

Planning Applications Committee

Supplementary Agenda

Wednesday 9 November 2011

7.00 pm

Small Hall - Hammersmith Town Hall

MEMBERSHIP

Administration:	Opposition
Councillor Alex Chalk (Chairman) Councillor Victoria Brocklebank-Fowler (Vice-Chairman) Councillor Oliver Craig Councillor Rachel Ford Councillor Peter Graham Councillor Andrew Johnson Councillor Alex Karmel	Councillor Colin Aherne Councillor Michael Cartwright Councillor Wesley Harcourt

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http://www.lbhf.gov.uk/Directory/Council_and_Democracy

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For queries concerning a specific application, please contact the relevant case officer.

Date Issued: 7 November 2011

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URGENCY

By reason of special circumstance, namely ensuring the proper conduct at future meetings, proper application of and adherence to constitutional requirements in relation to access to documents, and the proper consideration of planning applications, the Chairman is of the opinion that this item should be considered as a matter of urgency in accordance with s.100B(4) of the Local Government Act 1972.

The Planning Applications Committee is asked to resolve to acknowledge and adhere to the Disclosure of Confidential Information Protocol, as attached as Appendix 1.



PLANNING APPLICATIONS COMMITTEE

9 NOVEMBER 2011

Disclosure of Confidential Information Protocol

WARDS

All

URGENCY

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CONTRIBUTORS: **BACKGROUND**

ADLDS

Planning and Legal officers have prepared a protocol, attached as Appendix 1, which provides further guidance in respect of requests by Committee members for information relevant to planning matters submitted in confidence by third parties. It should be read in conjunction with the Local Protocol For Councillors On Access To Information in the Council's Constitution (page 455-458).

It has been drafted to set out the principles deriving from caselaw and to ensure Committee members are aware of and abide by the existing constitutional requirements.

RECOMMENDATION:

The Planning Applications Committee is asked to resolve to acknowledge and adhere to the Disclosure of Confidential Information Protocol, as attached as Appendix 1.

LOCAL GOVERNMENT ACT 2000
BACKGROUND PAPERS

No.	Brief Description of Background Papers	Name/Ext. of holder of file/copy	Department/Location
1.	Council's Constitution	Laura Campbell Committee Co-ordinator Ext 2062	First Floor, Hammersmith Town Hall, Room 133a
CONTACT OFFICER: Alex Russell, Environmental Services Lawyer, ext 2771			

PLANNING APPLICATIONS COMMITTEE

[DRAFT] DISCLOSURE OF CONFIDENTIAL INFORMATION PROTOCOL

1. Introduction

- 1.1 This Protocol sets out further guidance in respect of requests by Committee members for information relevant to planning matters submitted in confidence by third parties. It should be read in conjunction with the Local Protocol For Councillors On Access To Information in the Council's Constitution (page 455-458). This Protocol deals with information which is exempt from disclosure under the provisions of the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Local Government Act 1972.

2. The Issue

- 2.1 Financial viability is a material planning consideration in terms of the likelihood of the proposed development being carried into effect. This can be a very important issue when assessing the acceptability or otherwise of a development proposal, particularly where the proposal may not accord with the targets set by planning policy. The government encourages local planning authorities not to impose requirements on developers which render proposals non-viable unless serious harm would arise. It is frequently the case, particularly in the current economic climate and depressed development market, that a judgement has to be made regarding the viability of a development proposal and the impact on viability of any changes or obligations which the Council wishes to impose. Issues which typically arise and have most impact on viability include the quantum and density of development, the tenure mix of residential schemes and the scale of any planning obligations to be incorporated within a proposed s106 Planning Agreement.

Furthermore, financial viability is a consideration within the statutory development plan in relation to the provision of affordable housing. It is referred to in both London Plan policy 3.12 and Core Strategy policy H2.

- 2.2 In order for the Council as planning authority to properly determine the effect of planning requirements on development viability, the assessment and negotiation of planning applications frequently involves the consideration of financial and commercial appraisals prepared by developers; such appraisals invariably contain commercially confidential and sensitive information. Where such information is provided by an applicant to the Council on a commercially confidential basis the Council is under a duty to not to

disclose that information to anyone else unless allowed or required to do so by law. Should the Council breach this duty it may be liable in damages for any loss caused. A member or officer who breaches confidentiality may also find themselves pursued personally by the person to whom the duty is owed in addition to any disciplinary proceedings which may be brought by the Council. It is therefore essential that all such information is carefully protected and where it is lawfully disclosed e.g. to Members, that such disclosure can be justified and that appropriate measures are taken to ensure the Council complies with its obligations.

3. The Principles

3.1 The legal principles to be applied in relation to a Member's right to access information held by the Council are established in the leading House of Lords case of *Birmingham City Council v. O* [1983] and can be summarised as follows.

- (i) A Member does not have a roving commission to have access to any and every document in the Council's possession.
- (ii) Where a Member can establish a "need to know" in order to carry out their functions as a member then they will have extensive rights to access information, including confidential information.
- (iii) It is for the Council (though delegation if it wishes) to decide in any given case whether a "need to know" arises subject to the usual *Wednesbury* principles.

3.2 It should be noted that:-

- (i) A Member's motive and the use to which they intend to put the information are highly relevant to establishing a "need to know". An improper motive may vitiate a request.
- (ii) Each request must be decided on its merits and on the basis of a properly made request.
- (iii) In cases where the matter is not clear cut the final decision rests with the Council and the Courts will only interfere with such a decision where it can be shown to be irrational.
- (iv) The Council has a duty to balance the rights of its Members with the rights of third parties who have submitted information in confidence.
- (v) The right to have access to information does not necessarily confer a right to a copy of the information in permanent form.

- (vi) Under the Council's Constitution decisions as to whether a "need to know" is established are delegated to the relevant Director (Executive Director following the Tri-Borough restructure).

4. Financial & Commercial Information & Committee Reports

- 4.1 As with all Council decision makers, the Committee is under a duty when making decisions to take into account all relevant matters. It follows that sufficient information must be contained in officers' reports to permit intelligent consideration of all relevant matters. However, public administration would be impossible if Members were required to consider each and every relevant document in full and it is well established that Members may rely on officers to summarise and filter information and to present it in a digestible and readily understandable form.
- 4.2 For example, in the case of English v. East Staffordshire Borough Council [2010] it was held that it was perfectly proper for the committee to take a decision where the "gist" of the information but not the detail was provided in the report and had been subject to independent scrutiny. The committee had not requested the detailed information and had considered the contents of the report sufficient to enable them to properly consider the application.
- 4.3 The planning officers' report to committee must, where relevant to an application under consideration, make explicit how financial viability has been considered in the assessment of the application and the formulation of the officers' recommendations. In some cases, reliance will have been placed on assessment of viability data by in-house specialist property staff. In other cases external professional advice will have been sought from a valuation / accountancy company instructed by the Council and independent from the developer. As well as the original financial appraisal material submitted by the developer, there may be a written assessment provided by the professional valuation / accountancy advisors drawing conclusions from their independent review of the material provided by the developer. The officers' report should summarise the gist of such material and independent advice without disclosing any commercially confidential exempt data.

5. Requests for Confidential Information

- 5.1 Requests by Members for confidential information relating to planning matters should always follow the requirements of the Constitution (page 455) which provides as follows:-
 - "1.1 All requests for documentation from Councillors should be routed through the Director, or where the Director is not available and the request is urgent, then it should be made to an Assistant or Deputy Director, or Head of Section as appropriate.

It would be for the Councillor to explain why their particular request needed an urgent response.

1.2 Councillors are requested to:

- Be as specific as possible about the documentation that they wish to see;
- Normally make the request in writing;
- State the reason for wanting the information, and the purpose to which it will be put.”

5.2 In addition, requests in relation to confidential planning information must always be made in writing and provide full reasons in order that they may be relied upon in any subsequent litigation.

5.3 Where a Member considers that they require the information in relation to an upcoming committee meeting and they consider the treatment of the matter in the published officers' committee report to be inadequate then they shall provide full reasons for this belief in good time before the meeting, by writing to or e-mailing the Director and they should copy the request to the Chairman who may at his discretion consult with other committee members. In such circumstances the Director shall consult with the Chairman before reaching a decision. The Director shall provide reasons in writing for his decision.

5.4 Where the Director concludes that the information should be disclosed he/she may impose such conditions as he/she considers reasonable in the circumstances to protect the Council including requiring the Member to sign a confidentiality agreement undertaking not to share or disclose any of the information to any other person and allowing inspection of documents only rather than the provision of permanent copies.

5.5 It follows that if a Member has been granted access to commercially sensitive financial information provided to the Council in confidence, no reference to it can be made in public. The *nature* of the appraisal and the conclusions of any independent assessment or review of it can be discussed at the Planning Applications Committee, but there must be no discussion or disclosure of any of the commercially sensitive material or data contained within it in open session.

Michael Cogher
21st October 2011