

Viability Assessment and Freedom of Information

Dr Bob Colenutt

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Quotes

- *“Developers must be made to show their sums. Hiding behind commercial confidentiality to keep viability assessments secret is a public betrayal”*

Guardian Leader Jan 1st 2015

- *“We find it particularly hard to accept that the pricing and other assumptions embedded in a viability appraisal are none of the public’s business”*

Tribunal Decision on the Greenwich Peninsula. February 5th 2015

The scope of the presentation

- Origins of viability in the planning system
- Current policy and practice
- Viability – the concept
- Unpicking the viability equation
- Variation due to scheme type
- The viability assessment industry
- EIR (2004) framework
- Arguments against open book
- Arguments against open book
- The Greenwich Peninsula case
- Recent decisions
- Where do we go from here?
- Conclusions

Viability and the Planning System

- The purpose of planning is to designate land use in the public interest. The personal circumstances of the landowner, developer or user of the land or property do not determine its use. Planning permission goes with the land or buildings not with the owner or occupier
- There has always been a fierce debate about how to capture the increase in land value created by the granting of planning permission - the growth of planning gain and “planning obligations” from the 70’s.
- Planning gain was determined by policy (mitigation, mixed use etc); until 2006 Guidance on Housing where there was the first mention of guidance on viability assessment

Viability as a planning requirement - the NPPF 2012

- *“Plans should be deliverable. Therefore, the sites and scale of development should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened.*
- *To ensure viability, the costs of any requirements likely to be applied to development should, when taking account of the normal costs of the development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable” (DCLG 2012, para 173).*

2013/14 Review of Planning Obligations

- *“An application may be made to the local planning authority for a revised affordable housing obligation. This application should contain revised affordable housing proposals, based upon prevailing viability and should be supported by relevant viability evidence” Para 6 Review and Appeal. This measure is to apply until 2016*
- *The developer will need to demonstrate to the local planning authority and to the Planning Inspectorate on Appeal that the affordable housing obligation as currently agreed makes the scheme unviable in current market conditions” Para 11 Growth and Infrastructure Act 2013*
- It provides a Review and Appeal system if local authorities are unwilling to agree to lower levels of affordable housing contributions.
- Recent change to exclude all planning obligations for housing developments under 10 units and for changes of use applications (DCLG, 2014)

Why has this happened?

- Long standing resistance from developers to paying “planning gain” or section 106 contributions or obligations to the local planning authority for infrastructure or community facilities
- Additional pressure from developers to reduce obligations because of the impact of the recession on the property market
- Government concern about housing delivery, seeking to reduce “burdens” on developers such as planning obligations under the assumption that housing supply was limited by local authority planning obligations

Why is it important?

- Government spending on affordable housing has fallen over the last 10 years. Developer contributions to affordable housing through section 106 is now one of the main ways in which it is provided (Delivering Affordable Housing through section 106, JRF, 2006)
- Viability testing has reduced the percentage of affordable housing especially of social rented homes (In the Mix; The Need for a Diverse Supply of New Homes, Shelter, 2014, p.21)
- Viability testing of affordable housing contributions is undermining statutory local plan policies for affordable housing contributions (Research by Bureau of Investigative Journalism, Guardian, 18.6.13; and see web site of 35% Campaign in Southwark)

Viability Assessment - the concept

- What is viability in Planning?
- Residual land Value (RLV) method
- $\text{Costs Minus Value} = \text{RLV}$
- Viability assessment will assess whether the scale of Planning Obligations required makes the scheme unviable

Unpicking the Viability Equation

- **Costs**
- Construction
- Finance
- Fees
- Infrastructure (minus grant money)
- Developers Profit
- Planning Obligations

- **Development Value**
- The market value of lettable space

- NB Output can be Profit if land costs are known

Methodological problems

- There is no agreed methodology. Three Dragons/GLA model; ARGUS; Bespoke models
- Input data e.g. Construction costs; finance costs; and outputs are case specific not standardised
- How do we know what level of RLV is sufficient to make the scheme viable? It must generate a “competitive return to a willing landowner and developer”. But who decides what level is competitive?
- Benchmarking land value attempts to define this

Specific problems with the model

- Inputs (as we have seen) are highly subjective values
- Known land price may be an underestimate
- Convention on using current sales prices can be very misleading
- Where values or IRR are based on cash flow over longer time scales they are equally unreliable
- Average viability figures for large sites are not meaningful
- A viability assessment for an initial planning application does not reflect the reality of subsequent land trading in the market place
- 20% developer profit as convention is highly contentious particularly in booming markets

Undervaluation and the Viability Industry

- There is a “viability Industry” of consultants selling their skills in reducing developer obligations; and agents getting incentives for reducing them
- LB Islington is cracking down on “artificially pessimistic viability assessments” (LBI Discussion paper on Development Viability, 2014)
- Sources of Undervaluation
 - Sales values
 - Inflated construction costs
 - Inflated finance costs
 - Inflated fees
 - Freehold values usually not included in VA
 - Commercial floor space not always included in VA
 - Receipts from selling on parcels usually not included

FOI Issues

- Aarhus Convention 2001
- FOI 2000
- EIR 2004 12 (5) (e) for larger schemes
- The EIR states that “there should be disclosure except where the disclosure would adversely affect or is likely to prejudice the commercial interests of the council or any third party”. (EIR applies only to the decisions of public bodies not to private developers).
- Reliance upon the exception is always subject to the requirement under 12(1)(b) that the public interest in maintaining the exception outweighs the public interest in disclosing the information i.e what is the balance between the public interest in protecting a legitimate economic interest and the public interest in disclosure. It is for the public authority, usually the LPA, to define this public interest and assess this balance.

Arguments against full disclosure

- **Developer view**
- A threat to “legitimate economic interests”
- It has been independently assessed e.g. by the DV
- Competitors would be placed at an advantage
- Bespoke models are a company secret

- **LPA view**
- LPAs are democratically elected to make these decisions
- DV has checked it
- Viability assessments are too complicated for the public to understand
- Developers would not be as frank cf “*Why developers could share less viability information following a Tribunal hearing*” (Planning Resource 13.2.15)
- Disclosure would make it difficult to negotiate with developers

Arguments for Full Disclosure

- The way the Viability model is constructed and used is often flawed and needs full exposure and interrogation
- Input and output data are highly contested and need full exposure
- Relatively small changes in the modelling inputs generates very big differences in viability; sensitivity analysis is essential but is rarely done (or made available)
- No evidence that full disclosure would damage commercial interests
- Open competition between developers is surely a good thing
- Closed book encourages manipulation

Example: Greenwich Peninsula

- 121 ha. on west side of the Peninsula; Land reclamation by EP £225M
- Total scheme 10,000 housing units, 32,000sq m of commercial, plus other
- GLA sold to Quintain/Knight Dragon for £50m plus £50m of Affordable housing grant
- Policy 38% affordable reduced to 25% of habitable rooms by a variation
- With a change in mix of uses – 4 plots on the riverfront with no affordable
- Loss of 527 affordable units at a estimated cost of £150 million
- **VA based on v pessimistic sales values as of 2012; excluded all commercial and freehold values; v high professional fees (13%); high finance costs; developer profit put in at 20%**
- **Our view is possible undervaluation of the residential alone £0.5Billion**
- ***Question? Why did Greenwich instruct a v poor independent assessment and agree to the variation so lamely?***

How are FOI Appeals going?

- Heygate 2014 Tribunal. Partial disclosure
- Walthamstowe Greyhound Stadium. Full disclosure
- Stoke Newington. Disclosure JR failed
- Earls Court. Full disclosure achieved
- Greenwich Peninsula 2014 Tribunal. Full disclosure
- Winchester JR challenge succeeded
- Shell Centre JR challenge failed but is being appealed
- *Information Commissioners Office becoming more aware of FOI issues in relation to VA*

Options for Reform (a)

Option 1 Require Open Book for all VAs. On the one hand, Government says, *“Where possible viability assessment should take the form of an open book review of the original viability appraisal” Para 13*

- *But “At Appeal, if the developer is unwilling to proceed on an open book basis, general evidence of changes in costs and values since permission was granted can be submitted. However, a developer must consider whether his Appeal will provide sufficient evidence for the Planning Inspectorate to make a robust, impartial decision on viability” DCLG Section 106 Affordable Housing Obligations, Review and Appeal 2013. para 15*
- *Lyons Review, 2014 “It is essential that site specific negotiations are based upon an open book approach to inform relevant appraisal inputs” P.75*

Options for Reform (b)

Option 2 Change the Methodology

- *e.g. Lyons Review of Housing Supply 2014 “There should be a single methodology and guidance clearly identifying the uplift in value arising from the grant of planning permission to enable this to be properly considered as part of the planning process alongside the costs of the necessary infrastructure and affordable housing. Calculation of the appropriate benchmark values for viability assessment should be based upon EUV plus a premium” P.75*

“Viability assessments should not be based upon the actual developer’s subjective estimates and expectations regarding costs and revenues and the actual developers circumstances regarding land cost, cost of capital, financial structure, operating costs etc. A development viability test for a proposed scheme should be based upon “typical” or “consensus” estimates and expectations regarding the main inputs to the development viability appraisal”. This allows the calculation to apply not to a specific developer but to a “typical” developer” (Personal communication to 35% Campaign, based upon research by Pat McAllister and Peter Wyatt)

Conclusions and implications

- VA has significance for the whole planning system because it makes the individual circumstances of the developer and landowner a material consideration
- VA can undermine statutory local plan policies
- VA puts finance above the planning merits of mixed development
- VA model is easily open to manipulation requiring extra interrogation
- Open book is essential, not least to reveal secrets of developer/local authority partnerships over major schemes.
- But the main demand of community groups is the removal of VA from NPPF