

PART 2 – CONFIDENTIAL FACTS AND ADVICE

DD2062

Title: Newington Butts site access

Information may have to be disclosed in the event of a request under the Freedom of Information Act 2000. In the event of a request for confidential facts and advice, please consult the Information Governance team for advice.

This information is not for publication until the stated date, because:

It includes commercially confidential information resulting from financial negotiations involving GLAP, Newington Butts Development Limited (the developer) and London Borough of Southwark. The information is therefore covered by section 43(2) (commercial interests) of the Freedom of Information Act.

Further, it includes information/advice in respect of which a claim for legal professional privilege or to confidentiality of communications could be maintained in legal proceedings. Such information is exempt (section 42 of the Freedom of Information Act).

Date at which Part 2 will cease to be confidential or when confidentiality should be reviewed: 15th January 2020

Legal recommendation on the grounds of keeping the information confidential:

The information in Part 2 below contains information that relates to the commercial and business interests of Newington Butts Development Limited, London Borough of Southwark and GLAP, the disclosure of which could prejudice those interests. For these reasons it is considered that the information below is exempt from publication in reliance upon the exclusion contained in section 43(2) (commercial interests) of the Freedom of Information Act 2000.

The section 43 exemption is a qualified exemption and its use is therefore subject to a public interest assessment. At present, on balance, it is considered that the public interest is best served if the information is not disclosed. Disclosure by GLAP would be likely to have a detrimental effect on the commercial interests of Newington Butts Development Limited, London Borough of Southwark and GLAP. It is considered that this outweighs the general public interest in disclosure for reasons of transparency of decision making.

The eligibility of these exemptions should be reassessed in the event of an FOI request for this information as the level of sensitivity will change over time and different circumstances may alter the arguments in favour of non-disclosure.

Legal Adviser - I make the above recommendations that this information should be considered confidential at this time

Name: Morgan Francis

Date: 25/10/2016

Confidential decision and/or advice:

1. Land receipt reduction

Part 1 of this report summarises the risk that that L.B. Southwark would treat Dante Place as a ransom strip requiring a payment of several hundreds of thousands of pounds. Lengthy negotiations, have produced a more reasonable settlement requiring a payment to L.B. Southwark of £150,000. This amount is for improvements to the park adjacent to the development.

The reduction in the land receipt is recommended for the three reasons listed in part 1 of this report. There is also a likely risk that if this issue is not resolved, that Newington Butts Developments Ltd may take legal action against the GLA. This would certainly involve, at the minimum, not insubstantial legal costs for the GLA.

This approach is also recommended in order to maintain strategic relationships with both L.B. Southwark and the main developer, Mace, and to help facilitate the regeneration of Elephant and Castle.

The GLAP contribution will be via a reduction in the land receipt: from £35,232,607 to £35,132,607. This represents a reduction of only 0.28%.

2. Tender scoring implications

MD1240 included an explanation of how scores for the Newington Butts OJEU tenders were calculated and then weighted. Table 1 below featured in MD 1240 to summarise the outcome of that scoring.

Table 1 Newington Butts scoring from MD1240 13/07/2011

	First Base KKR		MACE Essential Living		Barratts	
	Score	Weighted Score %	Score	Weighted Score %	Score	Weighted Score %
ITT Section A - Delivery and Technical Evaluation (40%)						
Team Approach / Project Management (20%)	7	5.6	7	5.6	7	5.6
Programme and planning (20%)	10	8	7	5.6	5	4
Scheme Delivery (25%)	7	7	10	10	5	5
Stakeholder Engagement & Long Term Management (10%)	10	4	10	4	7	2.8
Risk Management (10%)	7	2.8	10	4	5	2
Sales and marketing strategy (15%)	5	3	7	4.2	10	6
SUB-TOTAL	46	30.4	51	33.4	39	25.4
Section B1 – Commercial (20%)						
Risks associated with financial offer (40%)	7	5.6	7	5.6	5	4
Development financing (40%)	7	5.6	7	5.6	5	4
Security package (20%)	7	2.8	7	2.8	7	2.8
SUB-TOTAL	21	14	21	14	17	10.8
Section B2 – Financial Offer (40%)						
Level of Financial offer to the GLA	6.5	26	7.5	30	1	4
TOTAL	73.5	70.4	79.5	77.4	57	40.2

There has already been one revision to the financial offer from Newington Butts Developments Limited or NBDL (formed by Mace and Realstar, previously Mace and Essential Living). MD1444 (04/02/2015) approved an amended lease which resolved some issues arising from the original tender process and compensated the developer for resultant cost increases by reducing the land receipt from £35,582,607 to £35,232,607. The latest recommended change would result in a land receipt of £35,132,607. This represents a reduction of just 0.28% on the figure in MD1444.

Using the recommended revised land receipt of £35,132,607 to recalculate the scores in table 1 results in no change at all. The scores are unchanged, so this change would not have affected the outcome of the tendering process.

3. Legal Comments

The Decision (to accept a reduction in the overall land receipt for Newington Butts) is a solution to what otherwise might be a costly and prolonged dispute involving LB Southwark, NBDL and GLAP about the right to access the development site. LB Southwark might seek an injunction restraining NBDL and ultimately the occupiers of its new development from using Dante Place to access the flats currently under construction and/or the might bring a claim for damages. The measure of damages in cases of this type can vary but a common rule of thumb is that the claimant might recover about 30% of the uplift in the value of the development site – which is attributable to the use of the “ransom” strip.

A legal dispute involving LB Southwark, NBDL and GLAP might lead to all three parties incurring significant legal and other expert (valuation) fees. The uncertainty created by a prolonged dispute (potentially 12-18 months) may also harm investor interest in the development.

Taken together, the likely delay, the uncertainty, the legal and valuation fees and the potential of a damages award will jeopardise the scheme’s viability.

Without any admission of liability on the part of GLAP, the proposed reduction will be the last in a series of events which will compromise the dispute. We are told that NBDL will agree with LB Southwark to make a payment of £150,000. NBDL will also carry out works, in agreement with LB Southwark, which will bring Dante Place up to a standard consistent with that of adopted highway. In exchange, LB Southwark will declare that Dante Place will become highway to be maintained at LB Southwark’s expense in the future.

We are told that LB Southwark have proposed using a process akin to that set out in section 38 of the Highways Act 1980 to conclude the arrangement with NBDL. GLAP will not be party to that agreement.

The reduction in the land receipt will have to be provided for by deed of variation between of the agreement between NBDL and GLAP. GLAP’s conclusion of the deed of variation should be conditional on (a) NBDL having made payment to LB Southwark and (b) NBDL having completed their works to Dante Place and (c) LB Southwark having made a public declaration that Dante Place will be highway maintainable at the public expense.

4. Financial comments

The decision is seeking approval for a payment of £150,000 from GLAP to the Newington Butts developer. The developer will then make a payment to LB of Southwark of the same amount. The £150k will go towards the cost of improvements to a park adjacent to the development. The payment from GLAP will be in the form of a deduction, of £150k from the balance due to GLAP from the proceeds of the disposal of the Newington Butts property.

Newington Butts property was disposed in 2015 on a long term lease, for residential developments. GLAP received 10% of the premium at the time of the disposal from the developer, and the balance will be paid in 2018. GLAP has decided to contribute towards the cost of the park improvements, in order to minimise the risks of failure to the project.