Landmark CHAMBERS

Viability and Confidentiality in CPO Promotion

Rupert Warren QC

Landmark Chambers

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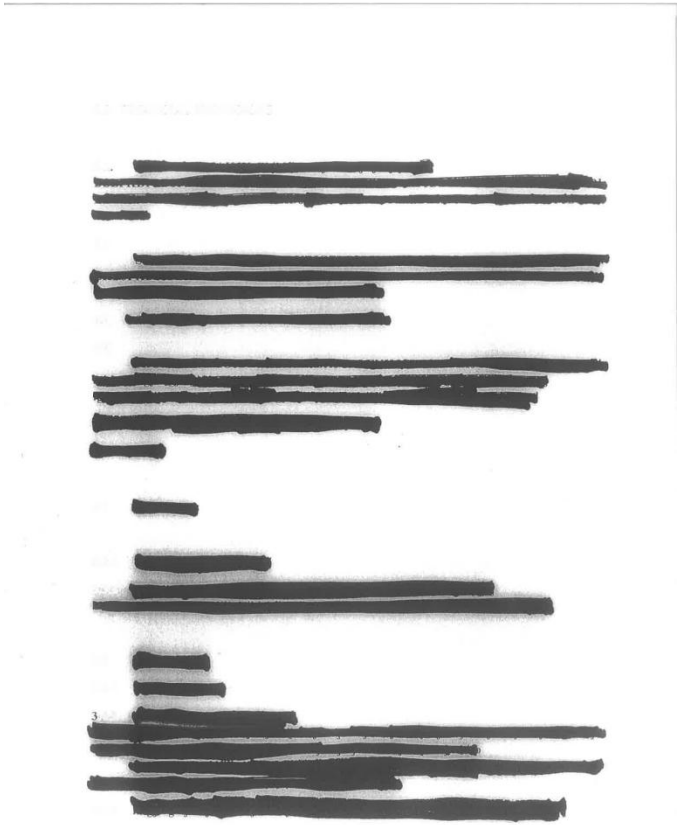
The Development Agreement as it often appears at a CPO inquiry



The main issues

- What is the main legal and policy framework within which the issue of viability/confidentiality is considered?
- What do recent examples tell us about the way the Secretary of State approaches the issue?
- What are the main practical lessons for structuring a project which may require CPO/ what areas should be scrutinised by objectors or those assessing a CPO scheme?

The legal and policy landscape

Legal requirements: duties on the Local Authority, not the developer

- Environmental Information Regulations 2004 with the Aarhus Convention behind it
- Local Government Act 1972
- Common law rights of councillors to see material

Policy requirements:

- Paragraph 14 of the DCLG October 2015 CPO Guidance, *General Overview*

EIR 2004

- Environmental Information very widely defined, and will usually include viability/deliverability material: see reg 2(1):

"information in written … form on –

(c) Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements in (a)

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures referred to in (c) "

The commercial confidentiality exception in the EIR

- The duty to disclose: reg 5(1)
- The exception: reg 12(5)(e):

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

…

the confidentiality of commercial … information where such confidentiality is provided by law to protect a legitimate economic interest"

This reflects art 4(4) Aarhus

Work assessing the FV of CPO schemes in principle should fall within the exception

More detail

- The information must have the quality of legal protection: see s.4(1) of the FIA 2000.
- Viability assessments submitted to a local planning authority fall within the ambit
- There remains an overarching public interest test (see general rider to art 4(4) Aarhus) – fact-sensitive and may depend on where the main value drivers/risks are in a scheme

Recognition in UK Courts that viability assessments are confidential

R(Bedford) v LB Islington & Arsenal FC [2002] EWHC 2044 at [81]: "*perfectly obvious that [the FVA] was assessed as confidential on a reasonable basis*"

R(Perry) v LB Hackney [2014] EWHC 3499 (Admin) 24 October 2014:

- Whether the FVA submitted on a planning application was confidential – yes:[48] to [70] – acceptable for officers/external assessors to sift and evaluate
- Whether s.100B, D of the LGA 1972 gave councillors a right to see the full information – no: [86] to [95]
- NB the more involved question of excluding public view of papers before the Council, if it has an interest in the land: s.100L LGA 1972 and Sch 12A Pt 2 para 9 of LGA 1972.

Where two or more local authorities are involved: Luton v Central Bedford

In ***R(Luton BC) v Central Bedfordshire Council*** **[2014] EWHC 4325 (Admin)**, Holgate J held (at [164] to [196]:

- Fairness in the planning process is not confined to considering objectors and local authorities but has to respect the position of the applicant as regards confidentiality
- The decision-maker needs to be able to examine such matters with applicants in a confidentially-sensitive manner
- Even if there was an agreement between authorities to share information on key points, any such "special position" did not on its own give rise to a legitimate expectation or unfairness to the 2nd authority.
- Stressing the "fact-sensitive" nature of these points

Summary: legal issues

- Commercially-sensitive material in FVAs is likely to be deemed exempt from EIR and LGA disclosure
- At the planning application stage of a CPO project, if inputs/FVA are partially or wholly disclosed, their confidentiality might be waived
- LGA rules where in JV or DA arrangement with one or more local government bodies need to be carefully scrutinised, but overall the balance lies with greater rather than lesser confidentiality in this field

Policy: DCLG guidance on CPO

October 2015, replacing Circular 06/2004

Para 14 of *General Overview:*

In preparing its justification, the acquiring authority should address:

a) **Sources of funding** – the acquiring authority should provide substantive information as to the sources of funding available for both acquiring the land and implementing the scheme for which the land is required. If the scheme is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty that the necessary land will be required, the acquiring authority should provide an indication of how any potential shortfalls are intended to be met. This should include:

- The degree to which other bodies (including the private sector) have agreed to make financial contributions or underwrite the scheme; and
- The basis on which the contributions or underwriting is to be made.

Para 14 continued

"…

b) **Timing of that funding** – funding should generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period (see section 4 of the Compulsory Purchase Act 1965) following the operative date and only in exceptional circumstances would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years

Evidence should also be provided to show that sufficient funding could be made available immediately to cope with any acquisition resulting from a blight notice."

Materially different from 04/06?

- Paragraph 13 still refers to a greater burden on the AA if they cannot show that all the necessary resources are likely to be available to achieve the outcome within a reasonable time-scale
- Most cases involve DA with well-funded private sector partners, so “sources of funding” can be relatively easily demonstrated
- The new wording “*the basis on which the contributions or underwriting is to be made”* might provide more scope for disclosure of the DA’s conditionality or triggers.
- The wording “now or early in the process” also might raise evidential issues about the DA funding and process

Examples

1. **Croydon** (NPCU/CPO/L5240/73807)

See DL 15, IR 7.20-7.31 NB – pre 2015 DCLG Guidance

- The key point was that although the Viability Review showed that the profit on cost and development yield would be lower than a speculative developer would be likely to accept, the developer would not sell the scheme but retain an ongoing interest.
- The investment/development/management structure of the project will be important to showing that the scheme will come to fruition even if the AH is low and the return unacceptable to some parts of the market

Examples

2. **Hounslow** (NPCU/CPO/F5540/74976)

IR [8.33] to [8.66] Again, pre-2015 guidance

- At the application stage, FVA was negative
- By the time of the CPO inquiry, time had passed and the Inspector was prepared to take a different view (albeit in the absence of any real evidence)

- See also perhaps the **Ealing Broadway** CPO (pre 2015 guidance), (NPCU/CPO/A5270/74172), at IR [299]: despite viability FVA at the application stage showing marginal viability and evidence that might have worsened, the Inspector concluded that no evidence that the scheme would not be viable.

Practical consequences

1. Ensure FVA work at the application stage is prepared with one eye on the (likely) overall structure of the CPO DA, delivery and financial modelling; objectors: check the FVA and its assumptions (easier at the pl application stage)
2. Ensure the legal relationship between the parties is established with full regard the information duties of the public bodies in mind: at application stage/committee stage/CPO resolution stage
3. Use external assessors for FV at the AH and scheme stages, agreed in PPA or in the DA
4. Test whether the Scheme is likely to be the final version or whether there is scope for objectors to argue that a range of alternative scenarios would be enabled by the CPO (the *Argos/*stalking horse point)
5. Limit the DA's financial conditions to those strictly necessary; perhaps use property or alternative investment based stipulations rather than a series of conditions/stipulations which might be susceptible to market and other changes: see the discussion on viability changes in the recent CPO challenge case, *Archway* [2015] EWHC 794.
6. *Never* promote the CPO together in front of the Secretary of State, together with the planning application for the scheme – see the *Orchard Wharf/Grafton* case; the FV implications of the AH for instance cannot be kept as confidential by the Inspectorate as at the LPA level

Practical consequences

7. Focus on the new DCLG guidance:

- "Substantive information" as to the sources of funding: DA; funding and track record of developer partner;
- "The basis on which the … underwriting is to be made": conditionality in the DA/Indemnity Agreement. If there are major conditions, stress-test these for obvious points that might be evident even without the full disclosure of the DA/IA
- "Funding should generally be available now": again, the issue comes down in private JV cases to the funding arrangements/conditions, and in public sectors funding to security of grant/funding, conditionality and satisfaction of Central Government lending requirements

A look ahead

- Potentially greater use of CPO
- Contemporaneous extension of the reach of the Aarhus Convention.
- Public sector changes (led in London) to the idea of open-book FVAs at the application stage
- Public interest overarching test for confidentiality – potential area for increased challenge
- If the Scheme isn't viable – why is it being promoted? If it will become viable/could become viable with changes – why not do those now or seek a flexible consent?