PART 2 – CONFIDENTIAL FACTS AND ADVICE

DD2300
Title: **Barking Riverside Infrastructure**

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 suitable for publication until the stated date because:

The information in this report relates directly to the available funding for a major package of infrastructure works which is currently out to tender by TfL. Release of this information would have a direct commercial impact both on the tender of these works, and subsequently the delivery of the project. This information will only be suitable for release once the project is completed and all costs resolved.

Date at which Part 2 will cease to be sensitive or when this information should be reviewed with a view to publication: **31st December 2021 (Completion of the Barking Riverside Railway Station)**

Legal adviser recommendation on the grounds for not publishing information at this time:

In the event of any request for access to the information contained in this document under section 1 of the Freedom of Information Act 2000 ("the Act"), it is considered that access can be denied on the basis that the disclosure of such information would prejudice the GLA's, GLAP's, BRL's and TfL's respective commercial interests and, therefore, is covered by the exemption under section 43 of the Act. The information could also be viewed as information which is in part subject to legal professional privilege which is exempt under Section 42 of the Act.

Section 1 of the Act creates the general right of access, which provides that any person making a request for information to a public authority is entitled:

- to be informed in writing by the public authority whether it holds information of the description specified in the request; and
- if that is the case, to have that information communicated to him/her.

Part II of the Act contains a number of exemptions from disclosure for certain classes of information. In particular, section 42 covers information which is the subject of legal professional privilege and section 43 of the Act which provides that information is exempt information if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Here information is considered commercially sensitive as its release could detrimentally affect the ability of TfL to procure a delivery partner for the extension of the rail line and new station at Barking Riverside, which would have a direct impact upon the delivery of the wider Barking Riverside project.

The section 42 and 43 exemptions are qualified exemptions 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 at this point. Disclosure may have a detrimental effect on:

- GLAP's and BRL's commercial interests in respect of the Barking Riverside scheme; and
- TfL's ability to secure a delivery partner crucial to the effective development of the Barking Riverside site and the GLA's delivery of a project in the discharge of its housing and regeneration functions and which promotes social and economic development and wealth creation in Greater London.

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 is not suitable for publication at this time.

Name: TfL Legal **Date:** 14 November 2018

Once this form is fully authorised, it should be circulated with Part 1.

Decision and/or advice:

Clearly set out the decision or sensitive advice which is not suitable for publication.

1. Introduction and background

1.1. As set out in MD1565, a total of £172m was made available to TfL by a combination of partners to fund the extension of the rail line and new station at Barking Riverside. TfL committed to funding the remaining estimated £91m required to a total funding package of approximately £263.2m (as of 2016).

1.2. This funding package is broken down as:

£55m Senior loan facility L&Q Housing Trust
£48m Junior loan facility GLA Land and Property Limited (GLAP)
£15m Junior loan facility L&Q New Homes Limited
£ 9m Barking Riverside Limited (BRL) lending (from land receipts)
£45m Recycled Capital Grant Funding (GLA controlled)

Total = £172m

1.3. The Overground extension is critical to the delivery of Barking Riverside, particularly as the existing planning consent includes a Grampian condition requiring delivery of the rail line before further development can move forward beyond the existing levels of development consented or underway. The Masterplan includes the rail provision as a key feature and it forms a key part of the overall Planning consent.

1.4. The opening of the station is set in 2021, and in order to meet that deadline, work has to commence on the rail connections in December 2018 when Network Rail have agreed to allow access to the main rail lines over the Christmas period.

1.5. Without commencing work in December 2018, the potential risk to the project and to the delivery of the rail infrastructure is critical. In order for work to commence on schedule, TfL are obligated to procure a delivery partner by the 30th November 2018. If this doesn't happen, then they will miss the available development slot with Network Rail, which in turn will add a minimum of 6 months delay and raise costs exponentially, meaning the project cannot be delivered, and the wider Barking Riverside project is at risk.

1.6. TfL launched a negotiated procurement process (in accordance with the Utilities Contracts Regulations 2016) in 2016 to tender the package of works. Following a detailed down-selection process, two bidders submitted Best and Final Offers in October 2018.

1.7. During the procurement process, TfL identified that bid prices were significantly in excess of what was available for the scheme. TfL have worked extensively with the bidders to look at value engineering the scheme to reduce the proposed costs. This has looked at all measures that can be taken and identified circa £10m of savings that can be realised in the contracting process.

1.8. TfL have confirmed that both bids are still circa £20m over the existing allocated budget and have approached the GLA to help fund this gap in order for the scheme to proceed. Without a gap funding source to bridge this, TfL have confirmed that they would not be in a position to let the contract and the rail extension to Barking would not proceed. This would be catastrophic for the Barking Riverside project.

1.9. The procurement process is still underway but it is planned to award the contract on the 30th of November in order to meet the timeline critical December deadline. As the process is still underway, TfL have underlined the importance of not making the parties aware of the risk of a gap within the funding package.

1.10. TfL have proposed that, should the GLA be able to fund 50% of the gap (up to £10m), then they will find the monies to match fund on a pari passu basis up to the £20m.

1.11. TfL have identified that the total cost for the scheme includes “P50” contingency. In short, this represents a process of monetising all foreseeable risks, and assuming 50% of these costs are realised. A P50 contingency is substantively lower than other similar schemes have forecast for other rail projects (in some instances up to P80), but in this case TfL officers feel this is appropriate.

1.12. Therefore, there is potential that if these risks are not realised, then in turn the overspend will not occur. On that basis, the GLA has said that any money it looks to commit would be funding of last resort, and only drawn down should the P50 contingency be realised.

1.13. GLA officers have worked with both TfL and BRL to identify what measures could be available to meet this funding gap. Originally it was envisaged that the existing loan facilities could be extended in order to support the gap in the scheme. However, the business model for BRL shows that any additional borrowing would be unviable and loss making for the wider business.

1.14. It is therefore proposed that the GLA provides up to £10m of grant funding to meet the potential gap if and when it arises. As the GLA is unable to directly contract with TfL to secure specific outputs for its capital funding to TfL (by virtue of section 120 of the GLA Act 1999), instead it is proposed that these monies would be channelled to BRL, who would provide grant funding to TfL to ensure the delivery of the scheme. This would then allow BRL to impose the obligations on expenditure and drawdown on TfL that the GLA could not directly.

1.15. Should the GLA agree to make the £10m funding available, it is proposed that the GLA enter in to a funding agreement with BRL that replicates the required obligations on TfL. Notably these would include:

- A maximum of £10m of grant funding available;
- That any funds are drawn down by 31st March 2022;
- That costs and expenditure is handled on an open book basis;
- That the funds are drawn down on a pari passu basis with TfL;
- That the monies are used only to fund items identified on the project risk register not within the successful bidder’s agreed and contracted budget; and
- That 4,987 affordable homes are delivered at Barking Riverside as long as GLA funding is provided from the Affordable Homes Programme budget – see paragraphs 1.18 and 1.19 below. It is not expected, however, that BRL would pass this obligation on to TfL.

1.16. The Accelerated Construction Fund is a package of grant monies from Government for the acceleration and unlocking of difficult sites and schemes, particularly through the provision of additional infrastructure and match funding. It therefore appears to be a suitable source of funding to meet this gap that would critically impact the development scheme.

1.17. As noted in Part 1 of this report, the Mayor is in the final stages of negotiating a package of land and infrastructure gap funding agreements with Government (including the Accelerated Construction Fund) to a total of £486.7m. These agreements are expected to be finalised by 1st January 2019 and subject to a future Mayoral Decision for acceptance. However, until such time as these funds are in place, commitments against these monies cannot be made.

1.18. Currently, of the 10,800 homes, 1,158 have been completed with 413 affordable units. Without confirmation of the additional funding, none of the remaining 9,642 homes (of which 4,987 will be affordable) at Barking Riverside will be delivered. There is an expectation that Registered Providers delivering these future units at Barking Riverside will draw upon available grant funding packages.

1.19. It is therefore proposed to make £10m of AHP 2016-21 funding available to deliver the necessary infrastructure to unlock these 4,987 affordable homes. This equates to £2,005 per affordable unit. Given the exceptional infrastructure requirement to enable these homes to be built, this funding will be provided over and above the tariff rates for any future affordable homes at Barking Riverside.

1.20. It is assumed that this contingency funding will not be required until the latter stages of development, circa 2020/21. As and when the land and infrastructure funding packages are agreed with Government (expected Q4 18/19), and assuming this project meets the requirements of these funding packages, then it is proposed to reallocate this project against these new funds, subject to a further approval and in agreement with GLA's finance team.

2. Legal Comments

2.1. Section 31 of the GLA Act 1999 prohibits the Mayor from using his power in section 30(1)(a) of the Act to incur expenditure in doing anything which may be done by Transport for London, which on the face of it would prevent the GLA from incurring expenditure in providing funding for transport provision. However, section 31(5B) of the GLA Act provides that nothing in section 31(1)(a) shall be taken to prevent the Authority incurring expenditure in doing anything for the purposes of, or relating to, housing or regeneration. Accordingly, the GLA has the power to fund the proposed transport-related infrastructure within the Barking Riverside scheme.

2.2. Trowers & Hamlins have previously advised the GLA as to whether the use of grant funding towards the development costs of the extension to the London Overground Gospel Oak to Barking rail service and new station at Barking Riverside (the Barking Riverside Extension) would be compatible with State aid rules. The advice was provided in respect of GLA grant funding with L&Q Housing Trust but the analysis could also apply to grant funding provided to BRL. A summary of the advice is set out at paragraphs 6.10 to 6.12 in Part 2 of MD1565. It is important that GLA officers consider this advice when agreeing the terms of the funding agreement (in particular how the funding must be used and the infrastructure outputs) with BRL.