Viability assessments and affordable housing: how best to serve the public interest?

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Summary

It cannot have escaped the attention of anyone in the development sector when this week it was reported that the Royal Borough of Greenwich announced an intention to make viability studies publicly available. The reason: so that the Royal Borough and residents alike can see precisely why a developer might claim they cannot meet affordable housing targets. At the same time, the London Assembly called for tighter viability assessment rules. At the heart of the issue? Constant and insatiable need to deliver new and affordable housing in the hearts of our cities, towns and in rural locations. This blog looks at the existing position in relation to availability of viability information, and the implications of a move to open books.

Background

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towns and in rural locations. This blog looks at the existing position in relation to availability of viability information, and the implications of a move to open books.

The existing position on probity

Viability assessments are routinely submitted with planning applications that include residential uses. They provide a raft of commercial data to a local planning authority which ultimately goes to the deliverability of a scheme. Generally, there will be some form of confidentiality arrangement in place in order to ensure that there is neither inadvertent nor deliberate release of the supporting data. This is because some of that data will be confidential to a developer and very commercially sensitive. Releasing it may impact on future commercial bargaining positions. For example the First Tier Tribunal acknowledged in the Heygate case (where a Freedom of Information request had been made for Lend Lease's viability information) that there was a real risk that future commercial customers would use Lend Lease's projections to their advantage in negotiations. Of course, other aspects may include figures that reflect and respond to market trends and are consequently not so commercially sensitive. But the point is, it all forms part of a viability assessment.

The next point that is worth remembering, in light of the great fanfare that has accompanied stories calling for a greater degree of probity in relation to viability assessments, is that all of that information gets provided either to the local planning authority itself, or where it has outsourced review of the viability information to professional advisors, to those expert advisors. And it gets scrutinised. There is nothing in the current way in which viability assessments are dealt with that means that between them, the local planning authority or its expert advisors cannot consider and challenge inputs and outputs of the appraisal. If they think a figure is unrealistic, they can challenge it. Look at the Bishopsgate Goods Yard planning application as a recent example.

So it is misleading that headlines suggest that making the viability studies publicly available as part of the planning documents means a shroud is suddenly lifted – that the relevant local authority can only then see whether and why a developer truly cannot meet their affordable housing targets. The information is already there, and capable of interrogation by or on behalf of the local planning authority.

It is all a balancing exercise

The conclusions of viability reviews are reported to planning committees, explaining the conclusions reached as to why a development can only provide a particular level of affordable
housing, and other financial burdens such as planning obligations. It is also worth noting that where such information is held by or on behalf of a public authority, there is already a legislative system that deals with the potential for it to be publicly released through the Freedom of Information and Environmental Information regimes. At the heart of those regimes is a concept of the public interest, and a consideration of whether or not the balance weighs in favour of or against public disclosure.

Under EIR, there is a presumption in favour of disclosure, and exceptions to the duty to disclose information will only be made out if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. So if the public interest in favour of release of the underlying confidential data is strong enough, there is already a route to greater public scrutiny. What is evident from a long line of FOIA/EIR cases is that no case is the same, and the balance may weigh differently on a case by case basis. The strength of that public interest will not always weigh in favour of disclosure – where the prejudice that would be caused to legitimate economic interests on balance justifies withholding the relevant confidential information.

What is also essential to remember in all of this, is that the very fact of affordable housing targets (and CIL, for that matter) evidences difficulties the state faces in delivering affordable housing and supporting infrastructure on its own. It can't do it. The result is loading the competing cost and policy demands of housing on the one hand, and infrastructure on the other, onto the private sector. CIL and s106 costs squeeze viability and reduce the level of affordable housing a development can support, and vice versa.

We have very significant dependence on private commercial entities to help fund regeneration and infrastructure. Where there is that public/private interaction to deliver on those objectives, clearly the need to avoid harm to commercial interests, through release of genuinely commercially sensitive information, has to be given proper weight. And again, that is what the FOIA/EIR system already provides for.

The way in which viability assessments are undertaken also means that the confidential and non-confidential information is not necessarily easily divisible. As the First Tier Tribunal noted in Heygate there is probably a dividing line, somewhere, but there are always grey areas.

Conclusions

- The information is already there and capable of scrutiny and challenge by public authorities.
• The conclusions of the viability review exercise are explained to Committee.

• There is already a legislative route for potential public access to the underlying information (even to highly confidential information) where on the facts of the case the public interest is sufficiently strong.

So what is the point of this call for developers to be open and transparent by publishing as standard the full detail of viability assessments – even highly confidential information? A need to show the electorate clean hands?

The risk? You cannot underestimate the reliance we have upon the private sector to drive growth, regeneration and to deliver infrastructure. You have to accept there are commercial terms. You have to incentivise. Faced with an expectation of open books, there could be increased reticence from developers. Ultimately, revealing commercially sensitive data can make schemes commercially much more challenging to deliver. It could lead to provision of less information in supportive viability assessments – greater opacity – and protracted discussions that frustrate scheme delivery. It could take with one hand more than it delivers with the other.

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