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## Heygate, Southwark Freedom of Information Appeal Hearing January 2014

### Submission of Robert J. Colenutt

My name is Dr Robert Colenutt. I am a Senior Lecturer in Urban Studies at the Institute for Urban Affairs at the University of Northampton. My background is in town planning and regeneration in local government working for local authorities in London and in Northamptonshire, and before that as a community planner for community organisations. I have written widely on urban policy, during a career of over 40 years, for academic journals, magazines and in books. My current research, funded by the ESRC, is an examination of planning policies and market reactions to strategies for sustainable housing development.

This submission supports the Commissioner's decision on disclosure of viability documents. The full disclosure of viability documents is necessary because the public must have the right to scrutinise documents that have, as I shall argue, a direct bearing on local planning policies and community outcomes.

### **Background to viability policy**

The planning system is under increasing pressure from policy makers to depart from normative planning objectives and standards and adopt 'market'-focused criteria for assessing plans and individual planning applications. The implications of the increased emphasis on economic viability for the design, mix and delivery of new development are becoming apparent in three ways;

- *on transparency and public scrutiny over planning decisions;*
- *on the democratic principles underlying planning practice;*
- *on the objectives of achieving the sustainability objectives in the National Planning Policy Framework.*

### **Definitions of Viability and its Use in Planning**

There are two dictionary definitions of viability: "capable of living, developing or germinating under favourable conditions", and "feasible, practical especially from an economic standpoint" (Oxford English Dictionary). These definitions pinpoint two different meanings; (a) the wider organic meaning of viability relating to the health of an organism; and (b) the narrower meaning of economic feasibility (although the term "economic" itself can technically also be interpreted to refer to very broad costs and benefits, and not solely monetary ones).

From a policy point of view, viability in the planning context is being considered less and less from a wider organic sense, and more in an economic sense. This creates a tension

between viability considerations and the longstanding concept of 'sustainability' which is embodied in the 2012 National Planning Policy Framework (NPPF).

### **Viability and Planning Policy**

Viability factors have been a consideration in planning for some years but have recently become more prevalent. In 2006 the DCLG "Planning Obligations Practice Guide" noted that *'LPAs may wish to use a generic development control DPD to outline how they intend to deal with sites where developers cannot comply with planning obligations because of limited financial viability'* [Para 3.13]. Its "Planning Policy Statement 3 : Housing" from the same year, gave a particular focus on assessing how 'affordable housing' requirements might impact upon housing delivery : *'Local Planning Authorities will need to undertake an informed assessment of the economic viability of any thresholds and proportions of affordable housing proposed'* [Page 29] and subsequent guidance "Delivering Affordable Housing" (CLG, 2006) reinforced the manner in which affordable housing targets would need to be realistic *'given site viability, funding 'cascade' agreements in case grant is not provided, and use of an agreement that secures standards'*.

The Coalition Government has taken this guidance on viability further in a range of new measures. In the National Planning Policy Framework (NPPF) there is a requirement for Local Planning Authorities (LPAs) to give viability considerations more pre-eminence than has been the case in the past.

The NPPF does not define viability with any precision or set out a methodology to measure it – rather it stipulates how the drawing up of new Local Plans and making planning decisions will need to pay attention to the context of viability considerations and the manner in which these impact upon the *deliverability* of housing schemes, taking into account the cumulative effects of local planning policies and standards. *"Plans should be deliverable ..... to ensure viability the costs of any requirements likely to be applied to development should when taking account 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"* (para 173).

In February 2012, the Department of Communities and Local Government (DCLG) invited planning applicants to request amendments to planning conditions made prior to 2010 on the grounds of changed economic circumstances.

The recently enacted 'Growth and Infrastructure Act 2013', permits the review of previously agreed *Section 106 conditions* for affordable housing - subsequently filled out by DCLG guidance issued in April 2013 to explain how this should happen. This guidance gives applicants until 2016 the right to apply to a local authority to modify section a Section 106 Agreement where it is being argued that the terms of the Agreement now render the development economically unviable. Applicants must set out a revised affordable housing

proposal based upon ‘prevailing viability’ and supported by relevant viability evidence. The revised proposal can include revisions to tenure, housing mix, phasing or for on-site / off-site contributions. There is also an appeal process if the developer is not satisfied with the response of the local authority.

A further focus on how local authorities should ‘balance’ considerations on local development with viability considerations has now been issued in the recently amended government guidance on setting rates on local Community Infrastructure Levies : *‘Charging authorities will need to be able to show why they consider that the proposed levy rate(s) sets an appropriate balance between the need to fund infrastructure, and the potential implications for the economic viability of development across their area’*. [CLG 2012, para 23]. The guidance even goes so far as to advise how new charges should be set that will support scheme viabilities some way into the future – *‘Charging authorities should show, .....that their proposed charging rates will contribute positively towards and not threaten delivery of the relevant Plan as a whole at the time of charge setting and throughout the economic cycle’* [CLG 2012, para 30], though it does not give further clarification on what is meant by ‘economic cycle’.

The Government’s policy has subsequently been elaborated in a report it commissioned from Sir John Harman (Local Housing Delivery Group, 2012), written specifically to apply the NPPF’s viability policy to plan making with the aim of increasing the delivery of new house-building. Harman’s group addressed the charge made by house builders that local authorities were routinely applying planning and policy criteria that made potential housing development schemes unviable, and refusing other ‘viable’ schemes because they did not incorporate a sufficient range of local authority planning standards as set out in Local Plans.

The Harman Report states that the aim of viability assessments must be to enable the “deliverability” of plans and building projects. Its own particular focus is on setting a suitable context for Local Plans, in order that they can be considered ‘sound’ enough to bring forward deliverable development. Its guide to viability assessments emphasises the following issues:

- the importance of considering the cumulative impact of overall planning standards on plan and scheme viabilities;
- the importance of ‘striking a balance’ between sustainable development and economic viability;
- the importance of a collaborative approach in assessing viability, and in starting a process that will be ongoing;
- that viability should be assessed across time and geography;

Its definition of what is meant by viability is : *‘An individual development can be said to be viable if, after taking account of all costs, including central and local government policy and regulatory costs and the cost and availability of development finance, the scheme provides a*

*competitive return to the developer to ensure that development takes place and generates a land value sufficient to persuade the land owner to sell the land for the development proposed. If these conditions are not met, a scheme will not be delivered’ (ibid p.14).*

To summarise the new central policy position: first, viability is now a primary planning consideration that has to be balanced with other planning matters in Local Plans and in negotiation over section 106 Agreements. Second, if local planning criteria proposed or applied by planning authorities are regarded by developers or landowners as a cost that will adversely affect their “competitive” return, the planning criteria can be challenged, and potentially ultimately disregarded.

The logic of this is that an LPA’s development criteria or planning standards will be increasingly influenced by site by site economic considerations *existing at a particular point in time*, rather than by planning standards that apply across a whole Local Plan area for the whole of the plan period (usually 10-15 years).

This implication goes well beyond asking for “commercial confidentiality” to be taken into account, because viability assessment is much more wide ranging than company information, and in fact, is now becoming the basis for planning applicants to challenge the validity of agreed planning policies.

The change in planning practice brought about by viability guidance has implications for the democratic basis of the planning system, and in particular for the integrity of policies that have been agreed by local authorities as a result of statutory consultation on Local Plans. This in turn has implications for the transparency of decision making and the public scrutiny of decisions that permit departures from agreed local plan policies. The next section of this evidence examine these implications in more detail.

#### **(a) Implications for public scrutiny**

Since viability assessment is to be given greater prominence in planning decisions, an “open book” approach to all documents relating to viability including land costs, and the developers own profitability position would seem to be important to maintain the democratic legitimacy of the planning system.

However, currently, there are no agreed ‘Open Book’ requirements. The DCLG guidance issued on reviewing Section 106 Affordable Housing conditions contains support for ‘Open Book’ practice to be encouraged, but then accepts that where developers do not wish to comply they should be mindful of what evidence is provided at an appeal and how their decision not to disclose may be evaluated by subsequent Planning Inspectors. In other words, the ultimate decision on reasonableness on disclosure of viability information would

be taken by a Planning Inspector (if the planning application went to Inquiry). This is quite unsatisfactory from the point of view of the public who are effectively excluded from information that is relevant to a planning decision which may have major community impacts.

**(b) Implications for democratic basis of planning**

The Royal Town Planning Institution (RTPI) response to DCLG on its recent consultation into a review of national planning practice guidance, said : *'We are especially concerned about **viability guidance** because it is a case where parties to a local plan examination or public inquiry may have financial motives to argue for particular methodologies, and therefore argue for them most strongly. A matter which may seem merely technical does in fact go to the heart of the reasons for having a planning system'*.

(I have included in an Appendix a note on methodologies for assessing viability, indicating the many areas of subjective judgement and differences in professional practice).

The implications of the Coalition approach to viability is already being felt in local authority planning decisions, at Planning Appeals and at Examinations of Local Plans. For example, at the recent (2013) Examination in Public of the West Northamptonshire Local Plan, in which policy on new housing development is a very prominent local issue, the house-builders submitted representations *en bloc* arguing that the Plan is "unsound" because it applies planning standards and affordable housing requirements which they claim make new housing development unviable and are thus at odds with the viability guidance in the NPPF. This claim was made in spite of the fact that the plan period for the Local Plan ran until 2026.

The Harman Report paid particular attention to the notion that viability assessments of Local Plans should *'be seen as part of the wider collaborative approach to planning and a tool that can assist with the development of plan policies, rather than a separate exercise'* [p10]. Taking that point at face value, it is our contention that for best practice as advocated by Harman to be credible, the public (not just local authorities) must have the right to be a part of this "collaborative" approach.

One example of the importance of full disclosure is the measure of land costs included in viability assessments. Most of the commonly used assessment tools make mention of valuations based upon prevailing 'market conditions'. What is invariably missing is the opportunity for the public to unpick how such values have been established, or by whose particular interests are being served. In our ESRC-study area it was an acknowledged matter that all the large sites (250 units +, and large sites for 'urban extensions') had either already been purchased by the operators within the house-building sector, or were subject to

signed 'options' set up between a local land-owner and a house-building firm as the basis for final transfer of ownership in the future, when conditions such as achieving planning approval are met. This leads to the conclusion that it is essential that local planning authorities, and the public, as part of viability assessment inspect the formal details of land purchase option agreements and other conditions of sale for all sites that fall within plans or other schemes undergoing viability reviews.

A further factor of concern to the public about viability assessment is that the NPPF and the Harman Report suppose that the rationale of the developer putting in the planning application should be yardstick against which assessments should be judged. Yet this need not be the case – a subsequent sale or transfer of land or other business interest to another developer might mean that a new assessment will be required in the light of what this new agency's development ideals or predilections might be. A previously agreed 'viability' assessment may indeed be undone by this change in 'market conditions', namely the aspirations of this replacement developer. However one considers this, it is not a very satisfactory prospect, viability assessments being merely a reflection of the different human character of a changed set of development managers or shareholders.

There is a crucial point of principle here. Planning decisions are intended to be made on land use matters, not on the applicants or landowner financial viability. Yet in the case of viability assessments, they are made on the applicant submissions alone. Thus, the planning decision ends up being made on the submission of financial viability of the applicant, not on the land which is the underlying public interest role of planning.

### **(c) Implications for achieving sustainable development**

The NPPF, though giving an increasingly important role to viability assessment, also aims to ensure that development is sustainable in the comprehensive sense of economically, socially and environmental sustainability. This is increasingly a contradiction at the heart of planning policy since viability assessments are often used to reduce obligations for sustainable development. At Planning Appeals, viability statements can often "trump" sustainability plan policies even if they are included in up to date Local Plans.

Interviews undertaken in the ESRC study of housing development in Milton Keynes and Northamptonshire showed that house builders regard sustainability as a "cost" on development. Measures such as Code for Sustainable Homes, contributions to public transport, or affordable housing, for training schemes, or for environmental improvements, are regarded as additional costs, not investments that in the longer term will give the development greater "value".

Thus the balance sought by the Government and by Harman between the financial measure of viability and other planning factors is not achieving the central NPPF policy goal of sustainability.

## **Conclusions**

Looking back at Government policy guidance on planning, viability is becoming an increasingly important factor in planning decisions. Yet democratic safeguards and public scrutiny have not caught up with this policy change and local authorities are usually unwilling to challenge this process because of liability to costs at Appeal (as we have seen above).

This places the public at a significant disadvantage in engaging positively with the planning system, and compels it to seek recourse to legal action and appeals to the Information Commission to obtain essential information about planning decisions that influence their communities. It is on these grounds that I submit the Commissioner's decision should be upheld.

## **Appendix. A Note on methodologies and data for assessing viability**

Given the high priority given to viability as a planning consideration, it is important that the public has the opportunity to evaluate the methodologies (and the data) employed to measure viability by planning applicants and local authorities.

A number of industry models have been developed in the UK over the past few years, notably by Roger Tym & Partners, and the Three Dragons Consultancy – and by the Homes and Communities Agency.

These appraisal models assess development viability by using the standard residual value approach when purchasing and valuing land i.e. the value will be assumed to be the difference between what the capitalisation of how much the development scheme generates in revenue and scheme costs i.e. what it costs to develop. Scheme costs including an assumed level of profit to the developer (usually 20%) on top of all relevant 'build costs' are deducted from scheme revenue to arrive at a 'gross residual value', which is the usual starting point for negotiations about the level and scope of "planning contributions" to meet local planning objectives. Once such planning obligations have been deducted, this leaves a 'net residual value' which is the basic amount left to the land owner. [Summary abridged from Three Dragons report to Charnwood District Council, 2010].



'Viability' will be influenced by a range of factors including changes in interest rates, cash flow, rents levels, planning standards and land value expectations. RICs guidance (2012) provides a full checklist of what would be practical to include in the content of a viability appraisal, and planning authorities are routinely encouraged also to monitor a range of factors including changes in house prices, build costs, regulatory development standards, finance costs and wider land values in order to take these all into account when deciding when and if to review planning policies.

The central criticism of these methodologies is that they take as given that the property market conventional view of assessing viability is itself objective and robust. Yet they contain many subjective ingredients that can make a large difference to the viability assessment:

- **Costs and Cash Flow.** The point at which land is put into the equation is crucial to viability estimates. If land costs are put in at "boom" prices, this will produce a very different viability result than these costs are put in at "recession" values. Further, because a development scheme may take 10-15 years to fully build out, the reliance on land costs put in at market values during the planning application stage does not give a reliable estimate of viability *over the lifetime of the development project*. Thus, the longer the time scale of the development scheme the more hazardous (and unreliable) become estimates of costs (costs of borrowing money, construction costs) and the more difficult it become to undertake a credible cash flow analysis. Given that many housing schemes are medium to long term projects spanning a range of market conditions, accurate costing is more of an art than a science. Costs can thus become liable to a degree of manipulation to bolster the developers case that they should not have to pay out large planning contributions e.g. putting in land costs at recession prices when the scheme will cover a longer economic cycle.
- **Capital values and final sales prices** will equally vary with time (monthly if not weekly) and may be difficult to predict. To some extent, these prices are not based on objective external assessment but are determined by the developer himself in the way he releases new homes onto the market in a phased way. He may be able to present these outturn values as being lower than they actually become over time as the scheme becomes established in the market, thus suggesting a lower return on the value of the development, and a smaller planning contribution to the local authority.
- **Developers Profit** is conventionally put in to the equation on the cost side at around 20% on the grounds that it represents the "risk" to the developer compared with other investment options. But it is by no means clear why this assumed risk is built into the equation since large developers such as Lend Lease are able to exercise significant control over market outcomes by having large portfolios of sites at different stages of readiness, and have robust relationships with their funders. It has

also to be noted that local authorities are being asked by Government to “de-risk” proposed schemes through development management methods thus reducing the a priori risk.

- The costs assigned to local authority planning standards and conditions are a further area of subjectivity. The developers’ viability assessment may give this a high cost value at the outset of a scheme but during the course of the development these costs may be reduced through negotiation – a process which is actively encouraged by the Government as we have seen above. Yet the assessment on which viability is calculated may ignore this possibility.

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