Neutral citation number: [2025] UKFTT 18 (GRC)

Case Reference: EA/2024/0007

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on 10 December 2024.
Decision given: 10 January 2025

Before:

Panel: Brian Kennedy KC with Panel Specialists. Anne Chafer & David Cook.

Between:

NUNO MEIRA

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE LONDON BOROUGH OF LAMBETH COUNCIL

Second Respondent

Representation:

For the Appellant The appellant as a litigant in Person.
For the First Respondent: Sonia Taylor in the written Response of 20 February 2024.
For the Second Respondent: Peter Lockley of Counsel.

The application of Regulation 12 (5) (d) of the EIR.

Decision: The appeal is Dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA") against the decision notice of the Commissioner dated 12 December 2023 Ref. IC-244791 – Z9Q15 ("the DN") which is a matter of public record.

Factual Background:

2. On the 13 April 2023 the Appellant wrote to London Borough of Lambeth Council

("the Council") making the following request for information under the FOIA:

"… . There is a small parcel of land by our property that appears to belong to the council. See attached highlighted in red. We have been speaking to the council about purchasing this garden since 2018, and directly with (name withheld) from the "valuations and strategic assets" team since August 2020.

I understand that the council is now applying for a planning preapplication for developing this bit of land before making it publicly available for sale. FOI: We would like to have sight of the preapplication information including drawings, since any proposal to this bit of land would affect us directly as the only property adjacent to this land is our house".

3. On 17 May 2023, the Council refused to provide the requested information. It cited the following exceptions as its basis for doing so:

4. Regulation 12(5)(d) (confidentiality of proceedings),
   Regulation 12(5)(e) (confidentiality of commercial or industrial information) and
   Regulation 12(5)(f) of the EIR. (Interests of the information provider)

5. Following an internal review (after the Commissioner's intervention) the Council wrote to the Appellant on 13 September 2023 and stated that it upheld its position.

6. The Appellant originally contacted the Commissioner on 13 July 2023 to complain about the way his request for information had been handled. The

Commissioner considered he had to determine whether the Council had correctly relied on the exceptions it cited to withhold requested information from the complainant.

7. The Commissioner observed that pre-planning applications (pre-app) and advice are plans and activities defined under regulation 2(1)(c) of the EIR which will affect the elements of the environment outlined in regulation 2(1)(a) (the land, landscape, soil and so on) whether they proceed to full application or not. The requested information therefore falls within the definition of environmental information and the Council was therefore correct to treat this request under the EIR. There is no issue between the parties on this.

8. The Commissioner having viewed a copy of the withheld information, maintains it comprises of the pre-planning application, the public authority's comments thereon, background information and the policies applied to the application.

9. The Commissioner identified two categories of requested information: (a) the broad tranche of pre-application information within the scope of the request, which was therefore exempted from provision by way of Regulation 12(5)(d); and (b) the much more narrow category of information comprising of background information and the policies applied to the pre-planning application which lacked the qualities needed for Regulation 12(5)(d) to apply. The Commissioner therefore went on to consider whether Regulation 12(5)(e) might apply to that information and found that they could not have the necessary quality of confidence required for Regulation 12(5)(e) and that exemption could not apply.

10. The Commissioner decided in relation to the information within the scope of the request for which regulation 12(5)(d) is engaged and in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure. Although the public authority ("the Council") invites the Tribunal also to consider the exceptions under Regulation 12(5)(e) and Regulation 12(5)(f) of the EIR, the Appellant does not raise or engage these exceptions in his appeal and the Tribunal intend, without prejudice to the other exceptions to primarily restrict the issue in this appeal to the exception under Regulation 12(5)(d)

11. The Factual Background, Legal Framework, Grounds of Appeal and our Adjournment Notice and Interim Decision and Case Management Directions

were issued in considerable detail by this Tribunal on 10 July 2024. The outcome of the Case Management Directions provided by this Tribunal at that hearing was that the Council was joined as the Second Respondent and what we regard as significant material evidence has since been ultimately provided for this oral hearing together with the significant assistance of Peter Lockley of Counsel representing the Council.

The Issues: Regulation 12(5)(d) – Confidentiality of proceedings.

12. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law. The engagement of the exception rests on three conditions being met.

13. Firstly, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance 'Confidentiality of proceedings (regulation 12(5)(d)), the Commissioner interprets *'proceedings'* as possessing a certain level of formality. They will include but are not limited to formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings.

14. Second, this confidentiality must be provided by law. The public authority has explained that it considers the information to meet the threshold for the common law duty of confidentiality. This is because the information is not trivial and was submitted to it voluntarily as part of the pre-application advice process.

15. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings.

16. Finally, the Tribunal must consider the balance of the public interest as regards the information that engages the exception. In doing so, we must acknowledge the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability.

17. In his Grounds of appeal, the Appellant asserts this appeal relates solely on his challenge to the Commissioners' reliance on regulation 12(5) (d) (confidentiality of proceedings) for the decision and suggests the same

arguments would also apply to regulations 12(5) (e) and 12(5) (f). He sets out his substantive Grounds of appeal as follows**:**

a. **<u>Ground 1:</u>** The pre-application advice process is not a 'proceeding' for the purposes of reg. 12(5)(d);

b. **<u>Ground 2:</u>** In any case, common law confidentiality cannot apply to any proceedings in which Lambeth is the applicant as well as the body determining the application; and

c. **<u>Ground 3:</u>** Disclosure in this case would not adversely affect confidentiality where it does exist, in relation to information supplied by third-party applicants.

Discussion:

18. Further to this Tribunals' Directions issued on 10 July 2024 we now, helpfully and significantly have an updated open bundle in 188 pages. There is a closed bundle of 13 pages (which is the withheld information), an unredacted version of the advice letter which is in redacted form in the open bundle. There is an authorities bundle which consists of all of the authorities in the Second Respondents submissions and which we have considered herein. Included in the updated Bundle is a witness statement from Mr Robert O'Sullivan, who holds a Master's degree in Regional and Urban Planning (MRUP) and who has 20 years' experience as a planning professional in local government. He has been employed by Lambeth Council since October 2006 and has professional membership of the Royal Town Planning Institute (RTPI) and has been a chartered member since October 2008. His role at the London Borough of Lambeth ("Lambeth") is Assistant Director of Development Management & Enforcement in Lambeth's Planning Department ("the Planning Authority"). He has overall management responsibility for the delivery of all aspects of the Planning Authority's development management and planning enforcement services. This includes oversight of the processing of all planning pre-applications and applications. We have also had the privilege and significant benefit of hearing Mr O'Sullivan providing further comprehensive and detailed material evidence in person at this oral hearing. We regard him as competent, able and forthright in providing material evidence with significant veracity.

The Evidence:

19. The following material facts are established from Mr O'Sullivan's witness statement:

    a) Pre-application planning advice is a service provided by Lambeth (in common with other local planning authorities), which allows "*an applicant to 'test the waters' on the likely acceptability of a scheme and provide early indications of our view of a development*." [**ROS/10, OB/E127; OB/E159**]. Lambeth charges a fee for the service and requires applications to be submitted via a bespoke form available on its website. The form requires an applicant to provide considerable detail of the proposal and to sign a declaration which begins: "*I/we the undersigned, request formal written advice from the council in respect of the proposed development described above*" [**ROS/15, OB/E128; OB/E163**].

    b) As the name suggests, the service provides non-binding advice and does not result in a final determination [**ROS/7, OB/E125**]. Pre-application planning advice and requests are not published, and no third-party views are sought by Lambeth: publicity and consultation are requirements of the planning application process itself, not the pre-application process, which is intended to allow developers to test and refine proposals with the local planning authority [**ROS/17, OB/E128**]. Although Lambeth encourages developers to engage with members of the community at pre-application stage where appropriate, this is at the discretion of the developer and is likely to be appropriate only for larger projects. Even then, there is no requirement to consult the public and a developer is entitled to test its proposals with Lambeth before making them public through the planning process itself [**ROS/9, OB/E126; ROS/30, OB/E131**].

    c) The application form invites applicants to identify material which is commercially sensitive or considered to be confidential for some other reason, with reasons and dates by which it will cease to be confidential. [**ROS/13-16, OB/E127-128**].

    d) If a planning application is submitted following the provision of pre-application advice, Lambeth's default position is that pre-application documents will be available on request to those wishing to comment on the application – although it will apply

that position flexibly, taking into account any requests for continuing confidentiality that the developer may make [**ROS/17, OB/E128**].

e) The Appellant lives in Lambeth. A small parcel of undeveloped land ("**the Site**") owned by Lambeth adjoins the property in which he lives. He has been engaged in discussions with Lambeth for several years about a potential purchase of the Site. For its part, Lambeth is exploring the possibility of developing the Site, which will affect its value if Lambeth chooses to dispose of it [**ROS/28, OB/E131**].

f) On 23 January 2023, acting through its agent SW Architecture, Lambeth sought pre-application advice from the relevant department of Lambeth Council (**"the Planning Authority")** in relation to potential development of the Site. On 16 March 2023, a senior planner acting on behalf of the Planning Authority wrote to SW Architecture, providing pre-application advice as requested ("**the Advice Letter**") [**CB/A1-11**].

g) In correspondence with Lambeth on 6 April 2023, the Appellant indicated that he would make an information request for the pre-application proposals. The Lambeth Officer acting as applicant in this case forwarded this e-mail the same day to the senior planner in the Planning Authority, seeking confirmation that the pre-application advice was confidential. She noted that she was content for the advice to be made public following any planning application [**ROS/24-25, OB/E130**].

h) Were Lambeth in due course to submit a planning application, it would be acting in a dual but distinct roles as both applicant of the proposed development, and as the relevant planning authority determining that application. The legal basis for such a dual role is provided by reg. 3 of the Town and Country Planning General Regulations 1992 ("**the 1992 Regulations**").

Further Legal Considerations on the Legal background:
Reg. 12(5)(d) EIR (confidentiality of proceedings)

20. There is no definition of *'proceedings'* within the Regulations. In accordance with its natural meaning, the Tribunal has given the term a reasonably broad scope. For instance, it has been held to encompass meetings of a public authority: **Archer & IC v and Salisbury DC** (EA/2006/0037, IT, 9 May 2007) at para. 68, or even a particular item of business taken in closed session at a local authority meeting (the meeting being the 'proceeding' for the purposes of reg. 12(5)(d)): **Chichester DC v IC and Friel** [2012] UKUT 491 (AAC) at paras, 16-19. It can also encompass the preparation of a report that is required prior to certain disciplinary proceedings against local authority staff: **Turner v IC and Cheshire East BC** (EA/2014/0009, FTT, 10 December 2013).

21. In **Flachglas Torgau v Germany** (Case C-204/09) [2013] QB 212, the Court of Justice of the European Union ("**CJEU**") considered the concept of 'proceedings' as referred to in Art. 4(2)(a) of the Directive (which is directly transposed by EIR reg.12(5)(b)). It noted that the concept was one for the national court to determine (paras. 63, -65), albeit commenting *obiter* (at para.63) that proceedings 'refers to the final stages of the decision-making process of public authorities.

22. In **Department for the Economy (Northern Ireland) v IC and White** (GIA/85/2021), the Upper Tribunal cited **Flachgas** and held (at para.31, emphasis added) that:

    "The scope of 'proceedings' is not defined. However, I consider that the term must broadly apply to the final decision-making stages of an authority".

23. The Upper Tribunal in **White** held that this definition could encompass internal decision-making by a government department in relation to litigation, on the basis that such decisions amounted to the department's own 'proceedings', involving as they did consideration of evidence and legal advice:

    "…In the particular circumstances, the [Department] and TRUK were engaged in legal proceedings, which were not in themselves the proceedings of the [Department] as they fell to be determined by the High Court. However, in the course of the legal proceedings, the appellants had to make their own decisions about how those proceedings should be conducted…it appears to me that the decisions taken by the [Department] about their conduct of the legal proceedings potentially falls within the scope of their own regulation 12(5)(d) 'proceedings'. This is because their own conduct of the litigation required formal decision-making steps and consideration of evidence and legal advice. I consider that the FTT has erred by holding otherwise […]"

24. The FTT in **Mark Jopling Obo Udney Park Playing Fields Trust Limited v**

IC & London Borough of Richmond [2024] UKFTT 00163 (GRC) ("the Jopling decision") has subsequently relied on the **White** decision to hold that pre-application advice does not constitute a 'proceeding' for the purposes of reg. 12(5)(d) EIR (paras. 16-17). Lambeth argues below that **Jopling** wrongly applies **White** and that this Tribunal should respectfully decline to follow it.

25. The CJEU in **Flachgas** also considered the requirement for the confidentiality of proceedings to be provided by law. It held that on established Treaty principles, there was no need for Member States to enact specific legislation to establish the confidentiality of proceedings (¶60). Although the wording of Art. 4(2)(a) required 'an express provision to exist in national law with a precisely defined scope, and not merely a general legal context' (¶61), the CJEU went on to qualify this requirement:

    "62 However, that specification cannot be interpreted as requiring all the conditions for application of that ground for refusing access to environmental information to be determined in detail since, by their very nature, decisions taken in that domain are heavily dependent on the actual context in which they are adopted and necessitate an assessment of the nature of the documents in question and the stage of the administrative procedure at which the request for information is made (see, by analogy, <u>Commission v France</u>, paragraphs 81 and 82)".

26. The common law rules that provide for a duty of confidence on the recipient of information in defined circumstances meet the requirements of **Flachgas**. They form a body of law that is clear and precise, but flexible enough to meet the requirements of the individual case. As recognised by the CJEU in **Commission v France**, Case (C-233/00) (to which the Court referred in **Flachgas** at para. 62 above), compliance with an article of the predecessor to Directive 2003/04/EC could be ensured *'when it is applied in practice to a specific situation'*, by means of 'concepts whose content is clear and precise, and which are applied in the framework of settled case-law': **Commission v France** paras. 82-83, emphasis added.

27. The Second Respondent argues from the above, it follows that:

    a. 'Proceedings' encompass a wide variety of activities of public authorities, provided that they are engaged in the latter stages of decision-making; and

    b. The confidentiality of those proceedings may be provided for either by statute, or by the common law.

28. The Second Respondent further argues:

   A) that in considering the public interest in maintaining the exemption, a public authority is entitled to take into account the inherent interest in respecting any expectation of confidentiality that the person supplying the information may reasonably have had, the risk that disclosure would mean that similar information would be less likely to be provided in future, and any consequential prejudice to the public authority's ability to carry out its functions: **Wallis v IC and Derbyshire County Council** (EA/2011/0219; 31 January 2012), and;

   B) the Commissioner's guidance on reg. 12(5)(f) accepts that in appropriate circumstances the relevant information may be supplied by a person <u>who is themselves an agent of the relevant public authority</u> – (the example given being an employee who provides information in relation to a disciplinary investigation).

29. The Second Respondent asserts the presumption in favour of disclosure is supported in **Vesco v IC and Government Legal Department** [2019] UKUT 247 (AAC), the UT considered the application of the reg. 12(2) presumption in favour of disclosure, by reference to earlier case law. At para. 19 it noted that: *It was "common ground" in the case of **Export Credits Guarantee Department v Friends of the Earth** [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.*

30. The Second Respondent further asserts the presumption in favour of disclosure is supported by The Town and Country Planning General Regulations 1992. The 1992 Regulations provide a scheme by which 'interested local planning authorities' can make applications for planning permission for development on land in their area:

   3. Subject to regulation 4, an application for planning permission by an interested planning authority to develop any land of that authority, or for development of any land by an interested planning authority or by an interested planning authority jointly with any other person, shall be determined by the authority concerned, unless the application is referred to the Secretary of State

under section 77 of the [Town and Country Planning Act 1990] for determination by him.

Regulation 10 requires a degree of separation between the personnel making the application and those determining it:

Reg:10. Notwithstanding anything in section 101 of the Local Government Act 1972 (arrangements for the discharge of functions by local authorities) no application for planning permission for development to which regulation 3 applies may be determined :

by a committee or sub-committee of the interested planning authority concerned if that committee or sub-committee is responsible (wholly or partly) for the management of any land or buildings to which the application relates; or

by an officer of the interested planning authority concerned if his responsibilities include any aspect of the management of any land or buildings to which the application relates.

31. As the Court explained in **R. (on the application of Cummins) v Camden LBC** [2001] EWHC Admin 1116, "*The purpose of the provision is to establish a decision-maker distanced from the interested committee, to dilute but not expunge its influence.*" A dual purpose.

32. The 1992 Regulations have been considered by the Court in the context of access to information at principal local authority meetings, as governed by section 101A of the Local Government Act 1972 ("**the 1972 Act**"). Section 101A provides for the confidentiality of such proceedings. Insofar as material, it provides that such a meeting shall be open to the public unless excluded by resolution during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of 'exempt information', as defined in S.100I, read with Sch.12A to the 1972 Act, which includes:

3. Information relating to the financial or business affairs of any particular person (including the authority holding that information) […]

9. Information is not exempt information if it relates to proposed development for which the local planning authority may grant itself planning permission or permission in principle pursuant to regulation 3 of the Town and Country Planning General Regulations 1992

33. In **R (on the application of Helen Stride) v Wiltshire Council** [2022] EWHC 1476 (Admin), the question arose whether information relating to pre-application advice fell within para. 9 of Sch. 12A (so that it was not exempt), in circumstances where it would otherwise fall within para. 3 (so that it was exempt). The Court drew a clear distinction between the balance of competing interests underlying the legislative scheme before and after an application had been made (paras. 38-39,):

> *"38. In my judgment, it assists in this case to have regard to the purpose of the statutory scheme, which is to promote public access on the one hand, but to safeguard the financial and business interests of anyone, including the authority, on the other. It is clear that in the interests of transparency, once the authority is applying for planning permission for development on its own land, then such safeguards should no longer apply, and the public should have access to relevant financial and business information.*
>
> *39. In this case, the authority accepts that once that stage is reached, there must be public access to, and hence scrutiny of, such information before planning permission is granted. Given that that will happen, the question is whether in balancing the competing interests of public access and private interest, the purposes will be served by disclosure of such information when the proposals are at an early stage. In my judgment, it is not difficult to see why proposals may be prejudiced by the early disclosure of such information. […]"*

34. The interplay between (i) these exemptions to the disclosure provisions under the 1972 Act and (ii) the application of EIR exemptions was considered by the Upper Tribunal in **Lourenco v Information Commissioner & LB Barnet** [2024] UKUT 111 (AAC), a case concerning pre-application planning information in the context of a putative application under the 1992 Regulations. The first ground of appeal was the Tribunal had erred in holding that it lacked jurisdiction to determine the application of the 1972 Act exemptions. Ultimately, the UT declined to rule on the precise scope of the Tribunal's jurisdiction, because after citing the passage set out above from **Stride,** it held that the information before it related to an early stage of the planning process, and thus 'plainly' did not engage Sch. 12A para. 9 as explained in **Stride**. It followed that even if the Tribunal had erred in law, any such error was not material. In these circumstances, the following comment

from the UT is *obiter*, but (it is respectfully submitted on behalf of the Council) is persuasive, and clearly right (para. 35, underlining):
"I am not wholly persuaded by the submission that the limits of FTT's statutory jurisdiction necessarily preclude it (or indeed the ICO) entirely from considering, as a subsidiary matter, whether information is disclosable under the LGA. That is because if the LGA requires a public authority to disclose information, such a requirement is surely relevant to the public interest balancing exercise that must be carried out under the EIR".

35. On the facts in **Lourenco** the Second Respondent asserts, the Commissioner, the FTT and the UT all upheld the local authority's reliance on reg. 12(5)(e) in withholding early-stage planning information.

The Hearing:

36. Mr O'Sullivan took the witness stand and acknowledged and agreed he fully understood the importance of providing truthful evidence to the Tribunal and confirmed he had signed his witness statement and averred to the facts and matters set out therein.

37. The Tribunal are able to extract further material evidence from his oral evidence which is on the court record, and which undoubtedly has a significant bearing on our deliberations and in the interests of saving time and costs we will refer to the most salient points of influence upon us in our judgment herein.

Examination in chief: (Mr Lockley's questions of Mr O' Sullivan)

38. With reference to the Jopling decision and its influence, the witness explained that the Jopling decision did make the planning press when it was released in March and April of this year, it was circulated on a website and magazine called Planning Resource. So definitely, planning professionals within the council would be aware of the decision. In terms of other professionals interacting with the planning system and submitting planning applications, i.e. architects, surveyors, he couldn't say with certainty that they would be aware of the decision.

39. The witness was asked if anyone raised it with him and he explained that no one had. He would attend pre-application meetings on occasion and had got a management team who reported to him, (probably in attendance at these

meetings more than he was) but they have not raised any issue or discussions with planning consultants or pre-applicants attending these meetings.

40. The witness was asked if he was aware of any decrease in the number of pre-application advice requests and he explained - not in Lambeth where they have not seen much by way of increase or decrease. They have remained quite steady in the past 3 years. That's not to say it would directly be related to the Jopling decision. There would be a variety of reasons why pre-applications might change in terms of submission numbers. There could be planning reasons, there could be a change in planning policy which could be at national level. The national planning policy framework which is the overarching national guidance on planning policy is due to be updated before Christmas and it is thought that the new government could release it early. There are discussions within that, - these may have been seen in the planning press which has been quite widely discussed. There are going to be policies around green belts, around grey belts, around development of ground field land and the government has a commitment, as has been public knowledge, to deliver 1.5m new homes. The Council very much want to kickstart economic growth within the country. Depending on what is in that document and the council could see an uplift in pre apps, because the development community would want to see how Lambeth as a planning authority interprets that the National Policy Planning Framework ("NPPF") and what the council view is on developments coming forward in the future. Planning policy operates both at a regional level, London, the GLA and the Mayor's London Plan and at a local level it would be Lambeth's local plan. The benefit of pre-app is for pre-applicants to get the councils' viewpoint on how a planning authority interpret and apply planning policy. So that is one element of why the council tend to see an uplift in pre-applications in and around the time when planning policy or guidance are updated and clearly, wider economic factors such as confidence in the development industry will have an effect on pre-apps. The council could not say one could read anything into the Jopling decision and in particular on it having an impact on pre-application submissions.

41. The witness was referred to para 27 of the submission where the Appellant is criticising the Councils' position where the paragraph says: *"the Council implies that a pre-application response would directly influence the final decision of a formal planning application."* and the witness was asked to comment. He explained (from his witness statement) and he did make a comment that a pre-application could be material to a planning application and what he meant by that is that a material consideration is anything that could be considered and

a local planning authority should have regard to when making a decision and a determination on a planning application so that could be planning policies, it could be a range of planning issues such as transport, design, quality of accommodation if it was a residential planning application and pre-application. The Council would take the view that pre-apps could be, or can be a material consideration. That is something that government has set out in national planning practice guidance, which is on the internet and that is guidance for developers and planning authorities, in the government's NPPF, where it is clearly set out that pre-applications could be material when it comes to determining planning applications. In his witness statement he has taken that wording directly from national planning policy governance.

42. The witness was referred to the open bundle, at page 112 where there are two paragraphs that start in the middle of the page and was asked if those paragraphs accurately state the position about the influence that the pre-app bias may or may not have on the final planning decision and answered that he agreed and pointed out that these two paragraphs are standard paragraphs that the planning authority would include in all pre-app responses. They are caveating that it is a without prejudice reply to a pre-applicant.

43. The witness was referred to the Appellant's statement at para 31 where he says "*…being in the conservation area the formal application will be heavily reliant on the conservation officer's view, who is not usually a consultee at pre-application stage.*" and the witness was asked if it is correct that the conservation officer is not usually a consultee at pre-application stage. He explained that that is incorrect. For applications which could impact on a heritage asset, (meaning by a heritage asset it is a conservation area or a listed building), the council would consult the conservation officer on all pre-apps and planning applications relating to heritage assets. In this instance, the conservation officer was consulted on the pre-app submission and did provide comments.

44. The witness was asked if he would do that as a matter of course in any conservation area and he confirmed that that was correct.

45. Counsel then referred to the next paragraph 32 -wherein the Appellant had asserted it can also be the case that planning guidance change between pre-app and formal application, making the advice redundant and the witness was asked if that is a frequent occurrence, and he explained why that statement is incorrect for a number of reasons. What the panel members and the Appellant would have seen in the open bundle is a redacted copy of the

pre-app. The reason for that is the pre-app advice covers a wide range of planning issues or considerations, so that would be everything from land use, to design, heritage if it is a conservation area or a listed building and the proposal could impact on those, transport, sustainability, biodiversity, fire safety etc. So, if guidance does change it is thematic or narrowed down to a specific part of the pre-app that wouldn't cover the whole of the pre-application. Even if that was the case and the council were to adopt a new local plan, local plans are a long time in the making. A local plan will take upwards of 3 years to be adopted from when the planning authorities first start working on it until when it is adopted so there is a long lead in time, and any pre-app discussions would draw to the pre-applicant's attention to the fact that there is a draft document currently being developed. In tandem, drawing their attention to adopted policies, the council would draw their attention to draft policies as well. In this manner he explained it is the case that the pre-applicant will be aware of draft guidance.

46. Counsel referred the witness to Para 37 where the Appellant states that *"A Statement of Community Involvement is often a condition to validate a planning application…"* and asked the witness if the term was used correctly there. The witness explained it is not used correctly in the sentence because a statement of community involvement is about engagement, this is a mandatory requirement, it is set out in legislation, and it is set out in the Planning and Compulsory Purchase Act 2004 and what this requires, is what each local authority does to produce a statement of community involvement that details how the council will consult and who we will consult. In terms of how the council consult, or what the mechanisms of consultation are he explained that will be letters to interested parties or stakeholders, site notices in terms of planning applications and it will be newspaper adverts. Those are the three most common types of publication consultation. Increasingly with social media and the council having various social media accounts which they will use as a method of consultation. The most recent statement of community involvement dates from 2020, so the council will be looking at updating that in due course and maybe taking account of new social media platforms.

47. Counsel asked the witness if a Statement of Community Involvement ("SOCI") is something that accompanies an individual planning application and the witness indicated that it is not, because as it says, it is often a condition to validate a planning application. The council also have a national planning policy framework. That is a comprehensive list of documents that must be submitted in order to ensure that an application can be validated. There is a

national list, and it contains things like planning application form, fee, location form and so forth. The council then has its own list which are add-ons to the national list. The council list in Lambeth was last updated in July 2016 and that would be the method by which the council would look to see if an application submission should be validated or invalidated. So, the statement in para 37 by the Appellant that it is the SOCI that is used to validate the planning application is incorrect.

48. Counsel then took the witness to Para 39 – where the Appellant is referring to the list of documents required for a full application, (that's the Lambeth local list that Mr O'Sullivan had mentioned) and the witness clearly explained that a statement of public consultation is required as a condition for acceptance of the planning application for all major development applications and other development in sensitive area such as conservation areas or areas of historic importance that are likely to generate significant public interest.

49. Counsel asserted the point that the Appellant is making here is one that he makes elsewhere in his appeal, which is that for any application within a conservation area including the proposal that we're dealing with in this case, which was in a conservation area, it is mandatory to have a statement of public consultation when you come to make your planning application. Counsel asked the witness to comment, and Mr O'Sullivan explained it is not, and the reason is, if one looks to the second paragraph, the italicised text which begins 'all major development applications', there is a subtlety to this statement in that it says, '*conservation areas of areas of historical importance that are likely to generate significant public interest.*' The witness explained, the council would only require a statement of public consultation if it's in a conservation area and it's likely to generate significant public interest and this document isn't required for all developments in conservation areas, it's only if there would be significant public interest in the conservation area.

50. Counsel then asked the witness how that is judged and whether something is of significant public interest. The witness explained that there could be a range of factors. One is clearly the scale of developments, so if something is for a couple of hundred new homes, it's a very substantial scale of development in terms of building heights, so it might be tall buildings. It might be a development which contains land uses which could be seen as a bad neighbour, so maybe it is general industrial type uses, something like a manufacturing plant. It could be something where it's an application to build on greenbelt, which clearly would be contrary to policy and that would be

known as a departure from planning policy. So those kinds of elements or something that might be referrable to the Mayor within London. All of those would be of significant public interest because they're likely to garner quite a lot of commentary from stakeholders and from local residents at the time of application submission. In that instance the council would classify that as significant public interest.

51. Counsel then asked the witness, if when thinking about the specific proposal we're concerned with in this case, would that be a matter that was likely to generate significant public interest, and Mr O'Sullivan explained: "*Absolutely not. Size of the applications might, but this is a very small application site, the quantum of development that could be achieved would be quite small. The potential for impact on stakeholders would be negligible and the council's view is it would be confined to immediate properties and for that reason we would regard it as not of significant public interest.* "

52. Counsel then referred to Para 43 from the Appellant where the more general point is made about internal stakeholders by the Appellant. Counsel asked the witness if it is correct that informal stakeholders are not usually consulted, and the witness explained it depends on the type of pre-app. It depends on the stakeholder. If it's an application that's raising potential heritage sensitivities, then the council would consult the conservation and heritage team. If it's something that's likely to raise land use considerations, the council would consult the policy team who would advise on land use matters. If it relates to transport matters, the council will consult the transport colleagues. In this particular instance, the council did consult three internal consultees: a conservation officer, the transport team and the waste services team.

53. Counsel then referred to Para 54 where the Appellant is making the point at Para 53 where he says: *'the Council has previously confirmed that it will not be developing the Garden itself and that it is being allocated for disposal"* and refers to an email. The Appellant goes on to cite Section 9 of the Town and Country Planning General Regulations 1992 and as they're set out, they state that the benefit of planning permission doesn't run with the land effectively. Counsel asked the witness what his understanding of the position is, and Mr O'Sullivan explained that generally, if the local planning authority was to grant planning permission it would run with the land. Planning permission does not run with the person or with the Applicant. In the Town and Country Planning General Regulations 1992, there was that provision which is Regulation 9 which did state that any planning permission granted to a local

authority would be personalised. It would, be for the benefit of the council or the local authority but it wouldn't run with the land. That regulation was deleted in 2018 and what that means now is if planning permission is granted to a local authority in England, it now runs with the land and it isn't personalised or specific for the authority. So, he explained section 9 of the Regulations has been struck out and no longer applies.

54. Counsel then referred to Para 46 – where the Appellant is referring to para 16 of Mr O'Sullivan's witness statement and says, paragraph 16 suggests then that the Council policy is to check with the applicant anyway when a FOI request is made, but the Appellant asserts the Council has not provided evidence of this being a written policy, and the Appellant could not find this in the Council's documents. Counsel then put to the witness that the Appellant is challenging Mr. O'Sullivan's witness statement that he will check with an Applicant whether they are content for information to be released when an EIR or FOIA is made. The Appellant says there is no written policy on that, and Counsel asked Mr. O'Sullivan if that is that correct. The witness explained that the Appellant is correct as there isn't a written policy, as it simply wouldn't be possible to document and have a written procedure or policy for every aspect of what the council do as a local planning authority, however there is an unwritten procedure in place. In the role as Head of Service the witness confirmed he is responsible for all planning decisions made by the Council planning department. He will also vet EIR and FOIA requests before they are responded to. Responsibility lies with him within the council. He has put a procedure in place with his manager and team which requires that he signs off on these and further if looking to release an EIR or FOI response, he will definitely require that the council contact the pre-applicant or the applicant if it's made on a live application, and give them a courtesy email or call that a request has been made for information and their thoughts on that. He confirmed that it isn't documented.
55. Counsel then referred to Para 60 – where the Appellant is talking about the extent to which the pre-app advice gives readers additional information about the quantum of development that's likely to be achieved on the land and he explained, the quantum can be extrapolated from the Local Development Plan which sets out the parameters for applications and is a document in the public domain. The pre-app advice will merely refer to what is indicated in the local development plan.

56. Counsel then asked the witness if it is the case that the quantum of possible development can be extrapolated mathematically form the local development

plan in the way that the Appellant has indicated there, and the witness explained that planning is a design led approach and that comes from the Mayor and his London plan and then carries down to Lambeth's local plan and very much any development on a site would be informed and led by design. The council would be looking at the scale mass and so forth. It would be right to set the general parameters of what might be achieved in terms of quantum by design but that is just one aspect of a planning application in the considerations of a planning application. The witness explained there are many other policies that need to be considered, so it is a wider planning judgement than just looking at design. It isn't correct to say that one could look at the local plan and the policies and that will prescribe the quantum that you're going to get. The witness did not accept that the Appellant is correct in his statement.

57. Counsel then asked the witness if he recalled what the fee would have been charged for the pre-app advice in this case, and he confirmed the fee at the point of submission was £2,333. The council pre application fees change on a yearly basis was £2,333 and the same application now would be £3,504.

58. Counsel asked if such quite significant sums of money are involved what is the value added from the pre-app advice as on reading the Appellant's submission it looks like all it is, is reciting policies back to developer. If the developer is paying those significant fees, what value are they getting from that pre-app advice? The witness explained that the pre-app advice, within Lambeth is structured as it is because the council want to give a very clear steer on whether something is likely to progress toward getting approval or is something that has no legs, it should not progress. In essence it's a gateway to say yes, thumbs up, there is merit in a proposal but it needs some refinement, and the council would invite one come back in for a follow up or for a pre-app; or alternatively indicate the proposal simply conflicts with policies and there's no merit in the pre-app and it needs to be reconsidered on what is being sought to develop on the site. First and foremost, it is a gateway. It can help with the interpretation of policies. So even though policies can be black and white, some policies within a local plan are open to interpretation. Two different planners will have different ways of interpreting the policy. The council are there to give a very clear interpretation on the wording of the policy and what Lambeth's intention was when the council drafted that policy. The witness continued, if it does clear the gateway and the pre-application invites an application in due course, the council will want to try and streamline and get the application through in as timely a manner as

possible. The council are very aware that developers, in wanting to bring forward developments on site, there clearly is a financial implication for them, so the council will do anything to hasten the process of potentially securing consent. The pre-app route assists with that.

59. Counsel then referred the witness to Para 63 where the Appellant is dealing specifically with whether it is possible for pre-app advice to add value to the land where the Appellant says, in stark terms, *" - no value is added to land by receiving pre-application advice, and only a formal Planning Consent could add value to a property"*. Counsel asked the witness, is it correct that pre-app advice adds no value to the land to which the witness disagreed and explained that the pre-app advice can add value. In particular, the market value which is the metric that the Royal Institute of Chartered Surveyors would tend to use for property valuation purposes. Something for example with agricultural land which would have quite a low market value, if a pre-app was submitted to a planning authority saying is it possible for us to develop this agricultural site for residential… which would have a much higher market value per square meter and the local planning authority is aware of particular circumstances because residential would be supported on the agricultural land and can give a positive pre app response, the pre app or pre-applicant in that instance would look and attribute a higher value to the land. The witness explained the statement is correct in the sense that it will be a consideration in the land valuation but having a formal decision re-enforces and bolsters it. There is some weight in pre-app in terms of value to land, that would be the professional view on it.

60. Counsel then referred the witness to Para 114 – where the Appellant is talking now about the situation where someone is in negotiation for the purchase of land the Appellant effectively asserts a purchaser of land would also ask for any pre-app to be disclosed. Counsel asked the witness if it is the case in his experience that purchasers ask for pre-application to be disclosed to which the witness explained it was not in my experience. He would have thought if pre-app has been provided to a vendor – so in this particular instance, as we have seen it is the council, Lambeth has sought pre-app advice for its own land. If the council then sells the land to a purchaser, they are in possession of the pre-app advice, they could release it, it is within their gift to release it. The witness explained if it is an intended purchaser and they're in discussions to buy the land and they make a request, the council wouldn't release it. The councils' approach is until a planning application is submitted, as a planning authority the council do not release a pre-app.

61. Counsel then referred to Para 155 where the Appellant is talking about the value of pre-app consultation versus post application consultation and the Appellant argues that if the local community are not able to shape the application before it is formally submitted, then the consultation after submission is sterile as it would not have considered any views from the local community. Counsel asked the witness if the Tribunal as a result of this hearing ordered the pre-app advice to be disclosed and it became public, would that give rise to any platform for the local community to comment on the proposal and is there any forum for consultation as a result: Mr O'Sullivan explained – he disagreed because the forum would be at the point a formal planning application is submitted. If pre-app advice was to be released and it circulated on a website i.e. or a WhatsApp chat and local residents were to write to the planning authority, there's nothing for the council to consider, there is no planning application. The point at which the local planning authority would accept and consider representations is during a statutory consultation which is at the point of receipt of a planning application.

62. By way of clarification Counsel asked Mr O'Sullivan if when the Appellant says that the consultation at that point would be sterile, do you agree with that, the witness explained he did not because looking at what government is saying, first and foremost that it encourages pre-app dialogue, that's set out in the National Planning Policy Framework. It isn't mandatory but it is very much encouraged. So, there is an expectation that there will be pre-app dialogue and discourse in advance of planning application submission. After that there is a legislative requirement for a 21-day statutory consultation for interested parties. If government felt that it was a fait a compli and pre app has taken place and that negates the reason for a 21-day statutory consultation, that would be enshrined in legislation and there would be a catch all if pre app has taken place there's no need for consultation because it's a fait a compli. The witness confirmed that isn't the case and explained even if there has been pre-app, the local community and interested stakeholders have a very valuable role to play. They are stakeholders who will know their local community at a granular level. So, if an application is received for a plot of land and there are neighbouring properties, the neighbours know the local site much better than the planners will because we don't live next to that site. The purpose of the statutory consultation is to invite in those local voices and to make sure the council is aware of local facts at that granular level. The witness explained it's not a case that if there has been pre app advice, there is no merit in consulting as it is a very valuable exercise. He explained that in his career

on many occasions, where the council have given favourable pre-app advice, and matters have come to light at the statutory consultation stage, issues being raised that the council weren't aware of, and they had to go back and seek further clarification. On occasions, the council might have even come to a decision that it couldn't support the recommendation to approve and would have actually refused the planning application.

63. Counsel then by way of further clarification asked the witness if the Appellant is talking here about the case where there has been no pre-app consultation and something specifically proceeds to a formal statutory consultation what if there were only that formal statutory consultation, would that be a sterile exercise if the opportunity for the local community to influence the development would have been lost to lack of pre-app consultation. Mr O'Sullivan explained that it is very often the case that planning applications when submitted will evolve over the course of consideration. The council will look to secure amendments to design, layout, various other aspects. So, it is not just the council internal consultees that will provide comments which requires the scheme to be amended. It will be local interested parties such as neighbours, stakeholders and might be national bodies such as Historic England, National England, the GLA etc. So, all these parties will provide input which might require the planning application to be amended. So even in the absence of pre-app, the local community will have a role to play, and the scheme can evolve during its consideration of representations received.

64. As a result of queries raised by the Tribunal, Counsel asked the witness about the need for confidentiality when the Applicant is not an external third party but a unit of the council that would be bringing forward the development. Mr O'Sullivan explained that having talked about regulation 9 being deleted and that the council can bring forward development on its own, this is something the council deal with quite regularly in Lambeth as would a lot of other authorities across England. Lambeth would treat any application or request for pre-app, in that the council would be treated as a third party for that purpose. There isn't any special internal procedure for a council application. Where there would be a difference, for example if there was correspondence between a Lambeth officer acting as the Applicant and the case officer in this case there probably is that ability to correspond by email because one will know someone's name but in terms of how the pre-app is treated, it's no different. This is done because from a legislative point of view, it's clearly set out in the Planning and Compulsory Purchase Act 2004, section 38(6) of that legislation says all planning applications must be determined in accordance

with the development plan unless the material considerations indicate otherwise. So, the councils' starting point as a planning authority is to look at the planning policies and irrespective of whether the pre-app is made by an external third party or the council, both of those parties do need to ensure that they comply with planning policy and development planning policy. That would be the starting point.

65. Counsel then asked the witness if it is the case that the council will itself have information that is sensitive and confidential in the way that an external, third party might have that information and Mr O'Sullivan explained that for an external third party it will likely be a commercial business as they are looking at making profit. Or the council might on occasion have charities or other third sector bodies who make applications and while they may not necessarily be profit generating, any income they generate will go back into their operations. In terms of the council and as an internal body, in his witness statement he did refer to the requirement for the council to secure best value. The witness explained that this is a legislative requirement; it is under the Local Government Act. Colleagues within the council in making a pre-app, must observe there is a requirement for them to secure best value for the site. The council would in much the same way treat an external party as the information being confidential because there is a commercial interest, therefore the council would see that an internal body, in order to ensure best value, that there is a commercial sensitivity in much the same way. We would equate external parties' commercial sensitivity with an internal best value sensitivity.

66. The Tribunal asked the witness if the release of that information to the world would prejudice the council's obtaining of best value to which the witness explained that the disclosure (as talked about it in his witness statement)- that in disclosing it, it would disclose not just the type of development that is sought on a particular site but also the quantum. The council might be looking at developing a site for residential and looking at a tall building on the site or looking at something that's five stories with five flats versus a two-story development… and clearly there is going to be different land value attributed to a five-story building versus a two-story building. Those discussions and what the local planning authority would be saying in terms of the quantum and what might be achieved on the site, there is a commercial sensitivity to that and that's why the council wouldn't want to release it at this moment in time. Identifying the quantum of a development from a reading of the local development plan would not necessarily be the case. Mr O'Sullivan explained Pre-app is often an interactive process and the council might have a pre-

applicant come in with something that's an opening gambit and they know that it's not going to be achievable and it's going to be back and forth discussion. That should be done in privacy between the authority and the pre-applicant because there is that commercial sensitivity to it.

Cross Examination – The Appellant's questions of Mr. O'Sullivan:

67. The Appellant commenced his cross-examination and asked when one does a pre app, it's an incomplete building that doesn't include all the reports because all the reports that one submits for planning are produced once the mass thing is complete and often a pre-app is a very limited set of information that doesn't give the full picture of what it's going to be. The consultation in turn is limited, and not to the extent one would have at a full planning application where at that point you launch it to the world to invite comments. The reality is at that point, once one wants to commit to formal planning, it's because one knows it's not going to have to change the scheme because it is very costly to go back once one submits and change drawings which then will affect all the reports which then potentially make the whole thing… having to pull an application and redo it is quite costly for developers.

68. The Appellant then referred to and added an extract which is Appendix 2 of his response- *"pre application advice does not provide a formal decision or report but provides an advice note (which may be in the form of an email or an informal letter)."* The Appellant asked if that the definition, is correct. Mr O'Sullivan agreed and explained there are instances where the council have given pre-app advice, and it doesn't end up being a planning application.

69. The Appellant asked the witness if the council sells the land to someone else, will another party be bound to the pre app advice?" Mr O'Sullivan answered that they wouldn't.

70. The Appellant then asked if it is not really something that goes with land, it is just a one-off advice to which Mr O'Sullivan confirmed the pre-app is confidential as well, it doesn't run with the land.

71. The Appellant sought clarification on Para 32 of Mr O'Sullivan's witness statement, where he had indicated it can also be the case that planning guidance changes between pre-application and formal application. The witness explained it is unlikely; it takes a while, it takes a couple of years now. This pre-app advice has been out since February of last year.

72. The Appellant asked if this revised national framework has been… or the pre-application, assessed in line with the new policy framework to which Mr O'Sullivan responded no, it would have been assessed in line with the national policy framework in place at the time.

73. The Appellant sought further clarification about the changes that are coming into place that will affect that planning pre-app to which Mr O'Sullivan confirmed it would affect any future planning application, but the pre-app is a fixed point in time.

74. The Appellant explained his argument is that the pre-app then leading and being considered for the planning application when the policy would have changed in between one and the other so at that point the pre-app would have made little sense. There is also he commented the case that building regulations can change and affect the schemes… thinking that recently there has been a change in fire policies and some budlings have had to change… even planning consents had to be reviewed, so it is the case that in many instances that changes to the policies whether they are planning or buildings regulations will make the planning advice redundant really. Mr O'Sullivan responded that this was if the proposal was classified as a high-risk building.

75. The Appellant referred the witness to Para 37 of his statement. He put it to the witness he had mentioned that there's no interest in the site, but can he be sure when there has been no consultation with anyone, and no one is aware of the pre-app that has taken place. The Appellant indicated that he'd been approached because of this piece of land, so how can the witness be sure that there is no public interest that warrants community involvement and the Appellant read from the statement of community involvement, October 2020, some extracts… item 4.3, 4.4 and 4.5 specifically; *"Early community involvement should help shape and inform what is appropriate for a site and should therefore be undertaken before proposals are drawn up. 4.3." – "Where developers have engaged with the community prior to submitting an application, the council will expect a consultation report to be submitted as part of the planning application. 4.4.*

76. The Appellant put it to the witness that all planning applications of any scale will benefit (if only through improved processing of the application) from early engagement and discussion with neighbours and/or others likely to be affected by the proposed development. Mr O'Sullivan explained there is most likely to be public interest and clearly as an adjoining landowner with an interest in the pre-app, but the test is whether the council would require a

statement of public engagement and would there be significant public interest. The council acknowledge that there would be public interest, but in order to meet that threshold to require that a statement is produced and furnished with any subsequent planning application, it would need to be significant. The witness explained Development of a site of this scale and size, in his professional view is it wouldn't be significant public interest. As he had explained earlier on, the council would be looking at something that would be referrable, something of a very substantial size, EIA, so environmental impact assessment or something that might have garnered attention in the media or political involvement. For the redevelopment of this corner site or end of terrace site, it would garner significant public interest.

77. The Appellant expressed disagreement explaining there is about 50, 60 flats that face directly to that site… and having spoken with a couple of them who are interested in knowing what they'll have from their terraces…". Mr O'Sullivan explained what the aim of that particular document to be submitted was for major applications or if a site were within a conservation area, there would have to be significant public interest. There would need to be significant interest in heritage impacts on the conservation area. Looking at the facts of this particular case, he explained, some of this might be something to discuss in closed session because it would have to divulge the nature of what was said in the pre-app, but the statement of community involvement, the council website, and government do want local communities engaged in a planning process. It is a fundamental tenet of the planning system that there should be transparency. There should be engagement. That's not to say this wouldn't have happened. This was an initial pre-app.

78. The Appellant bluntly asked this because he had been in a position where there have been some small schemes when he had been encouraged by councils to consult with the residents in smaller schemes, because people are going to be affected by this, if the council are not doing this, why should a developer be consulting with the neighbours when the council are not doing it on their own application before having drawn up plans. Is that not against public interest. He asked the witness isn't the public interest for this to be an open, transparent process. Mr O'Sullivan explained that the council very much encourage inquiry before planning applications are submitted and he explained, but very often it is an intricate process. A design journey very often isn't let's get something out, put it into the planning department and straight away the application will come in. Mr O'Sullivan explained there is a journey to go on, schemes will evolve so there is nothing to say that…there's no

planning application, a planning application has not been submitted. There's nothing to say that the council would not have engaged with the local community if it had progressed towards a planning application. There is a likelihood that they would have adhered to these requirements. This is pre-app number one, so if this pre-app had been responded to and an application was then submitted, the council probably would be reflecting and saying there was no engagement, but one pre-empt that Lambeth as an applicant or pre-applicant wouldn't have gone through that process.

79. The Appellant explained he had been doing public consultations for years and people often just want to know what's happening… and that's the public interest, knowing what is being done. In para 46, which is in the sequence to do with the disclaimers on the pre-app form, the pre-app form includes a significant number of disclaimers to do with disclosures if an FOIA or EIR request is made and invites applicants to list any materials that are confidential. The Appellant asked the witness if the application included the checklist and any materials that are meant to be confidential. Mr O'Sullivan confirmed that it didn't.

80. The Appellant asked the witness if he was involved in land acquisitions for the council to which Mr O'Sullivan confirmed that he was not.

81. The Appellant inquired if, say he was acquiring land and needed to go for funding and the bank doesn't even listen if there's a pre-app, they don't want to know. It's a pre-app… it doesn't add any value to the land unless there is a full application. It's about someone purchasing land. The fact that there is a pre-app doesn't automatically add any value. Disclosure or not of the pre-app doesn't affect value of the land per se. Mr O'Sullivan disagreed, explaining that pre-app can add value to a part of land. The witness explained that with a pre app in Lambeth it is not just the opinion of a single officer, we don't have a system where a pre-app comes in, an officer reviews and sends a letter out. It has to be cleared by management. So, it is the views of not just the allocated case officer but a senior member of staff as well. In any pre-app, the more the council are given at Pre-app submission stage, the more detailed the response can be. For example, that discussion around the agricultural land and someone makes a pre-app submission saying where they had acquired this piece of farmland and want to develop it for residential, submitting evidence to show that they can do this, there's established case law, there are appeals. Lambeth has granted something similar on ten occasions previously, therefore with this bundle of evidence what is the potential for putting housing on this

site. If the council were given that evidence and we've considered that we give a favourable support for redevelopment, there's some merit and some weight to be afforded to that pre-app when it comes to deciding whether to acquire a site and develop it. Mr O'Sullivan explained he is not a commercial valuer, it's not his area of expertise, but he does not think all sites will need a loan from the bank, there will be some developments that will move forward and be funded by the applicant, they might have their own reserves and are willing to take that risk.

82. The Appellant explained that he does not do pre-apps for buying land because otherwise someone else will come potentially while he is waiting for a response and he will make an assessment the pre-app is… again, he refers to all the caveats that are in pre-app responses that quite clearly note it is an opinion. The council will look at things that have been approved elsewhere. There's case law that says each application is assessed on its own merit and that's something that goes across the planning. Even applications that have been granted consent will sometimes lapse and when you try to re-apply for the same consent, you don't get it. The other bit was based on pretty much the same about land value and… the final point I want to make; it is p.155… public consultation being done before planning approval. The Appellant stated he didn't have any more questions but that he has agreed to disagree on some of the witness's opinions.

Re-examination by Counsel Mr Lockley:

83. Counsel refers to the Appellant's skeleton argument, and the very last page of the document which has an aerial photo of the relevant site. Taking the witness to this for the Tribunal's benefit because counsel reminds the witness that we have discussed the site with the benefit of that picture. Indicating the flats that the Appellant was referring to and asked about the impact on the amenity of the people in the flats of potential development on that site. Counsel asked if he has any comment by reference to the photo where we can see the actual layout of the broader site, about the impact of development on that site. Mr O'Sullivan explained one can see the application site is in the top left-hand quadrant. Interested parties and local residents, concern will usually be around amenity so that will be the impact on their living conditions and there tends to be sunlight daylight impact - are they going to receive less sunlight to their balconies, windows, bedrooms, living rooms; are they going to be overlooked; loss of privacy; sense of enclosure so is something being built in very close proximity to their dwellings. What is seen here is the

relationship of the application site to those apartment blocks to the right-hand side. There is quite a large separation distance. You see this large, landscaped grassed area in between the application site and the adjoining blocks, or the blocks are at a perpendicular and windows aren't facing directly towards the application site. Mr O'Sullivan explained in terms of the potential amenity impact on those properties the council wouldn't think there would be significant public interest from an amenity perspective that would warrant the pre-applicant carrying out engagement and submitting that document with a planning application. The council have outlined that in advice to the pre-applicant and it wouldn't be needed.

84. The Appellant interjected at this stage to inform the Tribunal that residents are also concerned about things like noise generated during the construction works and from equipment… how that affects them when most of these flats don't have cooling so in summer the windows are open, how it affects the local amenities, there's another couple of cars that are going to occupy the highway, the noise, the construction, the duration of construction and the impact that's going to have on the residents, there's a route to the school and that will pass right by the garden that's where most of the students go past into school. It's not just the amenity, the overlooking, there's a bit more to building and how that affects people for a year or so it would take to build this thing and how then the permanent situation would affect them. There's equipment etc. Mr O'Sullivan explained that the planning system is set up in such a way that when the council grant planning permission it is always conditional planning permission, and the Appellant will be aware of this. If there are matters that the council can secure through a planning condition and request further information at a later date, the council are required to do that. With construction impacts and potential noise, traffic disruption during construction period, there is what's known as CEMP, construction environmental management plan. The purpose of that document is to manage environmental distance for the duration of the construction period. That is a regular document that the council would secure through planning permission. When an application is submitted, there is consultation for 21 days, there will be a draft version of that document. The applicant will be required to give an overview of how they intend to construct the development, what will the duration of the development be, what's their proposed hours of construction and vehicle movements and so forth. That will be put out… interested people will have the opportunity to comment on that, those comments will be taken into consideration, if permission is granted, we will require through a planning condition a final version of that document which will tie down hours

of construction and all the other potential impacts arising from construction methodology.

85. The Appellant commented that a lot of people won't have the opportunity to speak and have their voice heard before it gets put to the planners. Mr O'Sullivan explained that with pre-app the council wouldn't consult the public. The council internally consulted three parties as mentioned earlier, conservation, transport planning team, and waste services. The reason why the council engaged transport planning is they will provide professional advice on construction methodology, method of construction. They will look at expected vehicle movement, trip generation and so forth. They are a very experienced team, and they deal with these construction environmental management plans very routinely. The council would have taken their advice on board and fed that into the pre application response. The Appellant explained that as a member of the public he would have liked more information. hat he just wanted to add this point and that he was not currently engaged in one of these where the residents have asked him specifically to discuss this with them before it goes to the planners. He explained that a lot of people won't have the opportunity to speak and have their voice heard before it gets put to the planners.

86. The tribunal raised a query of Mr O'Sullivan re the pre-app being confidential and running with the land. Mr O'Sullivan explained that it is not a formal decision of the council so what the council are required to do as a local planning authority, and this is a legislative requirement under the plannings acts, they are required to maintain a planning register. Every formal decision, every planning application that is determined, whether approved or refused, the council include that on the planning register., it is in the form of an electronic planning register if you were moving into Lambeth and looking to buy a house, you can go onto the register and see whether there has been any planning permissions granted on that road or has there been any planning decisions refused on that road. They would run with the land, if something is granted for a property you would be able to search that. He continued, pre-apps, because they are not a formal decision, they wouldn't run with the land in the sense that they are not a planning decision, but yes, there is a record that pre-app advice has been given for the land, but it doesn't sit on a register. The pre-apps are not on the register. That would be the case for all local authorities across the UK. We are required to keep a register of planning decisions, not pre-apps. There is no legislative requirement to do that. Of the witness's knowledge of the 33 London boroughs, he confirmed he is not aware of any

that would publish their pre- app responses. That's not to say there isn't, but from discussing with peer network and Heads of Service it's not something that has ever come up in discussions i.e. that other London authorities would make their pre app responses publicly available.

87. The Tribunal raised a further query of the witness re: someone purchasing a site on which pre-app decision had been made and if they would have access to that. Mr O'Sullivan explained that the council wouldn't have access; it wouldn't be publicly available. If someone did purchase a site and were made aware that pre-app advice had been given and they wrote into the council and said they had been made aware that there was pre-app advice can they have it released…the council would be going through the same procedure that the Appellant has gone through, which is that he would say *"I would like a copy of the pre-app"* and the council would say until a planning application has been submitted it is confidential, the council don't release it. We would decline the EIR request and apply the exemptions that have been applied in this instance. Only at the point that an application is submitted do we release a pre-app.

88. The Tribunal asked the witness if the pre-app process is an informal way to streamline for those who might want to embark on an application process. Mr O'Sullivan explained that it is. The government guidance on the MPPT website which was referred to earlier gives a number of bullet points which detail the value of pre-app and why government strongly encourages a pre-application before going through the costly exercise of preparing full planning submission and yes, part of that is cost expenditure. It was referred to it earlier, the planning application system in the 20 years where the witness has been engaged, it has become much more unwieldy. There's a lot more requirements put on applicants than there was even 10 years ago. The Appellant touched on fire safety. Everyone will be aware that post Grenfell there are now conditions in buildings of 11 meters and above in height. The witness explained, yes, the cost of engaging an architect to actually draw up the scheme, but there's a multitude of supporting documents and it will run into the 10s of 1000s. the development community see pre-app as a way of getting a very early-stage steer on it. A pre-app can be as minimal as someone writing a cover letter and saying see that plot of land there could I put residential on that plot of land, could I put a public house, a nightclub, an office, and if the council write back and say that in principle that land use is supported, then they may proceed to engage all these additional consultants and spend a lot of money. He explained it's very helpful to establish basic principles before going to that expenditure."

89. The Tribunal asked the witness re: the response to the pre-app being one for the individual making the submission rather than the world at large. Mr O'Sullivan explained: Yes, we always use the analogy that you don't need to be the owner of the property to make a pre-app. Anyone living in and around Normandy Road i.e. could make a pre-app submission to the council and say see that plot of land, could it be developed it for the following. The response is furnished to that person, and it is their pre-app only. It doesn't go on a register and sit there against that piece of land; it is just something for the person expressing an interest in maybe bringing forward a planning application. The planning system works in such a way that one could make a planning application tomorrow for the redevelopment of Buckingham Palace. The only thing one need to do is let the landowner know as part of the planning application that one is making a planning application. Westminster council would need to consider that and decide on the planning application. The planning system works in that respect - you don't have to be the landowner to make a pre-app or make a planning application proper. Some pre-apps are very light in touch, and it is just a case of establishing very basic principles. There mightn't even be an architect commissioned; it is just wanting to establish is it a goer in principle. Others, we will see where that full development management team have been engaged. So, the developer feels, we know, we've looked at the policies, we're quite confident that we can develop this site. In some cases, in the planning system, our local plans have what are called site allocations, so we internally have developed basic principles for the site. So, we've already published that we think the site is e.g. for educational use or residential use, or commercial… and the developer knows that and thinks ok, I'm going to run with this so I'm going to pay for an architect, a transport consultant, a sustainability consultant and all that comes to that pre-app, it just means that the more they give us, the more definitive a response we're going to provide. You tend to see this with the bigger sites and the bigger developers, your volume house builders, your Barclays of this world. They will engage with pre-app with a lot of front-loaded material, but for a site like this which is quite small in scale you probably would find that pre-app… you wouldn't get the full development team engaged at pre-app stage. There is no minimum requirements for a pre-app in terms of supporting information whereas as we touched on earlier, the local information requirements document, that is very specific, it is mandatory, we have to publish one of these and that does say if you are submitting an application for 10 or more homes you need to submit all of these documents and there's a long list of documents that are mandatory. If one

doesn't provide this to the planning authority the council won't validate planning application.

Appellant's Closing Submissions:

90. The Appellant explained that as a layman it seems simpler to him than it has been. When he looks at it, he looks at basics of the EIR regulations and the definition which aims to increase transparency and accountability in the public sector. That is the starting position unless it can be demonstrated that there is an exemption or exception that will apply and of course the adverse effect. He believes that this is all being assessed on a case by case rather than… a bit like a planning application on the merit of each application. with land…and anything that's done to it will affect us directly. So, it's all about getting information and knowing what's happening. What pushed him towards an appeal was the fact that the wording in the internal review was specifically saying that it would… that is disclosure would be likely to cause harm or distress to the third party. That was specifically worded in that way in the internal review. At that point the Commissioner was already involved, and he had this conversation with the Information Commissioner's Office ("the ICO") at the time who thought that this meant there was a third party. The Appellant provided evidence that there is no third party, as he saw a third party, as a separate party and that triggered this appeal. So firstly, the Appellant would like confirmation about this understanding… The Appellant argues that a third party is a separate party and this wording in the internal review is incorrect. The confidentiality of proceedings – (he refers to a recent decision in the Jopling decision in regard to this) surmising this procedure should broadly apply to the final decision-making stages. He specifically asked will someone buying the land be bound to it because if there is no cause and effect can we really say that this is connected with the final decision making. It was confirmed that regulations can change, and this can change again so it is not directly tied to the final decision making. It can just be a free-standing bit of information. There is no definition within Lambeth's pre-app guidance which defines the pre-app response as taking the form of an email or being an informal letter and all of this is against the idea that this is a formal procedure, it's an advice note, that can be free standing but it's not formal. The Jopling case has upheld that idea, that it's not adequate to refer to a pre application advice as a proceeding and that is the Appellant's view too. There are other bits that are common to the other exemptions, the public interest and the adverse effect.

91. Regarding 12(5)(e) The Appellant agrees there is no argument about this being information that relates to commercial…it relates to bit of land that the council is trying to sell… and the argument is not if this is commercial information if it's related to the adverse effect. The Appellant argues it is in the public interest.

92. Re 12(5)(f) The Appellant is troubled by the idea of a third party, which in his view is a separate entity, not a different sector within the same company. The whole exception and the guidance he can find on the Commissioner's website all seem to be geared toward information that's provided by third party into the council. Referring to the argument that was made before and still it's subject to the test of the adverse effect and the public interest. The adverse effect he argues has two consequences that are suggested by the council and Mr Lockley submits firstly that the council by disclosure would somehow lose bargaining position or some form of bargaining high ground if someone else knows what the pre-app advice response has been. The Appellant argues that in his experience to date it has not been this, the pre-app advice, even if someone has it doesn't really come into effect and disclosure of it wouldn't really affect the council. They can sell to whoever they want and the person who is competing to acquire it from the council can take a risk and that would be independent from what the pre-app information is. From the Appellants perspective, it is only about knowing what the council intends to do next to his house.

93. Second on the adverse effect is how it would affect the planning pre application service as a whole and how this could deter future applicants from lodging pre applications. From the Appellants perspective (again referring to the Jopling decision) it has not affected it adversely at all, what we've been doing, we've still been submitting pre-app and planning performance agreements. That has not stopped us in any way he argues, not deterred us in any way. The same way if the decision would be to uphold the appeal, we don't see how that could make any difference to the decision that's already out there. We don't think that it could affect in any way the planning system as a whole, the ability of the council of providing this service. The reality is that developers, such as the ones he has worked for in the past, don't really use this system because of the confidentiality. Confidentiality is one aspect of it that doesn't really come into play. The usefulness of the service is being able to start with a conversation while you are preparing the formal application and being able to accelerate that process and that is nothing that the Appellant contests. He has used the pre-app service before and would carry on using it

even with the Jopling case, even if a decision would be here to uphold this appeal. The Appellant states he does not see there could be an adverse effect in that sense. He does not accept that the council would somehow loose bargaining potential or would give an unfair advantage to anyone else by providing the pre-app advice received. Anyone that's in the business of acquiring land will make their own assumptions, take their own risks, and that's independent of the pre-app information. So, he argues, it would not reduce the asking price that the council could expect, the sale price, because it's not tied to the pre-app information… it's tied to what developers, or what whoever wants to buy this land, can achieve with it, that's something they discuss with their own teams. That's something the Appellant indicates he can do on a daily basis. That is why he does not see there could be an adverse effect. The case law in London Borough of Sutton v The Information Commissioner EA/2017/0064 says disclosure is the condition, not that it could or should. It needs to be more likely than not that an adverse effect would occur, and the Appellant does not think that that likelihood exists. The Appellant maintains that developers will carry on using the pre-app advice when they see fit. They tend to use more planning agreements and often the pre-app gets thrown away because of other ideas of what we want to do with it. That, he argues shouldn't affect the asking price. What affects the asking price is what we believe we can do with that piece of land and that's independent of what the pre-app advice has been. If someone from next door acquires land, they don't really have to carry on with the pre-app advice that's been given. The Appellant argues that from reading through the feedback the public interest is where the balance is. It doesn't seem that you can justify…again going back to how it would affect the planning system, it would deter people from using the system, it would not, he argues. The public interest in having a pre-app service that allows streamlining of the planning process wouldn't affect it because the Jopling decision is out there and it hasn't, that has been confirmed by Mr O'Sullivan earlier. Developers know now… because the Appellant says his company knows, but no one really knew or seems too bothered about this because we still use the system regardless. He maintains there was an argument that's in line with the previous adverse effect which is the public interest of the council being able to get as much as they can for the land is again not down to the planning pre-app being released or not, it wouldn't really affect the asking price, that's down to who is going to be buying it, how risk averse they are and how far are they willing to go to acquire the land. That means that wouldn't affect the asking price and that would maintain the public interest in making sure that the council is able to fund itself by selling assets. That's not something that

would be affected. There are, he maintains, arguments for the public interest. He also refers to Bristol City Council v The Information Commissioner and Portland and Brunswick Squares Association EA/2010/0012 where the Tribunal considered that the fact that the Council itself formed the site to be developed which gave rise to the need for particular scrupulousness and that's where we're coming from, we expect that our council would lead by example and that is in the public interest, that the council would take the lead and be open about their own dealings. The fact that they own the land, it's the assumption here, that would be more open, and they would do what they are meant to, which is to promote openness and transparency in local and national government. The number of people affected by the proposal, even if it's one, it's still someone that's affected by the proposal and he argues it serves the public interest to know that the council is sensitive to this. He mentioned before the effect of not releasing the information. Does it not give rise to an argument that maybe developers don't need to focus that much on doing public consultation as much as we do and understand, He does quite a lot of it and needs on a day-to-day basis to be ready to pick up the phone and apologise to someone because we were too noisy five minutes before 8am. This, he maintains, is something that is relevant here. The public interest is having a transparent local authority that cares about their residents and particularly when they own the land, they are able to lead and to demonstrate to other developers that there is a sensible way of doing it by engaging with the residents rather than just completely ignore… again, when you can see that the adverse effect as has been demonstrated by the Jopling decision…again, we don't really understand how the disclosure would affect the asking price. He does this for a living and it's not something that he understands, or thinks is justified. There's a comment on the gist he refers to which is that there has been an explanation of why disclosure of the advice would prejudice the council's ability to meet its best value duty. He does not understand it and he does this on a day-to-day basis. If he thought there was an adverse effect, he wouldn't be suggesting this but because he does not see the harm that can be done, particularly since if the council owns the land how is that going to affect it… it is not like someone is going to take the pre-app and do their own application. It is in his view isolated in that way. The remainder of the gist he argues seems to just suggest that the detail of the pre-app has been developed to a good standard, that doesn't seem to the Appellant to materially affect his comments. This he submits is the core of his argument.

94. The Appellant understandably conceded he doesn't really have the capacity

to go through 366 pages of case law. What he wanted to know is what the council is doing next to his house. He agreed he has not argued that the information is not commercial in nature, what he has argued is it is so sensitive so commercially secret or unique, that it would be affected by disclosure and that is the principle point that he is making. It's a pre-app and the land ownership just means that whoever's got the land does whatever they want with the land.

The Second Respondents submissions:

95. The council say this case contains pre application advice relating to a proposal for development of a small plot of land in Lambeth's area. The public interest in disclosing that, the council say, is very limited, because in the Appellant's own words in the exchange he had with the council prior to making the request, his is the only household that would be directly affected by the council's decision with regards to it. While there may be indirect effects on other properties, that is the Appellant's own words. The council say the public interest in disclosure is a narrow one. Conversely, there are wider interests in play that favour maintaining the exception. That's broadly speaking the confidentiality of the pre-application process itself and the commercial interests of the council.

96. A narrow public interest in disclosure as against the much wider public interest in maintaining the exceptions. The material exception in this appeal is, Reg. 12(5)(d). The Commissioner also agreed that the council is entitled to redact a small amount of personal data, but that is not contested by the Appellant, just some names, email addresses… that is recorded at paragraph 8 of the Commissioner's response page 27 of the open bundle.

97. Reg.12(5)(d) first, the issue that arises is the meaning of the term proceedings. This was an issue identified by the Tribunal in its case management decisions on the basis of the Jopling case following the paper consideration. The starting point is of course a natural meaning of the word proceedings, and the council say that natural meaning is a very broad one. It could encompass the actions or activities of any body. One reads that term in the context of the statute and the case law and both of those underlines, in order to merit the protection of 12(5)(d) the proceeding has to be something sufficiently well defined, of a certain level of gravity or significance to warrant the confidentiality that the exception provides. Hence the reference in the case law to a certain formality. On the term formality. Whether something is formal or not is a sliding scale, there's no binary test whether something is formal or not formal and it follows

that there's no gotcha point for the Appellant when he says that in the council's document, he describes the advice as informal in some places. Plainly, a pre -application is less formal than the determination of a planning application. On the other hand, it could be more formal than a routine response the council would send to an email query from a resident. The fact is that it has a certain level of formality as it is a service for which developers pay thousands of pounds, they receive expert advice – in this case in a letter stretching over 11 pages – that applies planning policies, exercises, expert judgement, so it's not merely an off the cuff response. It is somewhere in the middle: not as formal as a planning application but above a mere informal response. The second point… the whole notion of whether something is formal or not is, the council submits, a gloss – it's not any part of the statutory definition, so it shouldn't be elevated to a hard-edged issue of law. It is not a matter that is amenable to being a hard-edged or bright line test because it's a sliding scale…as to whether something is formal or informal. We see how this plays out in the case law. The first case to look at the nature of what proceedings is, is the case of Chichester DC v IC and Friel [2012] UKUT 491 (AAC), which is at tab 6 of the Authorities Bundle starting at p.191. The simple point is what was considered in that case a proceeding, because the case concerned potential sale of a council owned site. Planning permission was granted. That valuation was considered as a matter of report by the management committee. That took about two years to determine but shortly after the planning application was made, a few days later, the Executive Board meeting decided to make a contribution to a local football club. That was the meeting in question. There was no final decision taken. The planning application had only just been submitted, and it was at that meeting where an item was taken in closed session that the Upper Tribunal accepted that that could amount to a proceeding. So, it was a local authority meeting but not one which any form of final determination was being taken. The Friel case does of course predate the Court of Justice decision in Flachglas Torgau v Germany (Case C-204/09) [2013] QB 212, that's at tab 17. If we pick it up on p.344, you see the heading Question 2(a) and (b), those were the questions that were referred to the court. On reading those, the Tribunal will see that they are not about the scope of the term proceedings at all. It is about the way in which confidentiality has to be provided for in law. At para 63 over the page, and we see the court's comment: *"national law must clearly establish the scope of the concept of 'proceedings' of public authorities referred to in that provision, which refers to the final stages of the decision-making process of public authorities."* That's something of an aside, it's not germane to the question the court is answering. There is no reasoning to support it, it is just thrown out there by the Court of

Justice, somewhat surprisingly since at 65 the court then goes on to straight away say that *"the concept of proceedings… is for the national court to determine* Nonetheless, that is considered in our domestic case law in the case of Department for the Economy (Northern Ireland) v IC and White (GIA/85/2021). which is at tab 11 of the bundle. If we pick that up at para 27 we will see a discussion of what assistance the Upper Tribunal had about the meaning of the term proceedings. The first point is not defined in the Directive or in the regulations, there's some citation from the ICO's guidance which gives a number of examples: ". So, the ICO's guidance is not tying things necessarily to the taking of a decision. It appears the Upper Tribunal is deriving some assistance from the ICO's guidance. At page at 247, one sees requests *"may be refused where disclosure of that information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law, and not the entire administrative procedure at the end of which those authorities hold their proceedings."* So, what the Court of Justice seems to be saying there, is that it is tying its definition of proceedings to that which is protected by confidentiality. So, we can gain some assistance from the scope of confidentiality obligation as to what the scope of the proceeding is. That makes sense when one thinks about what it is that the exception is seeking to protect in the first place: proceedings that are confidential as provided for in law. Then we come onto *Flachglas*, and that passage is cited at para 31 in *White* at p.248 of the Authorities Bundle, the Upper Tribunal makes its own conclusions. It says: *"The scope of 'proceedings' is not defined. However, I consider that the term must broadly apply to the final decision-making states of an authority, as indicated by the CJEU in Flachglas."* So, it is not treating the Flachglas condition about final stage of decision making as the single determinative test, broadly as indicated in Flachglas. We can see in the same para how broadly the Upper Tribunal did apply it in that case. It held that proceedings could extend to internal discussions about how a government department was going to conduct legal proceedings. So that's not a matter of any external decision taking, they're not exercising a statutory function when they held those discussions, although there was a statutory function in the background in that case. The conclusion rested simply on the fact that the department's own conduct of the litigation required formal decision-making steps and consideration of evidence and legal advice. The council submit 'formal' must be used in a fairly flexible way in that sentence because an internal legal strategy meeting is not necessarily formal in the usual sense that a formal council meeting might be described as formal and further it is referring to the ongoing conduct of litigation, tactical matters, rather than any final decision that the department had to take. In the councils' submission, it's

a flexible principle that we see from the case law. That is why the council argue the First Tier Tribunal went wrong in the Jopling decision. The council submit it must be that Jopling was wrongly decided, and this Tribunal should not follow it. As submitted in the councils' skeleton argument para 48, it is a decision on the papers, the Tribunal had submissions only from the Appellant who was a litigant in person and the public authority which didn't address the issues. The council submit the FTT went wrong by applying the Flachglas criterion in an overreaching way as if it were a determinative test for proceedings rather than one indication in the mix about whether something could properly be termed proceedings. Applying what this council argue is the correct analysis to the pre-application process, it is one with sufficient structure and formality that results in advice of considerable weight, even if it is non-binding as everyone accepts. It is sufficiently significant and considered, that the whole process of seeking and giving that advice can qualify as a proceeding within the proper meaning of that term. There's a set form for applying for that advice, set fees which are very substantial, Lambeth has published deadlines for responding (the Appellant makes reference to those at para 166 in the open bundle), when Lambeth receives a request it engages its expert planners, they consult other expert statutory officers and they provide advice which is of a reasonable degree of formality, applying skill and judgment to a complex set of planning policies, and which can be a material consideration in the determination of planning permission. The council submit that falls naturally within the meaning of proceedings, as the Commissioner has found in a series of prior DN's which are listed at para 18 of the DN. Certainly this is a view the Commissioner has taken consistently in the past, para 4 of the open bundle.

98. The other element of 12(5)(d) are made out, confidentiality provided by a law. That can be common law it doesn't have to be a statutory test. The Applicant says that there can't be confidentiality where the Applicant is the council itself. There are two answers to that submission. One is that there is no requirement in law, either in the EIR exceptions or how common law confidentiality works, that's confirmed in authorities. The second answer to that point is in the circumstances of this case, one arm of the council is acting in a way that distinguishes it from a different arm / entity in the council department… one is seeking and one is giving advice, and that disaggregation between departments in the council becomes formalised in statute in any case that proceeds to a planning application, this is the Town and Country Planning General Regulations 1992 which permit a local authority to decide its own planning application, but requires some separation as between the personnel

who make the application and determine it in order to respect the rules of natural justice. The law on confidentiality. 12(5)(d) and (e) exceptions both rely on confidentiality provided by law. In our law, that's the common law duty of confidence. That common law duty doesn't require the information to have been obtained from someone who is in law a third party. The Council say that is clear first of all, by a comparison with the terms of section 41 FOIA. That is cited conveniently in the Friel case, tab 11 in the Authorities Bundle, starting at page 195. Para 20 – contrasts section 41(1) FOIA which provides authority from any other person (including another public authority).

99. On the facts in this appeal, it is not disputed that as soon as a suggestion of disclosure was raised by the Appellant, the council official made the expectation of confidentiality very clear. Open Bundle p.166 – where we have an email from the Appellant to that officer at the culmination of a quite lengthy exchange between them. The Appellant wrote: *"Since the pre-app consultation is already taking place, I will lodge a FOI act request with the council to have sight of the proposals."* That triggered the email above at p.165, where the Council officer forwards the chain to a senior person in the planning service and two paragraphs up from the bottom writes: *"He has now said he intends to lodge a FOI request (see email below) to ascertain details of our proposals. My understanding is that conversations are private as we have not really confirmed anything yet."*

100. It is clear that there is an understanding and an expectation on behalf of the Applicant that at this stage matters will remain confidential. The Council officer then sets out various exceptions, which she understands will apply. Turning over the page to p.166, it indicates the attachment of a case for information. It's not clear whether what's being attached and referred to there is an ICO or a FTT case, but either way the council submit it shows that Applicants do pay attention to legal and regulatory decisions about the confidentiality of pre-app discussions. That obviously matters to this Applicant and those decisions do condition expectations. It is, the council argue, clear from the terms of the email that there is a strong expectation and preference for confidentiality from this Applicant although it is to be noted the comment: *"Once we have progressed to full planning permission, I am happy for the information to be made public."* So, the expectation of confidentiality relates very specifically to the early stage at which we find ourselves.

101. The last element of the statutory test 12(5)(d) is whether confidentiality protects the proceedings, which is the terms of the exception. The council submit it does. Certainly, directly speaking, the duty of confidence applies to information rather than the meeting or the exchange or the proceeding itself,

but those proceedings consist of the exchange of that information. The whole reason to protect the information is so an Applicant can seek and receive advice through a process which is itself confidential. That is reflected in the email we've just looked at. The Applicant's understanding is that conversations are private, the exchange itself is private, and accordingly the council say the confidentiality is there to protect the proceedings and it follows naturally that disclosure would adversely affect that confidentiality because it would dissipate, the proceedings would no longer be confidential. For all of those reasons the council say the elements of 12(5)(d) are made out with developed pre-app advice and a relatively clear decision from the local authority about what is and what is not likely to be acceptable. The Appellant himself said in his submissions, developers will go with what they're likely to be able to achieve.

102. In effect the binding authorities have established 1) Re: the background, the common law duty of confidence does not exclude the case where the information has been internally generated, and 2) that the EIR do not include any separate requirement that that should be the case.

103. On the issue of in confidence and causation i.e. adverse effect caused the council dealt with the issues comprehensively in their written submissions and referred to above.

104. The last element of the statutory test 12(5)(d) is whether confidentiality protects the proceedings, which is the terms of the exception. In the councils' submission it does. Directly speaking, the duty of confidence applies to information rather than the meeting or the exchange or the proceeding itself, but those proceedings consist of the exchange of that information. The whole reason to protect the information is so an Applicant can seek and receive advice through a process which is itself confidential. The Applicant's understanding is that conversations are private, the exchange itself is private. Accordingly, the council say the confidentiality is there to protect the proceedings and it follows naturally that disclosure would adversely affect that confidentiality because it would dissipate, the proceedings would no longer be confidential. For all of those reasons the council say the elements of 12(5)(d) are made out. Lambeth's case is based on whether the information could affect the value of the land, as the Tribunal heard from Mr O Sullivan who has specific expertise on the side of the local authority and its own dealings. The nub of the dispute is whether there would be an adverse effect. The Appellant says pre application advice doesn't affect the value of the land at all. So, he makes two related points 1) the pre-app advice doesn't affect the

final planning decision and presumably as a consequence, he says 2) it doesn't affect the value of the land. The council argue that both of those are wrong. He puts both of those in much too stark terms. Mr O Sullivan, clearly, frankly and candidly admitted that a final planning consent will have more substantial affects, but the effect of the pre-app advice is not nothing and remains significant. Particularly in cases such as this one where we have a relatively well developed pre application advice and relatively clear decision from the local authority about what is and what is not likely to be acceptable. The Appellant himself said in his own submissions and avers that developers will go with what they're likely to be able to achieve. But the whole purpose of the pre application planning service is to give them guidance on what they're likely to be able to achieve, that was the thrust of Mr. O' Sullivan's evidence and is reflected in the statutory guidance on the purpose and the value of the pre-app process. Why, the Council ask do the developers pay thousands of pounds for the pre-app advice if they're not getting from that anything of value, any insight into what is likely to be acceptable to the local authority. In the council's' submission it clearly advances the case to a significant degree, as to what the developer can expect to achieve on any given site. That being the case that will have a material impact on the value of the land. Mr O'Sullivan provides by example, the quantum of development, the number of residential units you could get on a site, is going to affect its value, e.g. it's more valuable if you can put three flats on it versus single two-bedroom house. The pre-app advice in general will narrow down those variables, the scope of what's achievable. The council say in this particular case, that is what happened. It does move the conversation along. What would be the point in it if it didn't. That additional value is also of interest and of commercial sensitivity for the council and can prejudice and adversely affect its negotiating position in the way Mr O'Sullivan described and in the way the Tribunal saw in the closed session. For those reasons, I say 12(5)(e) is engaged. The council submit that the case law in the authorities' bundle supplied to the Tribunal establish disclosure would adversely affect the interests of the person who provided the information for two reasons. One is the commercial interest point already discussed and the second is the chilling effect, the unwillingness to use the pre-application process in the future, therefore foregoing the benefits of that from the Applicants point of view. In considering here the interests of the person who provided the information, the Applicant.

105. The Tribunal are considering the effect of disclosure to the world at large and so effectively have to assume wide publication of this advice even if the

Jopling decision has not had a wide effect. It could be due to countervailing factors such as the economic outlook or the example Mr O'Sullivan gave of more favourable planning policy coming in the pipeline. So, there are lots of other confounding factors that would make it very hard to prove the Jopling effect. Nonetheless on the basis of the reaction of the Applicant in this particular case from the emails from Rubina Nisar (on behalf of the council) and the reliance of the case law or the Commissioner's DN's to support their expectation of confidentiality the council invite the Tribunal to find on the balance of probabilities that disclosure in this case would have an adverse effect on the willingness of applicants either to use the service or to give the same degree of specificity and detail when they use the service.

106. The EIR exceptions don't give me the luxury of saying '*would be likely*', they're all introduced by the words in 12(5), so there's only one threshold for the EIR exception and it's equivalent to the higher exception. There is no issue with the Appellants' legal submission on that, that is clearly correct.

107. The second element of the test 12(5)(f) was the person under any legal obligation to supply the information. The council maintain the answer is no. All parties agree this is a voluntary process. Did the person supply the information in circumstances where the recipient public authority or any other public authority was entitled to disclose it and the council maintain the answer to that is no, because it was protected by confidentiality for the reasons already given as evidenced by the correspondence from the Council officer for Lambeth and would only be entitled to disclose it if there was a statutory basis for doing so. The Tribunal are assisted on this very specific issue by the decision of the High Court in the Stride case, which confirms that pre-application information wouldn't be disclosable under the regime of access to information at local authority meetings, set out in the Local Government Act 1972. Tab 13 of the authorities' bundle, if we start at para 22, there's a summary in Stride of the law in relation to public access of local government meetings. The basic position is that those meetings are open unless the information is exempt. Para 23 notes that: "the descriptions of exempt information are those for the time being specified in schedule 12A, the relevant parts of which provide: at - *3. Information relating to the financial or business affairs of any particular person (including the authority holding that information) …is exempt. - 9. Information is not exempt information if it relates to proposed development for which the local planning authority may grant itself planning permission or permission in principle pursuant to regulation 3 of the Town and Country Planning General Regulations 1992."*

108. The regulation allowing the local authority to grant itself planning permission. Clearly, para 9 is saying certainly in the paradigm case where there has been an application, that that will not be exempt information. The question that arises in Stride is, what is the position at pre application stage, is that information falling within the general exemption in para 3 or is it carved out because it's information to which para 9 relates. HHJ Jarman considered this and determined it effectively at paras 38-39 by his consideration of the overall purpose of the scheme. Turn to p. 278, - para 28. It identifies the competing interests on the one hand safeguarding the financial and business interests of the authority, and on the other the interests of transparency: post application, *"It is clear that in the interests of transparency, once the authority is applying for planning permission for development on its own land, then such safeguards should no longer apply and the public should have access to relevant financial and business information." At* Para 39: *"the authority accepts that once that stage is reached, there must be public access to, and hence scrutiny of, such information before planning permission is granted. Given that that will happen, the question is whether in balancing the competing interests of public access and private interest, the purposes will be served by disclosure of such information when the proposals are at an early stage. In my judgment, it is not difficult to see why proposals may be prejudiced by the early disclosure of such information. In this case, that applies in particular to the negotiations and contracting with other landowners."* Para 40: *"Accordingly, I conclude on ground 1 that paragraph 9 on its proper interpretation did not apply so as to render the information withheld from the public in the private session of the meeting as not exempt."* Information at pre-application stage is exempt from disclosure under the LGA. For the immediate purposes of whether there is any other entitlement to disclose the information, they confirm that there is no basis for disclosing it under the LGA regime. The final condition has the person supplying information consented to its disclosure. The council argue, absolutely not, in quite strong terms as we have seen in the emails. The council submit the relevant exemptions protect two separate but related interests: confidentiality in the pre-app process and the commercial interests of the council. Submissions briefly on that prejudice that the council say would arise and the weight and significance of it; and then balancing that against the public interest in disclosure. The council argue the prejudice would arise as disclosure would tend to damage the applicants' belief that sensitive information could be protected prior to submitting a planning application, even if they have specifically requested this. The council argue two effects are likely over time: fewer advice requests and less detail in the requests that are received. Both of those effects would be significantly contrary to the public interest because the benefits of pre-app advice are recognised very clearly in national planning policy, that is encapsulated in the quotation

at para 6 in Mr O Sullivan's witness statement p 125 of the Open Bundle: *"significant potential to improve both the efficiency and effectiveness of the planning application system."* Para 8 of his witness statement then lists a number of benefits, the council say those are considerable and significant, they improve design, flush out site specific issues, all of that results in better proposals, bringing forward more appropriate development which local authorities can in turn handle and determine more effectively and efficiently saving costs all round. Those are the councils' submissions on clearly very weighty public interests and on the balance of probabilities that gives rise to very significant prejudice which is not outweighed by the interests of disclosure in this case. Nor is there any reason why that prejudice would not arise in the case where the Applicant is an entity within the council, the case that we are talking about here.

109. The council argue that the Commissioner didn't do any worse than apply a misleading label, the council maintain the Commissioner misunderstood the fundamentals of the underlying proposition because she knew it was the council as Applicant.

110. Against that, the Appellant says that the pre-app process ought to be itself a public consultative process. He says i.e. in a conservation area, all applications should undergo pre-application consultation as opposed to pre-application advice. The council's reply submission is 1) that's wrong, it's not the case in every case and it wasn't the case in this case. As Mr. O Sullivan emphasised, the council's policy is in a conservation area, there should be pre-app consultation if there is significant public interest in the proposal. He gave the Tribunal reasons why that was not the case; and 2) It is really a side issue because if a developer were carrying out public consultation, the developer would be in control of what information it put before the public as part of that consultation. It doesn't have to include information if it considers it sensitive and it can still carry out meaningful consultation without doing so. On the other hand, what the Appellant is proposing to meet that public interest in early consultation is disclosure of a submission that has been drafted with the idea that it will remain confidential and may therefore contain sensitive information. It may also just contain information that's not particularly relevant to the external factors such as information about the internal layout, the quality of the building materials. Those are matters that are not going to be of particular concern to the public who might properly thereafter be consulted on amenity issues. Attempting to meet the public interest in early consultation by disclosing a document that was drawn up for a different purpose and may contain confidential information because it was assumed to

be confidential, the council submit is not an effective or appropriate way to go about meeting public intertest to the extent that it exists. The council's policy is that it's not required in every case and that this was a case giving rise to very little wider concern.

111. The second significant prejudice that would arise is the commercial sensitivity issue. The council argue that disclosure of this advice would have an impact on value of land and the council's position in negotiations and would therefore prejudice its ability to use its statutory duty to achieve best value. The combined weight of those two prejudices is very significant indeed. The Tribunal are invited to weigh that and contrast that with the public interest in disclosure, which the council maintain is relatively modest.

112. Although this is a proposal which only directly affects a single property, as the Appellant does note in his submissions at p. 168 of the open bundle. The Appellant has tried to show that the site is visible to a large number of dwellings because there are flats opposite or to the side. As Mr O 'Sullivan explained, there are very large blocks of flats, they rise much higher than the row of houses the proposed site would be adding onto, there is a significant green space in front of them, so there's not really any question of any proposed development on that small site directly affecting the amenity.

113. The Appellant said in response that, residents are concerned about noise, potentially other areas during construction, traffic, dust. As Mr O 'Sullivan explained in counter response, those are matters that are typically dealt with through consultation on an environmental management plan at the planning stage.

114. Sitting behind all the Appellant's submissions on the value of early public engagement is the fact that there is a designated statutory stage at which consultation takes place, and that is the formal consultation for the formal planning application. The council invite the Tribunal to prefer Mr O Sullivan's evidence. It is simply not the case that that's a sterile exercise, why would Parliament have provided for it if it never resulted in improvements, changes to design and sometimes, as Mr O Sullivan clearly admitted, in refusal of planning permissions. It's a process of meaningful consultation that can change or even completely overflow planning applications. There was a suggestion that enhanced transparency was required in a case where the council is giving itself pre-app advice and there's a suggestion there it might be over favourable – the council would ask the Tribunal to read the tenor of the advice and draw your own conclusions as to whether it's overly

favourable to the council as applicant. One comes to balance those competing public interests on either side of the scale, but the council ask the Tribunal to recall the passage in Stride referred to earlier which identified those competing interests in transparency on the one hand and prejudice from early disclosure on the other. At the time the council were concerned withthis appeal, it came down very clearly in favour of information remaining exempt at the pre-app stage, whereas it was appropriate to be as open and transparent as possible at the application stage. In this case, where any proposals proceed to formal planning application, the information we are discussing, the requested withheld information, would become public. If the proposal were to proceed to the next stage and if it were likely to become a reality the information would go into the public domain. If that didn't happen, the public interest is much reduced in seeing it because it's for a proposal that will never see the light of day and that's built into the structure of how the council handles information… if the matter proceeds it becomes public.

115. Re: query from the Tribunal on – public expense in focusing pre-planning considerations so that they are paid for without pre-app work that would have to be done - money spent on experts at that stage which is in the public interest.

116. The witness responded that the council will depend on the nature of the proposal. It's in the public interest for enough work to be done at the pre application stage for matters to proceed efficiently. The amount that the developer wishes to spend at that stage is more of a private matter, but the more detail the developer puts into a pre-app the more likely it is to contain sensitive information because it will have descended to the level of detail that is potentially commercially sensitive, and then the stronger the public interest in protecting what the developer regards as confidential in my submission.

117. When referring to the balance struck and the distinction made in Stride, that is under a different regime entirely it is nothing to do with the EIR. The council referred to the case of *Lourenco v Information Commissioner & LB Barnet [2024] UKUT 111 (AAC)* which brings that back to the EIR regime we are considering, tab 14. There were large development owners, the Hendon Hub, and the request sought the outline business case, early stage pre app information. By the time it was in the Upper Tribunal, there was a ground of appeal as to whether there was an error of law for the FTT not to determine whether the information was disclosable under the Local Government Act 1972. See that at para 19 where the grounds are set out, and then para 29 on p.289 the UT turned to discuss the LGA regime, and then at 33 it cited the

passage from Stride that we have already considered. It is clearly established it is not within the FTT's jurisdiction, information rights, to decide something under the Local Government Act so the ground fails. But see 35: *"I am not wholly persuaded by the submission that the limits of FTT's statutory jurisdiction necessarily preclude it (or indeed the ICO) entirely from considering, as a subsidiary matter, whether information is disclosable under the LGA. That is because if the LGA requires a public authority to disclose information, such a requirement is surely relevant to the public interest balancing exercise that must be carried out under the EIR."*

118. While this is an obiter comment, it is common sense and is persuasive and the reverse must also apply because if the information must also apply if the information would be exempt, that tells the Tribunal something about the relevant balance to be struck applying EIR. The council maintain that by applying Stride, pre-app advice of the kind we are concerned with here, would be exempt under the LGA and for all the reasons given in Stride, the distinction between the pre-app stage and the post application stage, the council submit is the correct balance in this case also. All the more so because those cases concern major developments giving rise to very serious public interest issues. The opposite is true in this case as we are talking about a minor piece of development of potentially only hyper local interest…more directly one property, that's the Appellant's. In conclusion, the council submit that the balance clearly falls in maintaining the exceptions that are engaged but also it falls in favour of any of them singularly or any combination of two of them if the Tribunal are not with the council on all three exceptions under Reg. 12 being engaged. Finally, the council submit that this isn't a case in which presumption in favour of disclosure is going to alter that outcome. It's simply not a finely balanced case where the Tribunal would resort to that presumption. The council invite the Tribunal to dismiss the appeal for all of the above reasons.

Conclusions:

119. In the DN, the Commissioner decided that, in all the circumstances, the public interest in maintaining the application of regulation 12(5)(d) outweighs the public interest in disclosure. The Tribunal look at each case on its merits and are here to consider the application of regulation 12(5)(d) EIR and do so on the comprehensive evidence and submissions from the parties as presented

at this oral hearing. As the other exceptions claimed are not the subject of this appeal, we make no judgment pertaining to Regs. 12 (5)(e) or (f).

Regulation 12(5)(d) – Confidentiality of proceedings.

120. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law. Within the agreed forum of the EIR, the engagement of the exception rests on three conditions being met.

121. Firstly, the confidentiality referred to by the Council must specifically relate to the confidentiality of proceedings. The Tribunal accept the Commissioners interpretation of Confidentiality of proceedings as '*proceedings*' possessing a certain level of formality. This does in our view include but is not limited to formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings. We accept and adopt the comprehensive and compelling submissions made above on behalf of the Council herein and find that the pre-app process amounts to proceedings under 12(5)(d) as envisaged for the engagement of the exemption.

122. Second, this confidentiality must be provided by law. The Council has presented compelling arguments supported by authorities as set out above and again we accept and adopt those arguments in support of the common law basis for providing the requisite degree of confidentiality about the pre-app process with which we are concerned in this appeal and find the information meets the threshold for common law confidentiality. This is for both the information submitted by the applicant for pre-app process and the Council's specific response to that pre-app request. The information is not trivial and was submitted to it voluntarily by the applicant (in this case another and separate department of the council) as part of the pre-app advice process and the Council's specific responses to that information if disclosed would disclose that information from the applicant. We accept that another department within the council can amount to a separate entity or third party for the purposes of making a pre-app application. Again, we accept and adopt the submissions made on behalf of the council as set out above and find in that regard there is a common law duty of confidentiality and in particular, we find the exchange between the Appellant on the one hand and the Council officer on the other in the instant pre-app, does establish that expectation of

confidentiality. Again, this has been dealt with in considerable detail by the above submissions and supporting authorities on behalf of the council, which we accept and adopt. As can be seen from the detailed exchange in the oral evidence at this hearing the Appellant has made no significant or material challenge in his opposition to these arguments as presented to the Tribunal herein.

123. Third, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings. Mr O'Sullivan as a witness has presented evidence at great length to the Tribunal, compelling evidence (see above) on behalf of the Council in support of the assertion of how and why disclosure of the withheld information would lead to adverse consequences for the council in general terms and more specifically by identifying sensitive valuations or price structures and/or creating a chilling effect whereby interested parties will avoid the pre-app process in fear that confidential information might be disclosed. The Tribunal accept these would be likely to both create a significant adverse effect on the pre-app process. The Appellant has not provided any significant material evidence to counter these important submissions.

124. Finally, the Tribunal must consider the balance of the public interest as regards the information that engages the exception. In doing so, we must acknowledge the EIR's express presumption in favour of disclosure and the public interest in transparency and accountability. We further accept the concerns raised by the Appellant on his own behalf and on behalf of neighbours in the affected vicinity however it is clear to us that all relevant information (subject to any legitimate exemptions under FOIA or exceptions under EIR) included in the pre-app are in any event released to the world at large at the final Planning application stage if a full planning application is subsequently made thereby providing appropriate transparency and accountability.

125. Having carefully considered all the available evidence and supporting authorities before us, the Tribunal are satisfied on the balance of probabilities that the public interest favors non-disclosure of the withheld information, the subject of this appeal.

126. Accordingly, we dismiss this appeal.

Brian Kennedy KC. 07 January 2025.