Square had full opportunity to explain why it considered the requested information needed to be withheld, it did not comply with the time limits set by the EIR. We were informed that a delayed response seemed of lesser harm than exposure to a court process for breach of a developer's confidentiality.

71. With our luxury of hindsight, it seemed to us that if a developer fails to give proper reasons for confidentiality when asked more than once, this should be sufficient consultation. Otherwise, there is the potential for a reluctant developer to stall the EIR process and negate its potency to enable effective participation environmental decision-making.

Judge Claire Taylor

14 June 2016