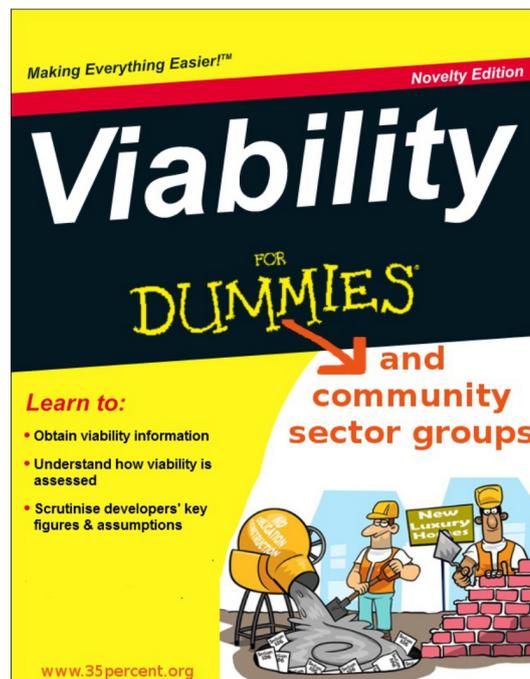


VIABILITY FOR DUMMIES

(Part 1)

HOW TO OBTAIN VIABILITY INFORMATION

A Guide for Community Sector Groups



What's all the fuss about financial viability?

Recent times have seen a significant increase in the number of developers using financial viability assessments to reduce affordable housing and other planning obligation requirements. Having received greater prominence in planning decisions since the introduction of the National Policy Planning Framework, viability has become a 'trump all' planning consideration. Despite government NPPF guidance encouraging transparency, viability assessments have remained shrouded under the veil of commercial confidentiality.

However, our campaign group's recent victory in a legal battle to obtain the viability assessment for a development at Elephant & Castle, may have opened the way for the community sector to become more involved in planning decisions where viability is the deciding factor.

This pamphlet draws on our experiences to guide other groups through the process of obtaining viability information, which will allow them to play a greater role in the negotiating a level of planning contributions.

DCLG Guidance on viability: "a collaborative approach involving the local planning authority ...and other interested parties will improve understanding of deliverability and viability. Transparency of evidence is encouraged wherever possible."

About us

The 35% campaign is a campaign led by the the Elephant Amenity Network; a coalition of traders, residents groups and local people campaigning for a voice on issues surrounding the Elephant & Castle regeneration.

Subscribe to our mailing list or get in touch through our website: www.35percent.org
Twitter: @betterelephant
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How the viability game works

New legislation that came into effect last year, allows developers to fast-track challenges against section 106 planning obligations if they can show that building the affordable housing required makes a scheme unviable.

The image below taken from a company's website really gives the game away in terms of how developers use viability to evade S106 affordable housing obligations.

We questioned why developer Lend Lease was pleading viability poverty for the Heygate redevelopment when it had been through a 5 year tendering process to become the Council's regeneration partner, knowing full well the affordable housing requirements for the site. As part of its CIL charging schedule, the Council had also commissioned its own viability assessment, showing that a policy compliant redevelopment was indeed viable.

We also spoke to other campaign groups and found that similar questions were being raised about viability assessments submitted for other major developments around London.



A little background to our quest

We first became interested in viability when many of the replacement housing developments, originally intended to rehouse Heygate residents were deemed unviable. We saw how viability was also later used as an excuse to scrap plans for a renewable energy plant (MUSCo), how it justified just 79 social rented flats out of 2700 new homes on the Heygate; and how it had justified squeezing 616 new parking spaces into what was supposed to be a car-free development.

Following the submission of outline planning for the Heygate redevelopment, we made an EIR request to the council asking for a copy of the viability assessment which had been used as justification for these significant departures from policy. Southwark rejected our request and also appealed after we referred it to the Information Commissioner who ordered its disclosure. Finally, after lengthy proceedings and a six-day hearing, an Information Tribunal ruled in May 2014 that the viability assessment minus 3 of its 22 appendices should be disclosed.

Our Tribunal victory was significant because it ruled that viability assessments should be classified as environmental information under the Environmental Information Regulations (EIR) rather than FOI. This is good because there is a greater presumption in favour of disclosure under EIR compared to FOI.

It was also significant because, following similar decisions concerning requests for viability information from campaigners in Earls Court & Greenwich Peninsula, the Information Commissioner now appears to have taken a position on the need for disclosure of viability information in planning decisions.

Don't get confused!

EIR is basically the same as FOI but for environment related information. It is harder for authorities to withhold information under EIR than it is under FOI.

Hedge your bets!

EIR/FOI requests can be made to any public body so you are not just limited to requesting information from your local Council. The GLA as planning authority or the DVS (District Valuer Service - part of the VOA) may also hold viability information relating to your development.



Making the information request

Don't waste time! It can take a long time going through the EIR/FOI request process and you don't need to wait for the actual viability assessment to be submitted with the planning application. As soon as you find out that viability discussions are taking place you can make an EIR request to your Council's FOI/EIR department. In our case, the developer entered into pre-application talks (Planning Performance Agreement - PPA) involving viability discussions with the Council, the GLA and the DVS (District Valuer Service) as early as two years before the outline planning application was submitted. All of these discussions, be they emails, memoranda or meeting minutes and the PPA or regeneration agreement itself are subject to EIR.

Timescales

Make it clear that you are requesting the information under EIR not FOI and provide as much detail as you can in your request to help identify it. The Council have 20 working days in which to respond. If they don't then write back giving them a further 7 working days to respond before you request an internal review of the matter. The Council will then have 40 working days to respond to your internal review request. If they fail to respond satisfactorily to this, then you can refer the case to the Information Commissioner - (see next section).

Tips

Do make sure the request comes from somebody in the group who is reliable, willing to go the distance, and who doesn't have a vested personal interest in the information. Whilst EIR/FOI law is supposed to be requester blind, we saw in our case that this doesn't hold true - especially when it reaches Tribunal stage.

Don't hesitate to contact the Information Commissioner if the planning decision is imminent. Tell him you have made an EIR request, that the information is crucial to your participation in the forthcoming planning decision and ask him to give the council a deadline for responding to your information request.

www.whatdotheyknow.com

This is a website which helps guide you through the process of making an EIR/FOI request. You can also make the request directly with the use of their automated web form.

If speed is of the essence:

Once the deadline for judicial review (JR) of the planning application has passed there will be no way of challenging the permission at a later stage. If things are tight you could try another approach in the form of an information request under duty of candour as part of a JR 'pre-action protocol' letter.



Providing a little context

When requesting an internal review or referring the case to the Information Commissioner, you should list reasons why you think it is in the public interest for the viability information to be disclosed. You should describe how non-disclosure of the viability info is curtailing your ability to participate in the planning decision-making process. Quote any controversial aspects of the scheme and show how viability has negatively impacted on affordable housing or other s106 contributions. Maybe also list case precedents where Councils have been forced to disclose viability assessments following EIR requests in the past:

Lakota redevelopment, Bristol

In 2010, the First-Tier Tribunal rejected Bristol City Council's appeal against a ruling from the Information Commissioner that it must disclose the viability report provided in support of an application to demolish and replace the Lakota Building in the St Paul's area of Bristol.

Jolly Boatman, Hampton Court

Elmbridge Borough Council appealed the Information Commissioner's ruling that it must release the viability figures and report submitted by the applicant in an application concerning a development at Hampton Court Station and the former Jolly Boatman pub. The appeal was rejected by the First-Tier Tribunal in 2011.

Earls Court regeneration, west London

In Nov 2013, the Information Commissioner ruled that the Royal Borough of Kensington & Chelsea had incorrectly withheld the District Valuer's appraisal of the viability assessment for the scheme.

Heygate Estate regeneration, Elephant and Castle

The First-Tier Tribunal ruled in May 2014 that the London Borough of Southwark and developer Lend Lease must disclose previously confidential viability assessment in the controversial Heygate regeneration scheme.

Greenwich Peninsula regeneration

The Information Commissioner & First-Tier Tribunal ordered disclosure of viability assessments underlying the scheme.

Be persistent and consistent!

Remember that all of your communications with the Council and the Information Commissioner will form part of the case documents should the case later reach the appeal stage, so keep the language courteous and try not to say anything which could later be used against you.



Calling in the Commissioner

If the Council's internal review response was unsatisfactory and you have referred the case to the Information Commissioner, his office will contact the Council asking for the disputed information and hear arguments from the Council upon which he will subsequently base his decision.

This can take some time but should the Commissioner eventually rule in your favour, the Council will be given 35 days to disclose the information requested. However, despite strong case precedents set by the Heygate, Earls Court & Greenwich Tribunal cases, in seeking to delay disclosure the Council may appeal the Commissioner's decision.

If the Council does appeal the Commissioner's decision, this will be done via the First-tier Tribunal (Information Rights) and as the requester you will be able to contact the Tribunal requesting to attach yourself to the case as a 'respondent'. Despite the fact that you will be supporting the Information Commissioner at the Tribunal, the Commissioner's office needs to remain impartial and so will be unable to discuss the case directly with you.

As respondent you will receive the case papers setting out the Council's grounds of appeal, to which you will be able to make a formal response.

You will also have the right to request documents that the Council should append to the 'core bundle' of documents to be presented at the hearing.

As a respondent you will be able to present your own witnesses and also cross-examine the Council & its witnesses during the hearing.

Regardless of the outcome, you will not be responsible for paying the costs of any other parties.

Make some noise!

It might be a good idea to create some publicity around the Information Commissioner's decision if it goes in your favour. The Council will not like to be seen obstructing transparency or spending public money protecting developers' intellectual property.

Despite the fact that you will be a respondent supporting the Information Commissioner, his office can discuss procedure but will be unable to discuss the particulars of the case with you. This is standard policy and a precaution protecting his impartiality.



Supporting the Commissioner at Tribunal stage

Whilst the Information Commissioner will instruct counsel to argue against the legal points raised in the grounds of appeal, he can do little to promote the public interest argument in favour of disclosure - this is where you come in.

In our case the Council claimed that the public interest in the development had been overstated and that we wouldn't know what to do with the complex viability data if it were to be disclosed.

In response we called 5 expert witnesses (including a councillor on the planning committee) who testified to the shortcomings of the development and how denial of access to viability information had impeded participation in the planning process. Our witnesses also included an academic planning professional who was able to argue that the information was readily understandable and showed that expert advice was available to the community groups involved.

The Council and developer were also arguing that the entire development would collapse if the viability information were to be released. We asked around, did some research and came up with a list of London developments where viability assessments had been disclosed but which were nevertheless proceeding unhindered:

- *Neo Bankside
- *Albert Embankment Development
- *Doon Street Development
- *Bondway and the Vauxhall Island Development

- *Poplar Business Park Development
- *King's Cross Regeneration Development
- *Walthamstow Stadium Development
- *Tribeca Square Development (Elephant & Castle)

Get help!

We were lucky to find some sympathetic public interest lawyers who helped us prepare the case papers and represented us for free at the hearing (Leigh Day and Monckton Chambers). Whilst it would have been possible to represent ourselves, our legal team obviously knew much better how to formulate our arguments and get them across.

Press Interest

Speak to the press and drum up as much publicity as you can. Remember: this is public money being spent by the Council to protect private interests. The Council's appeal will also be costing the public purse which funds the Information Commissioner's legal costs for the case.



Trade secrets

It is worth noting the differences between the Earls Court, Heygate and Greenwich Tribunal cases.

The Earls Court request was for the District Valuer's appraisal of the viability assessment, not the developer's viability assessment itself. The Heygate and Greenwich Peninsula requests were both for the actual viability assessments, but whereas the Greenwich assessment used an off-the-shelf development model (Argus), the Heygate assessment used a 'bespoke' model, which was used for other purposes besides the planning application. This bespoke model in appendix 22 of the assessment was therefore argued to be a 'trade secret' and an exception under the exemptions in section 12(5) of the EIR regulations. The Tribunal also ruled that the developer could withhold two appendices containing commercial sales & rentals projections in the Heygate case.

The Tribunal in the Greenwich case took a much tougher line. Everything was ordered to be disclosed without exception. This is partly due to the fact that the Greenwich developers had come back applying for a variation to the level of affordable housing originally agreed. The Tribunal found that there was a much greater need for disclosure in applications for variations in s106 agreements.

Indeed, the Greenwich Tribunal decision (which came after the Heygate decision) has set a strong precedent that will make it difficult for developers to argue against disclosure in any future cases.

The Tribunal in the Greenwich case ruled that "once it is accepted that the EIR regulations apply, it is necessary to apply them in their full rigour. There is no room for an "EIR lite" approach". (para 24).

In part 2 of our guide we will be looking at how to analyse viability assessments and compare their underlying assumptions against publicly available benchmarks.

Watch this space!
www.35percent.org

Get in touch

Please don't hesitate to get in touch with us about your request for viability information. We would be happy to offer advice and put you in touch with others who can help. We are also planning to collate and publish a list of viability assessments for major schemes that have entered the public domain.

