

**Southwark Council,
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Our reference: PH/3654968

10th October 2018

Dear Sirs,

Re: Elephant and Castle Redevelopment (“the scheme”)

The Potential Claimant [REDACTED]

The Potential Defendant: London Borough of Southwark, PO Box 64529, London SE1P 5LX (“the Council”).

The Claimant’s Legal Representatives

Public Interest Law Unit (PILU) of Lambeth Law Centre represents the Claimant in these proposed judicial review proceedings. The solicitors with care and conduct of the case are Paul Heron and Helen Mowatt.¹

Introduction

1. We are instructed by [REDACTED] [REDACTED] is a local resident in Southwark. She lives nearby to the Elephant and Castle roundabout. She is active in two local groups Southwark Defend Council Housing and Up the Elephant, which have participated in the consultation on the application for the redevelopment of the Elephant and Castle roundabout (“the scheme”).
2. Defend Council Housing is a broad based national campaigning organisation. It was set up to defend the principle of social housing specifically council housing. It is a campaigning

¹ The Public Interest Law Unit is working in close collaboration with Southwark Law Centre.

organisation with a minimal income. It campaigns alongside tenants' organisations on a national basis.

3. Up the Elephant is an informal campaign group which was founded as a response to the legitimate fears and concerns of residents surrounding the planned redevelopment of the Elephant and Castle. Residents and traders alike are concerned that the proposed redevelopment of Elephant and Castle will not serve the local community and will lead to gentrification and the displacement and dispersal of the businesses and places which serve as a vital hub of London's Latino community. Our client and the Up the Elephant group are particularly concerned about the scheme's equalities impacts and the proposals on affordable housing which she regards as inadequate, contrary to Southwark's development plan and, for the reasons set out below, potentially unlawful.

Details of the decision under challenge

4. The resolution of the Council's Planning Committee ("the Committee") of 3 July 2018 to grant full planning permission (Application No: 16/AP/4458) to Elephant and Castle Properties Co. Ltd. ("the Applicant"/ "the developer") for:

Phased mixed-use redevelopment of the existing Elephant and Castle shopping centre and London College of Communications sites comprising the demolition of all existing buildings and structures and redevelopment to comprise buildings ranging in height from single storey to 35 storeys (maximum height of 124.5m AOD) above multi-level and single basements to provide a range of uses including 979 residential units (use class C3) retail (use class A1-A4), office (Use Class B1), education (use class D1), assembly and leisure (use class D2) and a new station entrance and station box for use as a London underground operational railway station; means of access, public realm and landscaping works, parking and cycle storage provision, plant and servicing areas and a range of other associated and ancillary works and structures.

5. The Committee's resolution to grant planning permission is subject to the conclusion of a s.106 agreement between the Council and the Applicant. The Council has indicated that if there is no satisfactory legal agreement with the developer by 18 December its Director of Planning will be authorised to refuse the planning permission (if appropriate). The grant of planning permission is also subject to any intervention which the Mayor of London ("MOL") may make. It is open to the MOL to "call in" the application and determine the matter for himself. This letter is being copied to the MOL.
6. As the Council is aware this is a highly controversial scheme which has attracted widespread opposition from residents and expert consultees. Objections have been raised in particular to the chosen approach of wholesale demolition and redevelopment of the shopping centre rather than refurbishment, the shortfall of genuine social and affordable housing and affordable retail space and the resulting social displacement of the existing community.

Factual Background

7. The factual background and the reasons for the resolution to grant planning permission are contained in the officer's report (the "OR") (references to the OR are denoted in this letters as follows [OR/page number]). That background and the reasons for the resolution will be familiar to the Council and are therefore not repeated in full here.

8. The Applicant's original planning application had been presented at two previous Planning Committees on 16 and 30 January 2018 respectively. At the 16 January meeting a motion to refuse planning permission was started but members deferred making a decision to enable officers to prepare their reasons for refusal.
9. Officers presented their draft reasons for refusal at 30 January meeting. Those draft reasons included the shortfall of affordable and social housing provision. However, on the day of the committee meeting itself (30 January) an email was received from the Applicant putting forward a revised proposal which sought to address officer's reasons for refusal ("the revised application").
10. That revised application was the subject of consultation and officer consideration and was brought back to committee on 3 July 2018. A key aspect of the revised application was the quantum and tenure mix of affordable housing. One of the "main changes" [OR/5] in the revised application was the revised affordable housing offer. The increased provision of social rented units was described by officers as "the main improvement" in the developer's proposal and was said to overcome one of the major objections to the original proposal (see [OR/411]).
11. The revised application included the offer of 116 social rented units compared with the applicant's previous offer of 74 genuinely social rented units (i.e. units to be owned by the Council or a registered provider at social rents (see [OR/5(i)]). This boost in social housing numbers was presented to Committee members as a major benefit of the scheme (see [OR/8]).

Policy requirements for affordable housing

12. Affordable housing is considered at [OR/348-415]. The overall scheme is primarily for a private build to rent development, albeit with some traditional social rented units and a fall-back option to build to sell units on the west site.
13. The policy requirements on affordable housing are set out at [OR/348-359]. The key development plan requirements are:
 - developments must provide the maximum reasonable amount of affordable housing having regard to a number of factors including viability. (London Plan 3.12; also see Mayor's Affordable Housing and Viability SPG which establishes a minimum pan-London threshold level of 35% affordable housing (without grant));
 - Core Strategy policy SP6 requires that developments should provide as much affordable housing as is financially viable. The development must contain a minimum of 35% affordable housing. Within the Elephant and Castle Opportunity Area affordable housing provision should be on the basis of a tenure split of 50% social rented and 50% intermediate housing.
14. Furthermore, members were advised to take into account the Council's draft policy P4 of the New Southwark Plan ("NSP"). Being in draft, policy P4 is a material consideration only. The NSP is anticipated to supersede the extant Core Strategy in 2019. P4 seeks a minimum 35% affordable housing but with a different tenure split to SP6. Under draft policy P4 the % total of affordable housing required is 34% social rent, 52% affordable rent capped at London Living Rent and 14% affordable rent for household incomes between 60-90k pa.

Officers' advice to members on social housing offer in the OR

15. In respect of the Applicant's improved social housing offer, officers advised members at [OR/371-372] as follows:

“371. In contrast to the original submission the revised proposal includes the provision of traditional Social Rented housing – 116 units which would be located on the west site within 3 Mansion blocks. This amounts to 38% of the affordable which set against policy SP6 is below the required 50%. In relation to the east site the rental levels do not conform to the distribution requirement set out in emerging policy P4. The proposal reflects GLA grant funding, recently confirmed, which has facilitated an increase in the number of social rented units from 74 to 116.

372. The revised tenure split on the west site substantially meets the policy requirements set out in SP6 as social rented accommodation is now provided. However, on the east site the distribution of rent levels does not conform either to emerging policy P4 or the Mayor's preference for a majority of rents at London Living Rent...” (underlining added)

16. Officers considered that the objection raised to the original proposal, namely that it conflicted with the Core Strategy requirement for 50% of the affordable housing to be at social rent, had been specifically addressed and largely overcome by the increased provision of 116 social rented units [OR/411].

17. In the conclusion to the report, officers advised that the provision of 35% affordable housing would comply with the minimum requirement but that the proposed tenure split would not fully comply with the development plan [OR/787]. Nevertheless, officers highlighted the significance of the improved social housing offer at [OR/389]:

“However, it is of note that the main improvement that arises from the revised proposal is the provision of social rented accommodation to be operated by the Council or a RSL...”

18. The report concluded, finally, that members could be satisfied that the revised proposal contained the maximum reasonable affordable housing offer when viability is considered [OR/415].

19. In respect of social housing provision, members were thus being advised that:

- (i) the revised offer adds 42 social rented units to the proposal;
- (ii) this was a major improvement on the original scheme;
- (iii) this offer is underpinned by GLA funding;
- (iv) Consequently, the extent of any conflict policy SP6 (which requires a tenure split of 50% social rent and 50% intermediate rent), was greatly reduced.

Officers' advice in the addendum to the OR

20. The OR to the 3 July 2018 was accompanied by two addenda. The first of those supplemented the advice given at OR/348-415. It provided as follows at paragraph 11:

“Viability review of the applicant’s revised offer – GVA which is advising the Council on the viability of the proposed development has confirmed that the applicant’s revised affordable housing offer, which includes an agreement in principle for grant funding from the GLA, is the maximum that the development can reasonably support. GVA has also confirmed that the provision of grant funding would not increase the developer’s profit in comparison with the earlier affordable housing offer which included 74 social rented units.” (underlining added).

21. Officers corrected their advice on the proposed affordable housing offer by habitable room which was 35% rather 36%. They then repeated the the reference to the Applicant’s GLA funding at paragraph 23. Officers set out the following response to the outstanding objections on the scheme’s affordable housing offer:

“Officer response – these comments are largely considered within the affordable housing section of the report at paragraphs 348-415 (pages 92-101). There is an agreement in principle for grant funding from the GLA of £11.24m towards affordable housing. The applicant has committed to providing the level of affordable housing set out in the latest offer, and including 116 social rented units, and this would be secured in the s106 agreement...” (underlining added).

22. The advice in the addendum report could leave members in no doubt that the in principle agreement for GLA grant funding towards the additional social housing units was in place.
23. On the basis of that advice, a majority of the Committee resolved by a single vote to grant planning permission.

The actual position on GLA funding for the additional social rented units

24. Officer’s advice regarding the provision of 116 social rented units at [OR/371-372] appears to have been based on a letter sent by the Applicant’s consultant, DP9 Ltd, to the Council on 15 June 2018. That letter described the improved offer of social rent homes and the funding position in the following way:

“Discussions with the Greater London Authority (“GLA”) have progressed positively since February 2018 and we are pleased to confirm an in-principle agreement from the GLA to provide grant funding towards the proposed scheme. As evidenced by the enclosed GLA letter dated 14 June 2018 (Appendix 1), the Applicant’s affiliated company, T3 Residential Limited is eligible to become an Investment Partner and eligible to apply for grant funding from the Mayor’s Affordable Homes Programme, a bid for which has been welcomed and will follow in due course.

The grant funding enables the delivery of a further 42 Social Rent homes on the West Site (Plot W3 Building 3) which means 116 Social Rent homes are now proposed in total.”

25. The Applicant referred again to the GLA funding for the social rented units in its table at Appendix 3 to its 15 June 2018 letter. That table set out the Applicant’s response to members’ objections to the original planning application in January. In its response to the concern which had been expressed about the insufficient provision of social rented homes, the Applicant stated that “the number of social rented homes increases from 33 to 116, assisted by securing grant funding from the GLA.”

26. The Applicant's indication that funding had been "secured", like the reference to having "in-principle funding agreement", gave the clear impression that it had confirmed GLA funding for the additional social housing, which formed an important part of the revised scheme. This explains officer's advice to members at [OR/371].
27. The actual funding position was, in fact, set out in a letter from the GLA to the Applicant dated 14 June 2018 (included as Appendix 1 to 15 June letter). In that letter the GLA did not "confirm an in-principle agreement" for grant funding; far from it. The GLA's letter simply indicates that T3 Residential Limited (a company belonging by the Applicant) would be eligible to become an Investment Partner and (only) then was welcome to apply to the GLA for grant funding. Before an application for funding could be made, the GLA made clear, there would need to be a more detailed assessment including of T3's financial information.
28. Therefore, the actual position is that the Applicant, far from having an "in-principle funding agreement", is not yet eligible to apply for grant funding. The GLA's letter merely sets out some of the eligibility criteria for grant funding and invites the Applicant to bid for funding at some point in the future. There is no promise of funding or suggestion that the Applicant would obtain funding from a source which is, unsurprisingly, in high demand amongst developers right across London.
29. The accurate funding position was confirmed in a letter of 10 July from Mr David Lunts (GLA Executive Director for Housing and Land) in response to an information request from Sian Berry AM. That letter states that the GLA's letter to the Applicant of 14 June:

"does not constitute a funding agreement nor does it commit the GLA to make grant funding available in the future. The purpose of the letter was to confirm receipt of T3 Residential's application to become a GLA Investment Partner and outline the details under which grant funding may be available to T3 Residential to support delivery of affordable housing at Elephant and Castle" (underlining added)

Proposed Grounds of Challenge

(1) Irrelevant consideration on GLA funding

30. The Applicant's offer of 116 social rented units is dependent on grant funding. Officers advised members that such funding had been confirmed when it has not been. The Applicant has not even applied for such funding. The delivery of the additional 42 social rented units is thus wholly uncertain.
31. The advice to members of the Committee needed to accurately reflect the underlying material including the letter from the GLA to the Applicant of 14 June 2018. The advice given to members was incorrect and misleading. Members were told there was funding for additional social housing when there is not. Consequently, the Committee erred by:
- (a) taking into account an irrelevant consideration, namely that the scheme could deliver 42 additional social rent units on the basis of confirmed GLA funding; and/or
 - (b) failing to take account of the fact that the delivery of the promised additional social units was entirely dependent on securing GLA funding about which there is no certainty whatsoever (and certainly no "in-principle agreement").

32. Although the reason for officer's erroneous advice is perhaps understandable given the Applicant's misleading claim in its letter of 15 June 2018 that it had secured an "in principle funding agreement", the advice given to members was misleading nonetheless.
33. The addendum report to the OR made clear that GVA's advice on the viability assessment for the entire scheme was predicated on the erroneous assumption that the applicant had obtained in principle grant funding from the GLA. Therefore, the officer's misleading advice on the funding position not only affected deliverability of the 42 additional units of social housing but tainted the overall robustness of the assessment of the scheme's viability.
34. It is not clear whether the complete correspondence, including the GLA's letters, was included in the background papers before members. Even if the correspondence (including the letter from the GLA to the Applicant of 14 June 2018) was included amongst the thousands of pages of documents provided to Committee members, there was no reason for members to look behind the advice they were being given by officers in the OR that GLA funding had been confirmed between the Applicant and the GLA. Where the underlying planning documents are summarised in a detailed officer's report one cannot expect or assume members will read all of the underlying documents. An officer's report can be assumed to be accurate; in this case the OR and addendum report were not.
35. The provision of the additional social rent units, and the reassurance provided by the knowledge that such additional units were being subsidised by the GLA, was not some minor consideration in the application. As officers made clear (and the members set out in their reasons for resolving to grant permission), the increase in social rented units (which is entirely dependent on the promise of GLA funding) is the "main improvement" between the original application which the Council had indicated it would refuse and the revised application which it resolved to grant. It cannot be said that the Committee would have proceeded to pass the resolution to grant permission for a scheme in any event and without the additional 42 units. In other words, the error of law goes to the very heart of the decision.

(2) Breach of the Public Sector Equality Duty (PSED)

36. The planning application gives rise to a host of equality impacts resulting from the demolition of various building and the consequent dispersal of the cluster of BAME and Latin American, and in particular Colombian, businesses at the Elephant and Castle. Those businesses are operated by traders from many different nationalities but in particular the largest number are operated by traders of Colombia origin², for whom the Elephant and Castle forms a historically and culturally significant cluster.
37. The principles underpinning the Council's PSED are summarised in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] EqLR 60 at §26 McCombe LJ (which summary was approved by the Supreme Court in *R (Hotak) v London Borough of Southwark* [2015] UKSC 30; [2016] AC 811 per Lord Neuberger at § 73). The PSED involves a duty of inquiry and requires a public authority to be properly informed before taking a decision, and if the relevant material is not available, there will be a duty to acquire it (*Bracking* at §28(8)). Moreover, in cases such as the present in which there are large numbers of people, very many of whom

² Colombians make up the second largest group of Latinos living in London (113,500 in 2011 Census). Most Colombians in London reside in Lambeth, Southwark and Haringey.

fall within one or more of the protected groups, the due regard necessary to discharge the duty is “very high” (*R (Hajrula) v London Councils* [2011] EWHC448 (Admin), the High Court held (at §62)).

38. The Council’s equalities analysis is summarised at [OR/157-254].

39. Notwithstanding the clear and detailed representations on these issues supplied to the Council by the Latin Elephant, the Southwark Law Centre and others, the Council’s analysis is flawed and incomplete. In particular, the Council have acted in breach of the PSED in the following respects:

- (i) in assessing the impacts of the loss of the affordable businesses premises on traders and customers of BAME backgrounds [OR/165-173], the Council’s analysis fails to consider, properly or at all, the collective impact of the loss of the cluster and unique ecosystem of BAME, and Latino businesses in particular, which is of vital importance to the Latino community not just in Elephant and Castle but right across London. Research undertaken by a team from Loughborough University and the London School of Economics on the scheme which was provided to members in draft, and which highlights the significant impacts of the loss of this particular form of affordable retail space for BAME and Latino traders and the interconnected nature of the units, has been overlooked.³ Whilst the Council’s analysis does acknowledge the loss of individual business premises it has missed the impact of the loss of the cluster and co-location of BAME businesses and affordable business premises which will be difficult, if not impossible, to replicate in another central London locations.
- (ii) the Council failed to have regard to the equalities impacts of the proposals on women and female BAME business owners who are likely to find it harder to relocate their businesses than male counterparts.
- (iii) By failing to undertake an equalities impact analysis of the relocation strategy (including the relocation database) which will be secured by the s.106 agreement. This is the key element of the mitigation which is said by the Council to address the obvious (albeit understated) impacts on BAME businesses and customers. The relocation strategy will only take effect once any permission is implemented. In the meantime, the proposed mitigation measures will provide no assistance to businesses whose leases have or will expire before the planning permission is granted or implemented. Without any specific equalities impact assessment of the relocation strategy and the interim effects of the resolution to grant permission (pending the s.106), the Council’s analysis overstates the effectiveness of the mitigation and ignores the equalities impacts which have already arisen and will arise in the shadow of the planning permission.
- (iv) Whilst the Council’s equalities impact assessment recognises certain impacts of the scheme on Latin American and BAME businesses it has ignored the equalities impacts which arise by virtue of the traders and customers nationality. The Council has failed to have due regard to the specific impacts on the traders and customers of Colombian nationality at the Elephant and Castle. Colombian-owned and Colombian specific

³ “Socio-Economic Value at the Elephant and Castle”, Assistant Professor Suzi Hall, Research Fellow Julia King and others, August 2018

businesses comprise a number of the principal businesses within the red-line application. For example, Distriandina and La Bodeguita (both Colombian restaurants and social/night clubs) form a key part of the Colombian cluster. The Council's equalities assessment fails to have due regard to the equalities impacts on this specific nationality and focuses only generally on the protected characteristics of race and age. That is an significant omission.

- (v) There has been no consideration of the equalities impacts resulting from the loss of the "Tesco space" next to the existing Tesco shopping centre which contains rooms used for community meetings and which have been an important element in sustaining community cohesion and supporting the other businesses.

40. Each of these omissions, individually and taken together, gives rise to a breach of the Council's duties under s.149(1)(a)-(c);

Details of the action the Council is expected to take

41. In light of the identified error and the misleading advice given to members we respectfully request the Council to:

- 41.1. Rescind its resolution to grant planning permission;
- 41.2. Alternatively, put the matter back to the Planning Committee for reconsideration on the basis of accurate advice.

42. No planning permission has yet been granted. Members (and officers) alike should have the opportunity to consider the application on the basis of the correct information (namely the absence of any grant funding to support the provision of an additional 42 social units).

Disclosure and the Council's duty of candour

43. With the response to this letter, we seek the following information and documents to be provided under the Council's duty of candour:

- 43.1. Any correspondence, emails or other between the Applicant and the Council and between the Council and the GLA regarding the provision of public subsidy for social housing;
- 43.2. A copy of the draft Heads of Terms for the s.106 agreement and/or those parts of the s.106 agreement relating to securing the provision and delivery of of affordable and social housing.

44. Our client reserves its position to seek further documents, or even adding any further potential grounds of claim, in light of the disclosure.

Alternative dispute resolution

45. We hope that a satisfactory resolution can be found so as to avoid proceedings and our client would consider entering mediation if that were appropriate. As such, we would be prepared to take part in ADR. If this is of interest to the Council, would you please contact Mr Paul Heron of Public Interest Law Unit at the Lambeth Law Centre without delay. We would obviously require a comprehensive response to this letter and disclosure before any ADR process could be undertaken.

46. Unless the Council is prepared to rescind the Decision, our client will apply to the Planning Court by way of judicial review to seek an order quashing the decision of **3 July 2018**. That application will include a claim for the Claimant's costs.

Details of the legal advisers dealing with this claim

47. Mr Paul Heron of the Public Interest Law Unit at Lambeth Law Centre dealing with this claim.

Address for reply and service of court documents

48. Please reply to this firm using the contact details in our letterhead.

Timetable for a response

49. We request a substantive reply to this letter within 14 days, namely **by 4.30 p.m. on 24th October 2018**. We look forward to hearing from the Council or solicitors appointed by the Council as a matter of urgency.

If you have any queries, please contact Paul Heron or by telephone on 0207 840 2000 or mobile 07747857172. Alternatively by e-mail to pheron@lambethlawcentre.org or hmowatt@lambethlawcentre.org

Yours faithfully,

PILU

Public Interest Law Unit