
Subject: FINANCIAL VIABILITY ASSESSMENT OF PLANNING APPLICATIONS

Meeting and Date: Developer Contributions Executive Committee – 20 March 2017

Report of: Nadeem Aziz, Chief Executive

Portfolio Holder: Councillor Nicholas Kenton, Portfolio Holder for Environment, Waste and Planning

Decision Type: Executive Key

Classification: Unrestricted

Purpose of the report: To agree how the Council can best set out its requirements for the submission of financial viability assessments and to establish its approach to making assessments available for public viewing and comment

Recommendation: Developer Contributions Executive Committee agrees:

1. To introduce a local validation requirement that financial viability assessments submitted with planning applications are fully disclosed to the public unless specific parts are accepted by the Council as falling within an exemption under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004

2. That the above requirement is brought forward as part of a review of the Council's "Dover Validation Requirements 2015" document and the Head of Regeneration and Development be authorised to undertake this in consultation with the Portfolio Holder; the review process to include public consultation, and the proposed revised document to be reported to a future meeting of Cabinet for adoption

1. Summary

When applicants submit financial viability assessments it is normally on the basis that it is a commercially confidential document and that access should be restricted, including not making it available to the public. Historically, officers have sought to respect the claims of confidentiality but recent legal decisions indicate that this is no longer generally justifiable. The report recommends that such assessments should be made publicly available from the outset unless an applicant can demonstrate a compelling reason for a part, or parts, of it to be kept confidential. The report also recommends that the Council should revise its validation requirements for planning applications to reflect this.

2. Introduction and Background

2.1 The financial viability of development proposals seeking planning permission only becomes a material planning consideration if the applicant puts forward a case to demonstrate that the scheme cannot meet planning policy requirements for financial reasons, for example funding necessary infrastructure contributions (including

affordable housing) but should, nonetheless, be granted permission. Financial viability also becomes an issue with applications that propose enabling development in order to fund works to secure the future of heritage assets. The latter are, though, rare.

- 2.2 Up to now applicants have, in most cases, marked their financial viability assessments as commercially confidential and requested that access is restricted to relevant officers. The Council's practice is to seek an independent review of assessments (except in relation to affordable housing contributions from small-scale development) and because the Council does not have such in-house expertise this is commissioned from a third party specialist. The specialist's report and any related correspondence would all be covered by the applicant's request for confidentiality.
- 2.3 In some cases officers have negotiated a summary of the applicant's assessment and the specialist's review to be made available for public viewing. Such summaries are usually generalised in order to exclude specific financial information. When applications involving issues of financial viability are reported to Planning Committee the Officer report typically only paraphrases the outcome of the viability process.
- 2.4 Over the last eighteen months or so, Planning Committee members have become increasingly concerned that the information lying behind the Officer report is not available for inspection. It is therefore difficult for members of the Committee to understand how the outcome expressed in the report has actually been derived. This is a particularly important point because Committee members, and for that matter the public, are being asked whether a development scheme that cannot deliver all the supporting infrastructure that would ordinarily be required should, nonetheless, be given permission without being able to scrutinise the evidence for this.
- 2.5 Concern over this issue led, last year, to a Member submitting a Freedom of Information request to see a financial viability report that had been submitted with a planning application. The Council's decision in that instance was to agree with the request to release the report in full. This decision took account of recent legal cases and the views of the applicant. It is important to recognise that the decision lies with the Council as the public authority holding the information and while the views of the applicant are relevant they are not decisive. Therefore, while an applicant may submit a document under a claim of commercial confidentiality this may well not hold up when assessed against the requirements of the Freedom of Information legislation or the Environmental Information Regulations. If, the Council agreed with an applicant not to release an assessment, or parts of it, a third party could make a request for release under the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004 (EIR). If the Council rejected that request the requester could refer the matter to the Information Commissioner and potentially beyond that to the First Tier Tribunal. Should, on the other hand, the Council decide to release an assessment in the face of objection from the applicant it would open itself up to the risk of challenge. This would be a court challenge by way of a claim for damages for breach of common law duties under the tort of confidence. Should the release of an assessment become a contentious matter the Planning Authority would take appropriate legal advice.
- 2.6 The FOIA and the EIR contain similar provisions regarding the duties to disclose information. Both set out from the position that information held by a public body should be disclosed unless it falls within an exemption. Exemptions that are most commonly relevant to financial viability assessments are contained in S43(2) of the FOIA regarding commercial interests and states, "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial

interests of any person (including the public authority holding it).” Regulation 12(5)(e) of the EIR states, “a public authority may refuse to disclose information to the extent that its disclosure would adversely affect - the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;” While there are some similarities between these requirements they are not the same and the Council has to decide under which legislative regime a request for information should be decided. As planning applications propose development that will affect the environment it is often the case that EIR is the relevant legislation, especially as financial viability issues more commonly arise in relation to larger scale developments. Nonetheless, each case will have to be considered on its facts.

2.7 The following points of note were made in a case decided by the First Tier Tribunal in January 2015 (EA/2014/0122 [http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20\(30.01.15\).pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20(30.01.15).pdf)) concerning the London Borough of Greenwich:

- EIR was the appropriate legislative regime (the development in question was a very large scheme) although the request for disclosure was made under FOI.
- The exception to disclosure applies only if in all the circumstances of the case, the public interest in maintaining it outweighs the public interest in disclosing the information. There is a presumption in favour of disclosure
- There is a strong public interest in protecting commercially sensitive decisions about price. There is also a specific public interest in preventing others obtaining a developer’s expertise, or expertise which a developer has paid for, for free
- Notwithstanding the above, the Tribunal found it particularly hard to accept that the pricing and other assumptions embedded in a viability appraisal are none of the public’s business. They are the central facts determining the difference between viability and non-viability. Public understanding of the issues fails at the starting line if such information is concealed
- Eventual sales prices will, in any case, be dictated far more by the market at time of disposal than by any assumptions recorded in the disputed information
- The disputed information did not involve any “trade secrets”; rather it consists of conclusions drawn from information much of which is widely available.

2.8 Another First Tier Tribunal case involving the London Borough of Southwark (EA/2013/0162 [http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20\(09.05.14\).pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20(09.05.14).pdf)) in May 2014 concluded that:

2.9 Disclosure of the applicant's bespoke development appraisal model would harm their commercial interests and this outweighed the public benefits of disclosure (note that most developers use publicly available generic software packages to undertake their appraisals so this consideration is unlikely to apply in most cases)

- 2.10 A distinction was made between the commercial sensitivities of sales and rental information relating to residential and commercial development. In this case sales and rental information relating to commercial property was the result of commercial negotiation between individual parties which, it was agreed, was of great commercial sensitivity to the applicant and should not be disclosed. Sales and rental prices relating to residential development, however, is much more likely to be influenced by the general market rate at the time of sale and it was held that the public benefits of disclosure outweighed any dis-benefits.
- 2.11 These cases illustrate the differing considerations that may apply to the circumstances of an individual development proposal against a background of a general presumption that information should be disclosed to the public to aid public involvement in decision making and to help make that process transparent. How this can best be taken forward by the Council is considered in the following section.

3. Identification of Options

- 3.1 Option 1 - the Council continues with its current practice and only considers disclosing financial viability information that an applicant has claimed to be confidential in response to a formal request under FOIA or EIR.
- 3.2 Option 2 – to develop a Supplementary Planning Document (SPD) to provide a policy basis for requesting that when an economic viability appraisal is submitted with an application it is made publicly available.
- 3.3 Option 3 – to revise the Council’s validation requirements for applications to include a local requirement that when an financial viability appraisal is submitted with an application it is made publicly available.

4. Evaluation of Options

- 4.1 Option 1 represents current practice that has, of course, been the cause of concern to Planning Committee members and has led to the production of this report and so would not address that legitimate concern. The outcome of the two Tribunal cases referred to above indicates that the Council’s current practice is not reflective of the legal presumption that information should be made publicly available unless there is a demonstrable case of exemption. In addition, while formal requests for disclosure of information may well lead to the information being disclosed, such disclosure would inevitably occur later on in the course of processing a planning application after the closure of the public consultation period. This could therefore trigger the need for a further round of public consultation and add significantly to processing times. It is clearly more of an aid to the public and consultees and more in the interests of transparency if such information is made publicly available at the outset. For these reasons this option is not favoured.
- 4.2 Some Councils, for example the London Borough of Islington, have followed Option 2 and developed a SPD to establish a policy basis for requesting full public access to financial viability assessments. The SPD has, however, primarily been used to establish the methodology for carrying out an assessment and any process and procedural requirements and public disclosure forms only a part of that. In Dover District Council’s experience any concerns about methodology have been discussed and resolved through the process of review carried out by the specialist consultant engaged by the Council and this does not therefore provide a reason for preparing a SPD which would be time and resource hungry. In addition, the principal of public disclosure is established in law rather than policy – developing a policy document only to echo a legal requirement is not appropriate.

- 4.3 With regard to Option 3, the Council is required to set out its validation requirements for planning applications. The requirements consist of the national requirements and any local requirements that a Local Planning Authority considers necessary. Any local requirements have to be set out in a list and published on the Council's website. The list needs to be reviewed at least every two years and, as advised by the Planning Practice Guidance, the proposed new Requirements should be subject to public consultation, including applicants and agents. The District Council has such a list contained in the Council's Dover Validation Requirements 2015 document, which coincidentally is due for review. It is therefore an opportune time to incorporate a requirement relating to financial viability assessments as part of the review of the Council's local validation list. Applications that are submitted without complying with the Council's validation requirements would be held as invalid and not processed until such time as the missing information is supplied. This would achieve the aims of this report in the most efficient and effective way. If this option is agreed, a further report will need to be brought to Cabinet to adopt a proposed reviewed local list of validation requirements. The resource implications of this are contained to officer time and can be absorbed within normal duties.

5. **Resource Implications**

- 5.1 The resource implications of this are contained to officer time and can be absorbed within normal duties.

6. **Corporate Implications**

- 6.1 Comment from the Section 151 Officer: Finance has been consulted and has nothing further to add (SB)
- 6.2 Comment from the Solicitor to the Council: The Solicitor to the Council has been consulted in the preparation of this report and has no further comment to make.
- 6.3 Comment from the Equalities Officer: This report does not specifically highlight any equality implications however, in discharging their responsibilities members are required to comply with the public sector equality duty as set out in section 149 of the Equality Act 2010 <http://www.legislation.gov.uk/ukpga/2010/15>
- 6.4 Other Officers (as appropriate): None

7. **Appendices**

None.

8. **Background Papers**

None.

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