Landmark CHAMBERS

ENVIRONMENTAL INFORMATION (and viability assessments)

Andrew Byass

January 2017

Overview

- The position with respect to disclosure of financial viability assessments ("FVA") in planning statutes / policies / guidance
- The legal framework within which access to environmental information impacts upon planning and compulsory purchase procedures and viability assessments in particular
- The approach of the Tribunal and the Information Commissioner
- Emerging guidance from local planning authorities: Greenwich, Islington and others

Planning applications (1)

- Town and Country Planning Act 1990, s. 69 requires LPAs to keep a "*register containing such information as is prescribed as to – (a) applications for planning permission*"
- The Development Management and Procedure Order 2015 ("DMPO"), para. 40, provides limited mandatory requirements (does not include FVAs or similar supporting documentation)
- Planning Practice Guidance ("PPG") unsurprisingly however encourages transparency (Paragraph: 063 Reference ID: 14-063-20140306), while saying it is for LPAs to decide what information to publish

Planning applications (2)

- National Planning Policy Framework ("NPPF") requires LPAs to "*involve all sections of the community … in planning decisions*" [69]
- We are also told pursuing sustainable development "*requires careful attention to viability and costs*" and that to ensure viability development should "*provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable*" [173]
- On the theme of transparency, the PPG states that "*[t]ransparency of evidence is encouraged wherever possible*" (Paragraph: 004 Reference ID: 10-004-20140306)

Planning applications (3)

- FVAs are frequently provided in support of planning applications in confidence. There is then a process of peer review by an independent consultant appointed by the Council. There is no need to disclose under the DMPO
- Per Ouseley J in *R (Bedford) v LB Islington and Arsenal FC* [2002] EWHC 2044 (Admin), an LPA "*needs to be able to examine matters in a confidential matter with applicants*"
- There is also **no** need to provide a FVA to a planning committee when it is tasked with deciding a planning application. It is also exempt information under s. 100D(4)(a) and para 3 of Schedule 12A of the Local Gov't Act 1972

Planning applications (4)

- String of authority that says there is no need for a planning committee to see a full FVA in order to lawfully determine a planning application
- *R (Bedford)* is one example. See also *R (Perry) v Hackney LBC* [2014] EWHC 3499 (Admin), per Patterson J
- Patterson J in ***Perry***: there is no requirement for members to see a full FVA in order to make a lawful decision. Members "*were in a position to judge whether they felt they had sufficient information to enable them to carry out their decision making exercise*" [64]

Planning applications (5)

- Patterson J also determined that the FVA "*contains assumptions about build costs, sales costs and residual values*", and so relates to matters that are "***clearly matters of the utmost commercial sensitivity***"
- Material "*was provided and received on the reasonable basis that it would be treated confidentially… **I have no doubt that it should be so treated***": [49]
- See also *Turner v SSCLG* [2015] EWHC 375 (Admin), per Collins J, which also decided that Members do not need to see full FVAs

Planning applications (6)

- In summary:
  - Clear support for transparency in decision making, favouring disclosure of FVAs
  - Equally clear support, so far as planning statutes / policy / guidance is concerned, that not disclosing FVAs can be appropriate

The Environmental Information Regulations 2004

- The Environmental Information Regulations 2004 ("EIR") create a regime that overall confers a greater right of access to information than under the FOIA
- Per regulation 2, "environmental information" includes "cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities" that are referred to elsewhere in the definition
- Financial viability assessments ("FVA") have consistently been held to be environmental information where the EIR applies

Duty to make available

- 5(1) – "*a public authority that holds environmental information shall make it available on request*"
- 5(2); 14(2) - response or refusal should be made as soon as possible and not later than 20 working days after the date of receipt of the request
- Note 3(2)(b): the "*holding*" of information by a public authority includes if the information "*is held by another person on behalf of the authority*"
- It will cover independent consultants engaged to review FVAs (broader provision than under FOIA)
- The requirement to make environmental information available is subject to exceptions

Exceptions to the duty to disclose

- Two principal regulations to consider, reg. 12 and reg. 13
- 12(1) - there is a discretion to refuse to disclose environmental information if an exception in reg. 12 applies, **AND**, per 12(1)(b), "*in all the circumstances of the case, the **public interest** in maintaining the exception outweighs the public interest in disclosing the information*"
- The public interest in disclosure must be considered in **all** reg. 12 cases and, per reg. 12(2), the public authority must apply a presumption in favour of disclosure
- 13 – personal data; brings into play the data protection principles in the Data Protection Act 1998

Exceptions to the duty to disclose

- Likely exceptions to rely upon in respect of FVAs:
  - 12(4)(b) "*the request for information is manifestly unreasonable*"
  - 12(5)(c) "*disclosure would adversely affect- … (c) intellectual property rights*"
  - 12(5)(e) "*disclosure would adversely affect - … (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*"
- Other exceptions exist in reg. 12(4) and (5)

Manifestly unreasonable requests – 12(4)(b)

- Requests for all correspondence or documents that make reference to a FVA may be manifestly unreasonable
- For example:
  - Large schemes
  - Hundreds if not thousands of emails
  - Disproportionate staff time to consider all emails (particularly if require redaction in line with decision to withhold the FVA itself)
- NB – charging for staff time likely to be acceptable, but not overheads, since the latter do not amount to "*supplying*" the information: see Case C-71/14 *East Sussex CC v Information Commissioner [2016] Env. L.R. 12*

Intellectual Property Rights – 12(5)(c)

- *Southwark v Information Commissioner* EA/2013/0162
- Upheld reliance on 12(5)(c) for that part of FVA which consisted of a proprietary financial model which allowed dynamic costs assessments to be made during build
- Rejected the ICO's position that needed to prove monetary loss to demonstrate adverse effect: §36
- Accepted that disclosure would harm the developer's interests; competitors able to see and utilise the model

Commercial confidentiality – 12(5)(e)

- Principal exception likely to rely upon
- Four relevant matters to exception being engaged:
  1) Is the information in question commercial or industrial in nature?
  2) Is the information protected by the common law of confidence?
  3) Is such confidentiality provided to protect a legitimate economic interest?
  4) Would the disclosure of the information adversely affect such confidentiality?
- Must satisfy these matters otherwise exception will not be engaged

Commercial confidentiality – 12(5)(e)

1) Is the information in question commercial or industrial in nature?
   - FVAs will invariably contain information relating to the commercial activity of a developer
   - Construction costs; sale costs; yield estimates
   - ***Perry*** (supra) confirms that information of this kind is "*clearly … of the utmost commercial sensitivity*"

Commercial confidentiality – 12(5)(e)

2) Is the information protected by the common law of confidence?
   - Consider whether the information (a) has the necessary quality of confidence and (b) was imparted in circumstances importing an obligation of confidence
   - Would a reasonable person standing in the shoes of the recipient of the information have realised that upon reasonable grounds the information was being provided to her/him in confidence then this should suffice to impose upon her/him an equitable obligation of confidence: *Coco v AN Clark Engineers Ltd* [1969] RPC 41

Commercial confidentiality – 12(5)(e)

2) cont…

- Seeing some LPAs (Greenwich) indicating that FVAs will not be treated as confidential documents and that they will be published along with all other application documents
- In other words, what is required is full transparency (will come back to this later)
- FVA provided within this context would falter at this hurdle; there would be no reasonable expectation that the information was being provided in confidence

Commercial confidentiality – 12(5)(e)

3) Is such confidentiality provided to protect a legitimate economic interest?
   - Establish that some economic harm would (more probably than not) result from disclosure
   - What is typically argued: FVA values and costs enable contractors and buyers to see these estimates and so gain a negotiating advantage that they would not otherwise have, so reducing potential profits

Commercial confidentiality – 12(5)(e)

(3) cont…

- The ICO has, at least, made clear that referring to general risks of reduced profits / impaired negotiating ability may well not be sufficient to rely on exemption
- Per *Leeds City Council* (FER0557376, 2 December 2014), *"the arguments submitted by the council are not sufficiently detailed to link specific harm to specific elements of the withheld information … [Word by word analysis is not required, but] authorities should be able to identify specific harm and link it to the disclosure of a discrete element of withheld information*"

Commercial confidentiality – 12(5)(e)

(3) cont…

- Or *LB Southwark* (FS5058692, 25 April 2016), *"the information is made up of generalised or global figures relating to the proposed development. They do not therefore provide an in-depth picture of the developer's assumptions and projections. As such, the withheld information … could [not] be exploited by competitors…"*
- If detail is absent, will struggle to demonstrate that confidentiality is required to protect economic interests

Commercial confidentiality – 12(5)(e)

(3) cont…

- *London Borough of Hackney* (FS50538429; 1 April 2015), reliance upon 12(5)(e) upheld by the ICO in respect of information relating to agreed private sales value, gross development value, affordable housing value, supermarket floor space value, total completed value, and total build cost
- A lot of work was done justifying each head of information and why in particular disclosure would stifle potential negotiations (e.g. there would be a reduction in the likely bid range for the appeal site if private sales values were disclosed, as even potentially more "optimistic" investors would aim more closely to the FVA value)

Commercial confidentiality – 12(5)(e)

(3) cont…

- The ICO's decision in the *Hackney* matter relates to the same development as considered by the High Court in *R (Perry) v Hackney LBC* [2014] EWHC 3499 (Admin)
- *Perry* did not decide the EIR point; that was left to the ICO
- The ICO's decision refusing disclosure was appealed to the Tribunal but the appeal did not go ahead. Shortly before the Tribunal hearing, the claim was settled by consent with the withheld information being released.
- 26 months had passed. In all likelihood the FVA was no longer commercially sensitive, instead being out of date

Commercial confidentiality – 12(5)(e)

(3) cont…

- Currency of FVA is a very real issue that will impact upon likelihood of economic harm
- Move from FVA at application stage to development agreement with an appointed contractor, with different inputs for values and costs, perhaps depending on own supply chains and services
- *Clyne v Information Commissioner and LB Lambeth* (EA/2016/0012, 14 June 2016) evidence given was that FVAs *"were almost only valid on the day they were written"* [19(i), relied on at 45]

Commercial confidentiality – 12(5)(e)

4) Would the disclosure of the information adversely affect such confidentiality?
   - If first three questions answered positively, then this question will be also
   - Would not adversely affect confidentiality if the material had already been put into the public domain by the developer

Public interest assessment

- Having established an exception is engaged, it is necessary to weigh the competing public interests, per regulation 12(1)(b). That is:
  - the public interest in disclosing the information

  as weighed against

  - the public interest in maintaining the exception

Public interest assessment

- Matters relating to the public interest in disclosure:
  - The presumption in reg. 12(2) – "*A public authority shall apply a presumption in favour of disclosure*"
  - Decision making should be transparent: in so far as FVA relied upon to, for example, support a decision to:
    - reduce affordable housing provision
    - demolish a listed building with no viable uses
    - change the use from an uneconomic but protected use

    then such matters go to the heart of the decision or at least are significant aspects
  - Public participation should be supported by full consultation with access to all supporting material

Public interest assessment

- Matters relating to the public interest in non disclosure:
  - (1) Other developers will be deterred from providing full and frank viability assessments in other applications; i.e. a floodgates style argument. Not found huge favour:
    - *Bristol v Information Commissioner* EA/2010/0012, "*since the passage of the [EIR] there can never be a guarantee that confidentiality will be upheld*" §21;
    - *Southwark* (supra), "*this approach gives insufficient recognition to the fact that the legislature has intervened in public authority relationships through FOIA and EIR*" §42.
  - But see *Hackney* (supra) at §37 and §91, in context of ongoing s. 106 negotiations and other detailed material

Public interest assessment

- (2) Damage to a developer's commercial interests. Some difference in treatment of potential damage to negotiations with contractors / other commercial entities as opposed to potential damage to negotiations with private buyers of housing:
  - Private buyers "*are much more likely to be influenced by the market rate at the time*" and not FVA estimates: *Southwark* (supra), §57, *Hackney* (supra), §49
  - May be a particular factor in a compulsory purchase context – estimated values for Order land irrespective of whether owner is an individual or business

Public interest assessment

- In contrast to private buyers, contractors are much more likely to be influenced by estimated construction costs or values
- In *Hackney*, where the land was to be sold on, the argument accepted was that having the FVA's estimates would deter bullish (i.e. higher) value estimates, which would in turn feed into higher offers to purchase
- The Tribunal in *Clyne* took a different approach: "*we consider it far more likely that under a competitive tender process it would be unlikely for competitors to chose to align their tenders with figures in the [FVA] but rather to tender competitively*" [45]

Public interest assessment

- (3) Damage to viability of a project. Reflection of the above, but can carry sway if project delivers regeneration benefits, as in the regeneration of Elephant and Castle in *Southwark*
- (4) Damage to potential delivery of planning obligation benefits. Similar to the above, since delivery of the project will deliver planning obligations. In so far as claw back provisions exist, impact upon profitability can reduce provision of such further benefits, contrary to the public interest

Public interest assessment

- As with any balancing exercise, much will depend upon the particular facts
- Decisions have gone both ways, but the strong trend, particularly recently, is towards disclosure
- The conclusion in *Clyne* (the latest word from the Tribunal) was that the public interest favouring disclosure "*vastly outweighed*" the public interest in respecting commercial information
- Concerned the "*Megabowl*" site in Lambeth, derelict for some time, though the redevelopment proposals were controversial and proposed less affordable housing than policy sought

Public interest assessment

Clyne cont…

- Took the robust view that even with contractors, negotiations would "*be driven by competitive processes and the economics of supply and demand*"
- Disclosure would not have jeopardised the development from proceeding, nor "*badly affect*" the developer's bargaining position [67]
- Query this latter finding – some impact on bargaining position (and so profits) is acceptable / is capable of being outweighed by the public interest in disclosure

Public interest assessment

- *Clyne* comes after and considers two other Tribunal decisions (both with Judge Warren): *Southwark (supra)* and *Greenwich v Information Commissioner* EA/2014/0122
- *Southwark* (the later in time of the two): information that was to be the subject of commercial negotiation with other business not disclosed (§56), but information about sales to private buyers (and housing associations for AH elements) was (§57). Recall the emphasis upon the public interest in the regeneration of Elephant and Castle

Public interest assessment

- *Greenwich v Information Commissioner* EA/2014/0122 (the first in time): disclosure ordered of whole FVA. Context was important.
  - Development is for c10,000 homes to be built over 20 – 25 years. Application to vary AH obligation made in 2012, just after new owner took over the site
  - Strong sense of dissatisfaction with the quality of the FVA, which reading between the lines, seemed in the Tribunal's view to warrant further scrutiny. It assessed current values only despite longevity of the project, and assessments that the housing market was in poor health contrasted with other material

Public interest assessment

- ICO decisions over the last 12 months have overwhelmingly fallen down on the side of disclosure
- The limited exceptions:
  - A follow up to the Tribunal's *Southwark* decision requesting the review of the FVA instead of the FVA itself. The public interest matters had not moved on sufficiently for the ICO to reach any different decision
  - *Tower Hamlets* (RS50570729, 22 March 2016) – matters were at pre-application stage; significant that at the time of the request, the terms of the planning application could change depending on the negotiations

Commercial confidentiality – 12(5)(e)

In summary:

- There is strong support for FVAs being commercially confidential material, protected by law: *Perry, Turner*, and ICO/Tribunal decisions
- On a tangential note, the full detail of FVAs do not necessarily need to be seen by the decision maker. Judgment is required
- There are decisions going both ways as to disclosure when reliance is placed upon the commercial confidentiality exemption in reg. 12(5)(e)
- But the balance of decision-making is presently very much in favour of disclosure

Commercial confidentiality – 12(5)(e)

- Pointing to regeneration benefits, specific and detailed justifications for non-disclosure, and prejudice to negotiations with other businesses will still be the most relevant matters to focus upon to resist disclosure. These arguments can still succeed but are difficult
- Will also depend where the FVA is provided. E.g.:
  - Greenwich requires all FVAs to be public documents
  - Islington's Development Viability SPD operates a presumption of openness but permits of exceptions if justification can be provided (which broadly speaking must align with the EIR 12(5)(e) versus public interest test)

Commercial confidentiality – 12(5)(e)

- Note also the recent (November 2016) London Borough Development Viability Protocol which states that authorities will expect that FVAs will be publicly available (similar to the approach in Islington of permitting exceptions) but also notes that FVAs may have to be disclosed under the EIR
- While the protocol does not alter existing policies, it is said to provided additional advice on the approaches that local authorities intend to apply when assessing viability

Reviewing refusals to disclose information

- Internal review – within 40 days, entirely fresh decision by a different person – reg. 11
- ICO complaint – if remain dissatisfied, there is the ability to complain to the ICO. The EIR, reg. 18, effectively imports the enforcement provisions of Part 4 of the FOIA
- If either party is dissatisfied with the ICO's decision, an appeal may be made to the First Tier Tribunal (Information Rights) within 28 calendar days of the ICO's decision

Landmark CHAMBERS

ENVIRONMENTAL INFORMATION (and viability assessments)

Andrew Byass:
abyass@landmarkchambers.co.uk

January 2017