

**Welcome to Landmark Chambers’
‘Viability in Planning: Coping with COVID-19’
webinar**

The recording may be accessed [here](#).

Your speakers today are...



Topic:
Local Plans and Section
78 Appeals

Neil Cameron QC (Chair)
Landmark Chambers



Charles Banner QC
Landmark Chambers

Topic:
Adapting Existing
Consents



Topic:
A Valuer's View

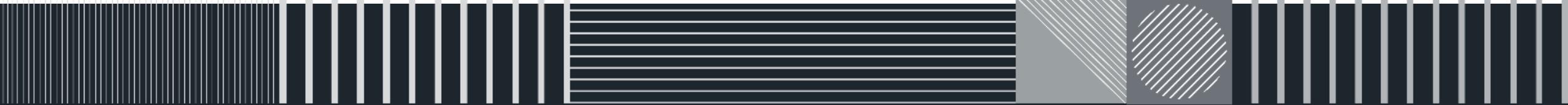
Robert Fourt FRICS
Partner at Gerald Eve LLP

VIABILITY IN PLANNING: COPING WITH COVID-19

A Valuer's View - Robert Fourt



Landmark Chambers' Webinar
20 May 2020



AGENDA

PROFESSIONAL GUIDANCE

- RICS professional statement – financial viability in planning; conduct and reporting (May 2019; effective 1 September 2019)
- RICS guidance note: valuation of development property (October 2019; effective February 2020)
- RICS guidance note: comparable evidence in real estate valuation (October 2019)
- RICS guidance note: Financial Viability in Planning (New edition forthcoming)

COMPONENTS OF DEVELOPMENT PROPERTY VALUATION AND VIABILITY

HIGHLIGHTS OF PROFESSIONAL GUIDANCE

BENCHMARK LAND VALUE – FVIP

VALUATION OF LAND AND VIABILITY: CURRENTLY & POST COVID -19

CONCLUDING COMMENTS

RISK & RETURN: ECONOMICS OF DEVELOPMENT

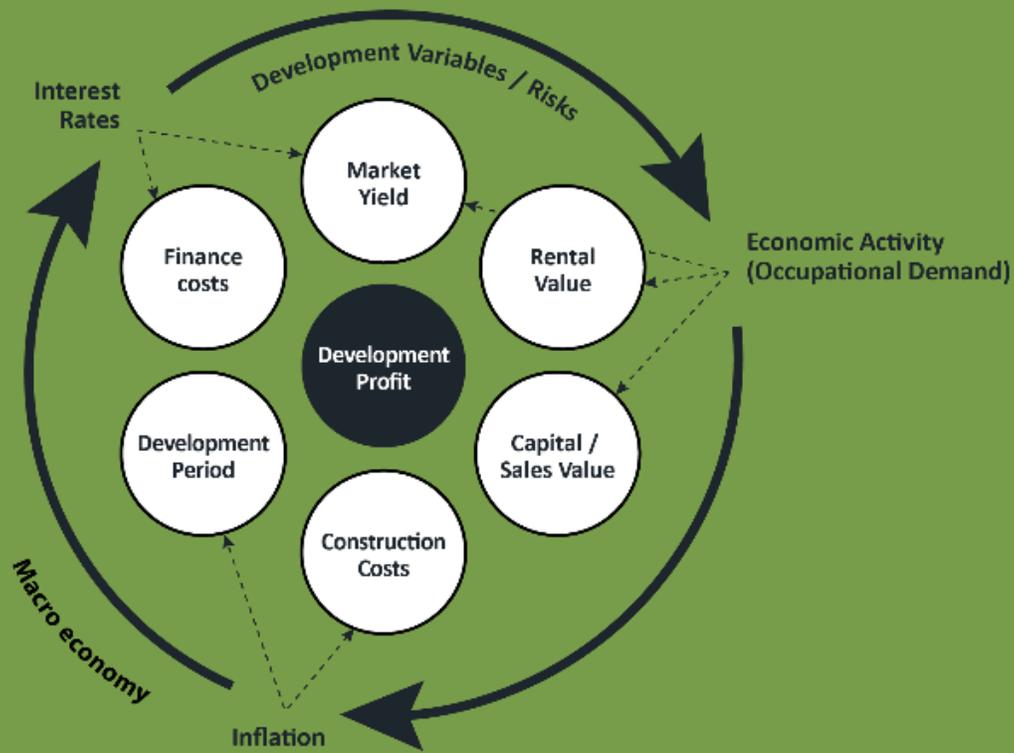
KNOWN KNOWNS; KNOWN UNKNOWNNS; AND UNKNOWNNS UNKNOWNNS

“ Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones ”

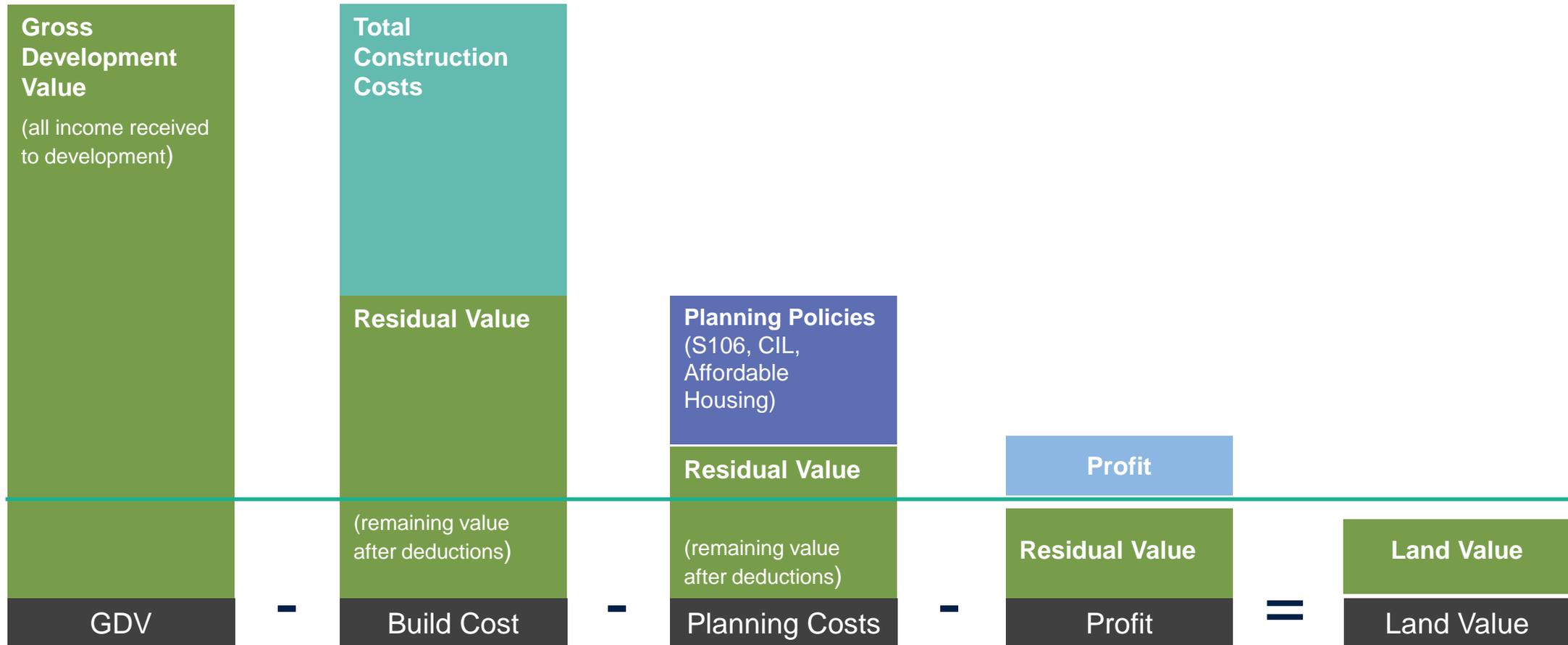
**Donald Rumsfeld, United States Secretary of Defence
News Briefing February 2002**

RISK & RETURN: ECONOMICS OF DEVELOPMENT

COMPONENTS OF DEVELOPMENT: THE MACRO & MICRO ENVIRONMENT



WHAT ARE THE BASICS?

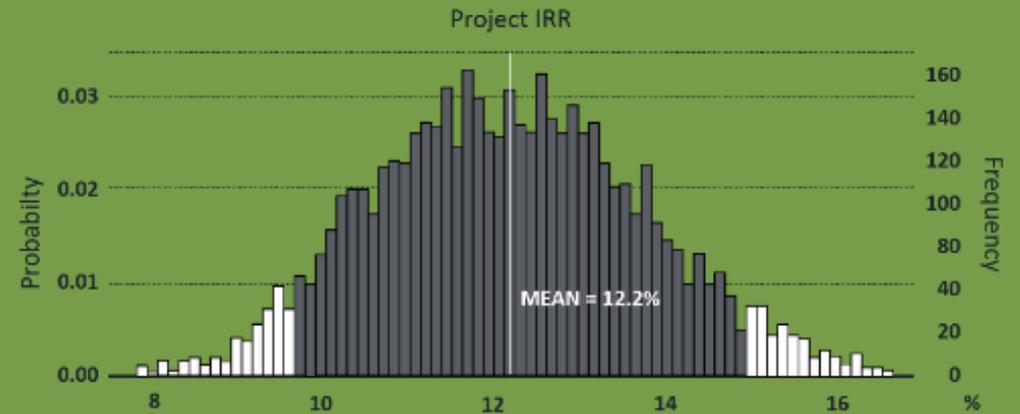
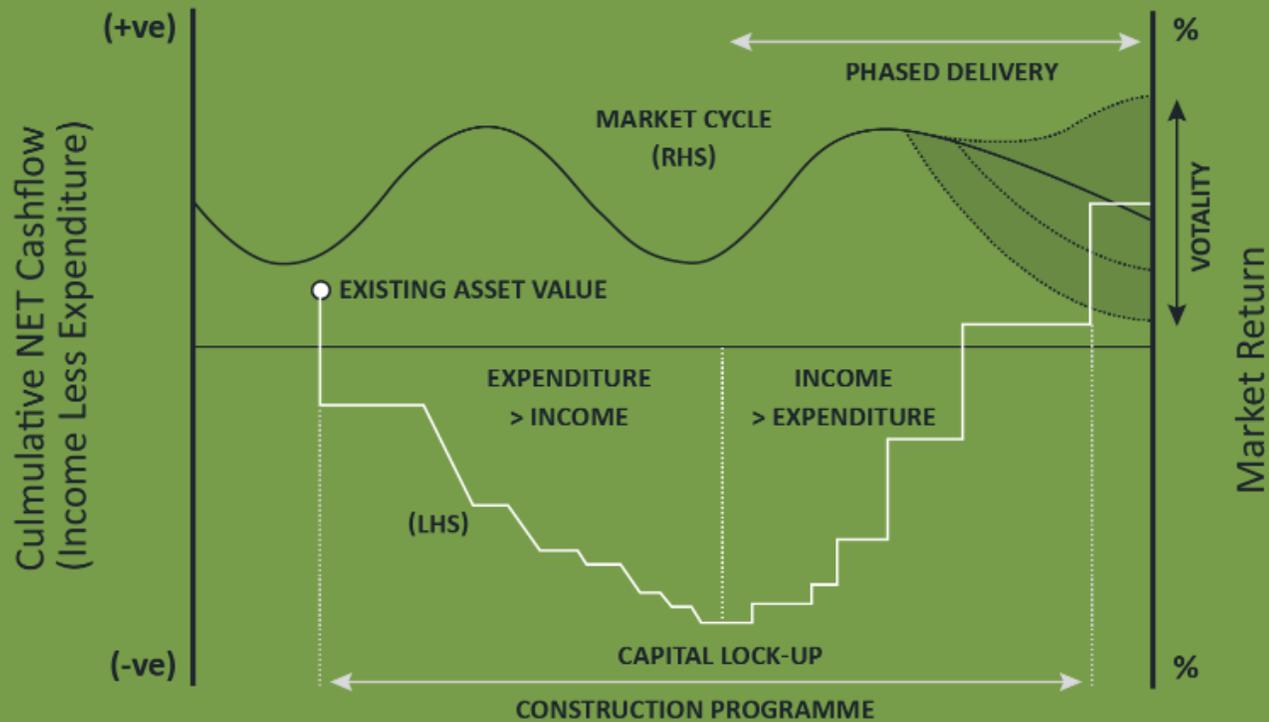


LAND VALUE SHOULD BE CHECKED/COMPUTED VIA COMPARABLE ANALYSIS

MARKET SIGNALS



RISK & RETURN: MARKET CYCLE TIMING...& SENSITIVITY TESTING



sensitivity...
 ...scenario, simulation
 timing (cash flow)
 projection (growth) modelling

IDENTIFYING SCHEME SPECIFIC RISKS

Typical stages of residential development

Stage 1: Project conception and evaluation			Stage 2: Planning Process			Stage 3: Pre-Implementation		Stage 4: Building Construction				Stage 5: Sale		
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Identify site and land assembly	Evaluate viability	Design and masterplan	Planning feasibility/ source services	Planning	Charges and levies	Procurement	Site works	Assemble build team / materials	Sub-structure/ services	Super-structure	Fitting out	Reservation / bespoke fittings	Completions	Aftersales
Finance									Housebuilding					
Secure land option / license / conditional or unconditional									External works / public					
											Reservations / bespoke fittings			
Marketing, branding and expressions of interest														

Source: Adapted from Tunstall et al (2016)

SUITE OF RICS VALUATION, COMPARABLE EVIDENCE AND VIABILITY MANDATORY GUIDANCE



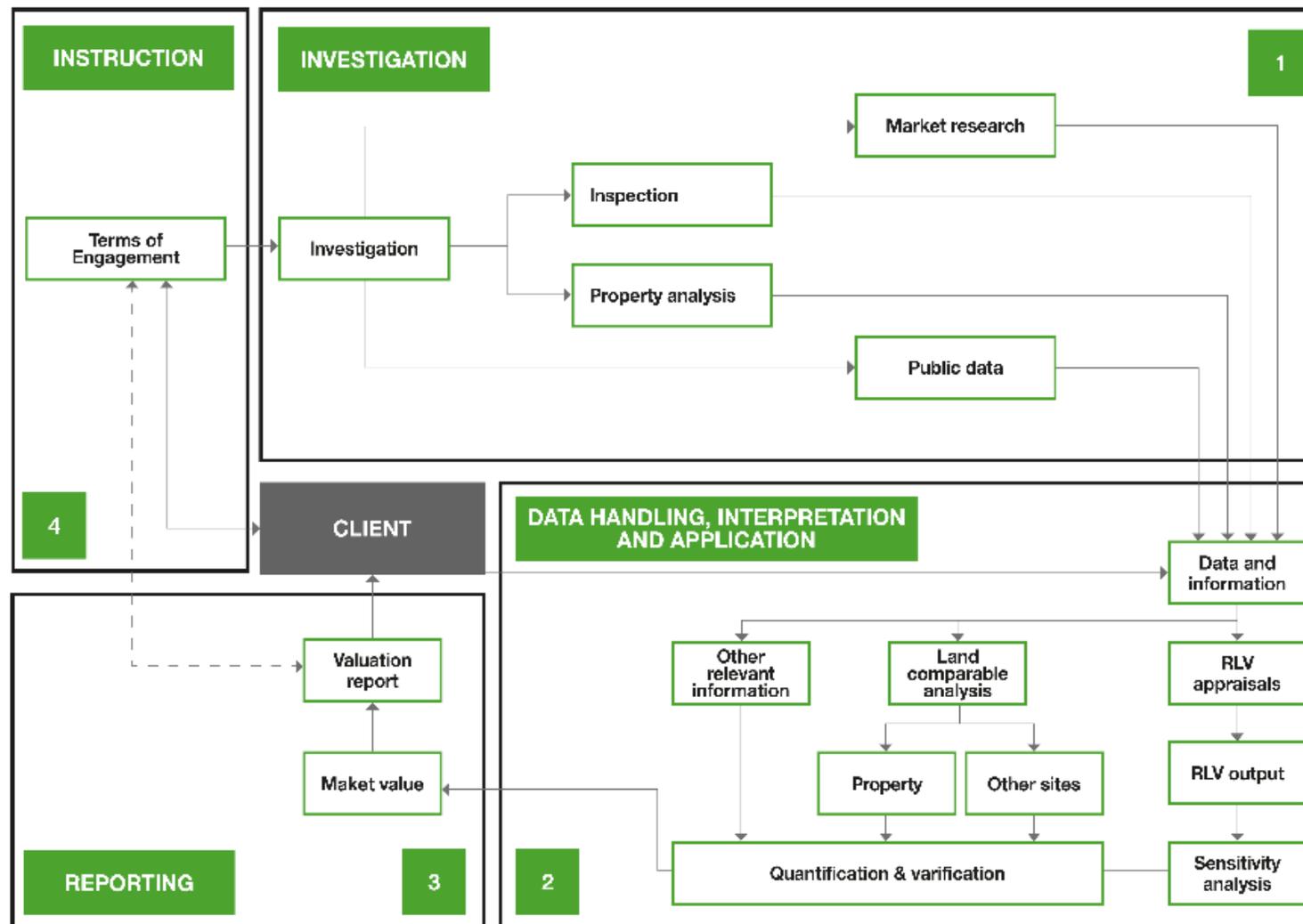
VALUATION OF DEVELOPMENT PROPERTY (OCTOBER 2019 PUBLICATION)

- Development valuation process
- Valuation approach:
 - Comparison and residual
 - Non reliance on a single approach
- Comparable analysis/application
- Residual: basic application and cashflow
- Risk (sensitivity) analysis and residual profit
- Land in the course of development
- Reporting

Appendices: assumptions and special assumptions



THE VALUATION PROCESS



COMPARABLE EVIDENCE IN REAL ESTATE VALUATION (OCTOBER 2019 PUBLICATION)

- Development valuation process
- General principles of comparable evidence
- Comparable evidence in real estate valuation
- Sources of comparable evidence
- Recording comparable evidence
- Analysis of comparable evidence
- Dealing with a shortage of evidence



PROFESSIONAL STATEMENT: FVIP – CONDUCT AND REPORTING

GLOSSARY

1. Introduction
2. Reporting and process requirements
3. Legislation, the development plan and professional guidance
4. Duty of care and due diligence
5. Transparency of information

Effective 1 September 2019

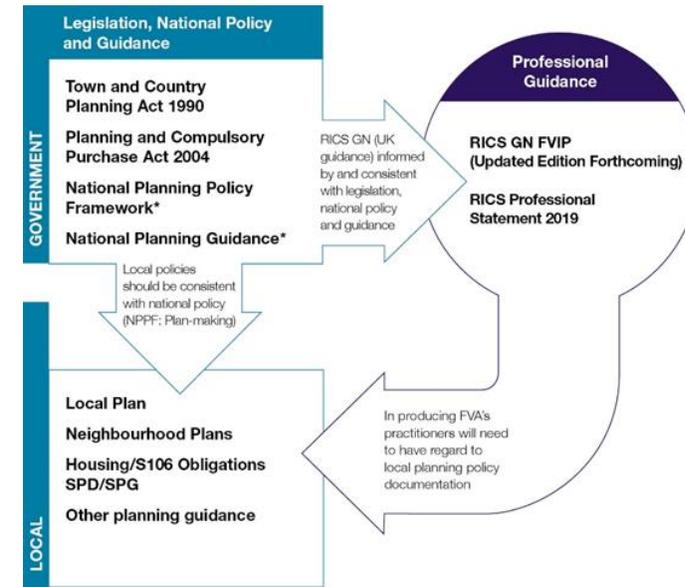


FINANCIAL VIABILITY IN PLANNING (2ND EDITION)

(Assessing Financial Viability under the National Policy Framework for England)

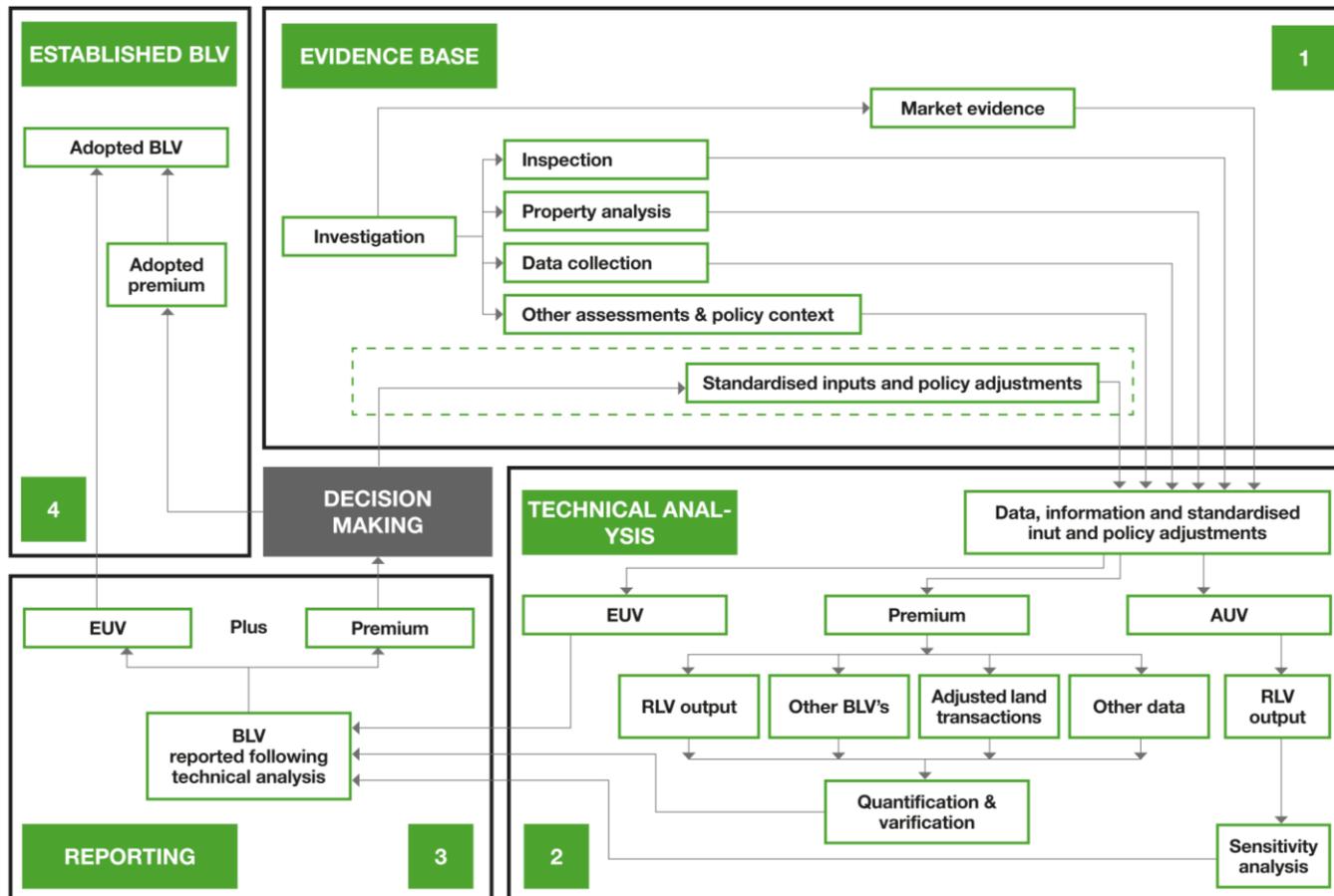
- Mandatory requirements for concluding FVAs
- Fundamental Principles of Viability in Planning
- Area-wide Viability Assessments
- Site-specific Viability Assessments
- **Benchmark Land Value**
- Other professional technical advice

Appendices



* subject to periodic additions / amendments

BENCHMARK LAND VALUE CONSTRUCT



VALUATION AND VIABILITY OF DEVELOPMENT: COVID -19

A functioning market

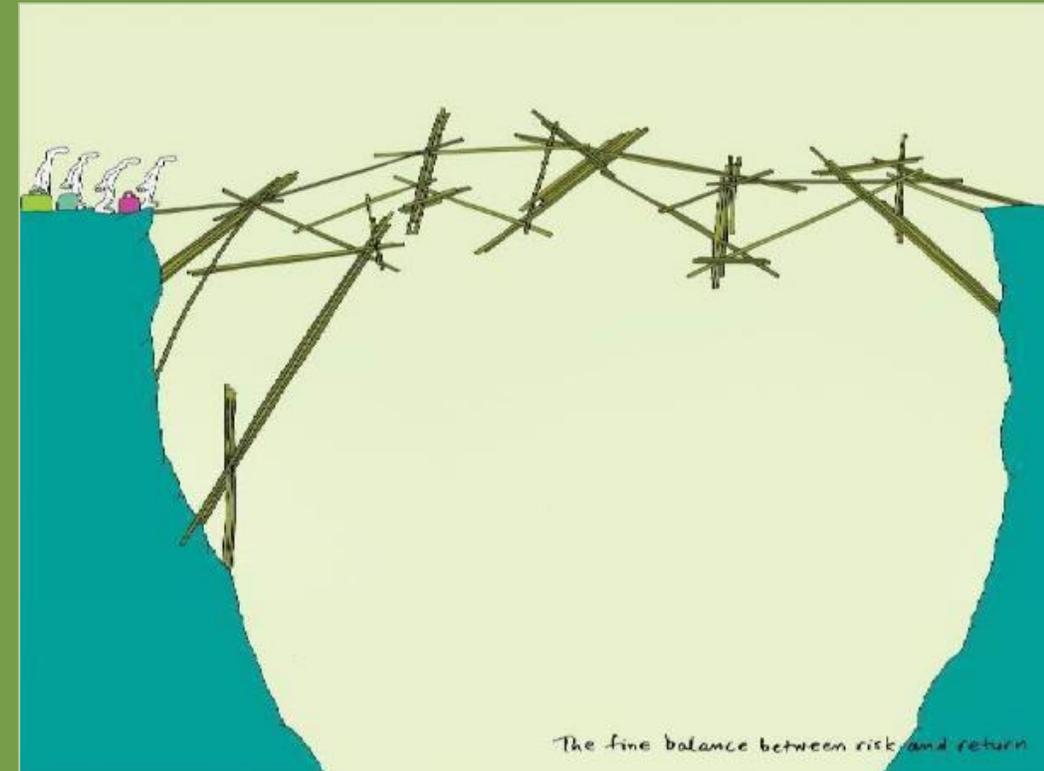
Price discovery – “mark to market”

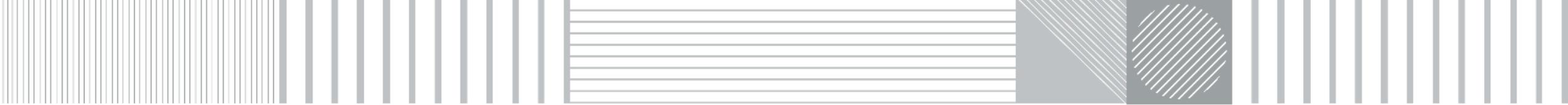
Valuing with and without planning permission

Marketing Period & Micro-markets

Residual Model:

- GDV
- Construction Risk and Programme
- Finance
- Volatility & Profit





CONCLUDING COMMENTS

- Land value and viability of development will continue to be debated from a political, socio-economic and technical perspective.
- The RICS will lead on the technicalities of land valuation and development viability.
- Land valuation and development viability assessments should be recognised for what they are, highly complex computations undertaken by those with experience and competence.
- New guidance will seek to deal with practitioners' issues, and expected reporting standards.
- Understanding planning policy and application to land valuation and viability will be important components alongside associated planning obligations.
- Deliverability of development and infrastructure will be major government objectives.
- Land values will mean revert but will remain on a long term upward trend (UK).
- COVID-19 will bring different dynamics into play in respect of valuation and viability.
- Market volatility, construction, financing and project risk will be key going forward.

Viability in Planning: Coping with COVID-19

Local Plans and Section 78 Appeals



Neil Cameron QC (Chair)

Local Plans

- Local plan preparation
- Local plan examination
- Local plan review
- CIL charging schedules



Local Plan Preparation

Current PPG guidance indicates that the role for viability assessment is primarily at the plan making stage.

One of the main aims is to ensure that policies are realistic.

Housing delivery – paragraph 39 of the Plan Making PPG – the assumptions relating to ‘achievability’ require assessment of economic viability

Planning for business – paragraph 40 of the PPG- LPAs are advised to engage with the business community to understand barriers to investment including “viability”

Developer contributions – policy requirements are to be assessed for viability –paragraph 48

Are the assumptions which informed any assessments still valid? – e.g. profit level.

Are policies realistic?

Local Plan Preparation

Sustainability Appraisal

- To include an assessment of potential effects on economic conditions (paragraph 1 of the PPG on SA/SEA)
- Is the assessment up to date?

Assessment Criteria	Question	Site Reference																
		BRA028	BRA029	BRO006	BRO007	BRO008	BRO009	BUR017	CRA005	DES014	DES040	GED003	GED004	KET002	KET015	KET023	KET024	KET025
Yield		Up to 10	Up to 15	1	5	Up to 15	Up to 15	Up to 7	Up to 15	Up to 15	Up to 15	6	3	6-7	12-14	2	4	1
Accessibility to	Facilities	~	~	✓	~	~	✗	✓	~	✓	✓	✓	~	✓	~	✓	✓	✓
	Pedestrian/cycle links	✗	✗	✓	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
	Public Transport	✓	✗	✓	✗	✓	✗	✓	~	~	✓	✓	~	✓	✓	✓	✗	✓
	Settlement hierarchy	~	✗	~	~	~	~	✓	~	~	~	~	~	✓	~	✓	✓	✓
Health		✓	✓	✓	✓	✓	✓	✓	✓	✓	~	✗	✓	✓	✓	✓	✓	✓
Skills		✓	~	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Liveability	Impact of noise or odour	~	✓	✓	✓	~	~	✓	✓	✓	~	✓	✓	~	~	~	✗	✓
	Compatible development	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓
	Size of site	✓	✗	✓	✓	✓	✓	✓	✗	✗	✗	✓	✓	✓	✓	✓	✓	✓
Biodiversity impact on	Protected species	✓	✓	✓	✓	✓	✓	✓	✓	✓	~	~	✓	✓	✓	✓	✓	✓
	Ecological features	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Landscape		✓	✗	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	~	~	✓	✓	✓
Cultural		✓	✓	✓	✓	✓	✓	✓	~	~	✗	✗	✓	✓	✓	✓	✓	✓

Local Plan Examination

Soundness

Is the plan deliverable?

Can developers rely on 'subject to viability' wording in policies or should they challenge the LPA's viability assumptions?



Local Plan Review

- A LPA is required to review a local plan within five years from the date of adoption (regulation 10A T+CP (Local Planning) (England) Regulations 2012)
- One of the factors which a LPA may consider when determining whether a plan should be updated is “significant economic changes that may impact on viability” (PPG on Plan-making paragraph 65)
- The significant changes in economic circumstances which are occurring may be thought to be obviously material
- Those who find that proposed developments are rendered unviable by economic changes can draw that to the attention of a LPA and request that they review their plan
- LPAs should consider the risk of judicial review of decisions relating to the review of local plans

CIL Charging Schedules

A balance must be struck between the desirability of funding infrastructure required to support development and impact on economic viability of development across a local authority area (regulation 14(1) of the Community Infrastructure Levy Regulations 2010)

- Should LPAs review that balance?
- Should developers take a more active part in CIL charging schedule examinations?
- Should developers consider a forum type approach as adopted for housing land issues at local plan examinations?
- Will the measures to allow small and medium sized developers to defer payment be sufficient – see CIL guidance published by MHCLG on 13 05 20

Section 78 Appeals

- The PPG on Viability (paragraph 007) contemplates that viability assessment may be needed at the decision making change “where a recession or similar significant economic changes have occurred since the plan was brought into force.”
- Even if contributions or affordable housing provision were agreed at the LPA decision making stage, they can be open for re-consideration in the appeal.
- Statements of common ground – it may be necessary to consider draft statements submitted with an appeal
- Consider procedural issues arising when seeking to alter an agreement in a SOCG
- Consider any review mechanisms with great care
- Consider the impact of revised viability assessments on whether there is a realistic prospect that housing will be delivered (NPPF definition of deliverable), and the consequent impact on housing land supply calculations.

Viability in Planning: Coping with COVID-19 Adapting Existing Consents



Charles Banner QC

ISSUE 1: CIL

- [MHCLG guidance 13 May 2020](#): *“the government will introduce amendments to the CIL Regs 2010 to enable charging authorities to defer payments, to temporarily disapply late payment interest and to provide a discretion to return interest already charged where they consider it appropriate to do so for developers that have an annual turnover of less than £45 million.”*
- In the meantime the guidance encourages LPAs:
 - to consider policies for payment by instalments (Reg 69B);
 - to consider exercising their discretion not to stop developments until outstanding CIL has been paid & not to impose surcharges for late payment.
- But: this is all about deferring, not reducing, liabilities.
- It won't be available to companies with a turnover of more than £45m.
- In [HWGPNFY Episode 4](#) Simon Gallagher, MHCLG Director of Planning, discussed this (see 37:14 ff) and said it was about *“helping small businesses”* and that the £45m figure was an attempt *“to mirror the eligibility criteria for some of the more general Treasury schemes”*

ISSUE 2 – SECTION 106 OBLIGATIONS



Section 106A

“(1) A planning obligation may not be modified or discharged except—
(a) by agreement between the authority by whom the obligation is enforceable and the person or persons against whom the obligation is enforceable
(b) in accordance with this section and s.106B”

Route (b) – the s.106A procedure with the right of appeal under s.106B – can only be invoked after 5 years from the date on which the obligation was entered into. (In 2013 this was shortened for pre April 2010 obligations in England).

Route (a) – seeking to persuade the LPA to agree to modify – can be invoked at any time – remedy is JR, not appeal: see ***R (Batchelor Enterprises Ltd.) v. North Dorset DC* [2004] JPL 1222**

Section 106A: procedure

- Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 as amended.
- Applications to modify need to specify the proposed modifications in the application
 - The application will be determined by reference to the entirety of the modifications specified: *“it is an all or nothing decision”* ***R (Garden & Leisure Group) v. North Somerset Council*** [2004] JPL 232 (Richards J)
- S106B: appeal against LPA refusal of S106A application
 - 6 month time limit
 - Appeal against non-determination after 8 weeks
 - Right to a hearing/inquiry
 - JR of SoS’s decision

The S106A test

- Discharge if obligation *“no longer serves a useful purpose”*
- Modification if obligation *“continues to serve a useful purpose but would serve that purpose equally well if it had effect subject to the modifications specified in the application”*
- Useful purpose = useful planning purpose (*Renaissance Habitat*)

Case-law on the s.106A test

- ***R (Renaissance Habitat Ltd) v. West Berkshire DC*** [2011] JPL 1209 (Ouseley J):
 - The useful planning purpose does not have to be related to the development in connection with which the planning obligation was entered into
 - Therefore no requirement that it relates to any impact of the development
- ***R (Millgate Developments Ltd v. Wokingham BC*** [2011] EWCA Civ 1062 (Court of Appeal):
 - It does not follow from an Inspector’s conclusion that planning obligations were “unnecessary” that the obligations do not serve a useful planning purpose
- So will financial contributions always serve a useful planning purpose which wouldn’t be served equally well if they are reduced? (More money = more useful?)
 - What if, without variation, they would render the development unviable? (assuming no downwards review mechanism already built into the s.106 agreement/undertaking)

MHCLG 13 May guidance

“Where the delivery of a planning obligation, such as a financial contribution, is triggered during this period, local authorities are encouraged to consider whether it would be appropriate to allow the developer to defer delivery.

Deferral periods could be time-limited, or linked to the government’s wider legislative approach and the lifting of CIL easements (although in this case we would encourage the use of a back-stop date). Deeds of variation can be used to agree these changes. Local authorities should take a pragmatic and proportionate approach to the enforcement of section 106 planning obligations during this period. This should help remove barriers for developers and minimise the stalling of sites.”

- **Potential for JR if LPA fails to take guidance this into account or unreasonably departs from it?**
- **No hint yet of a return of s.106BA**

ISSUE 3: ADAPTING PLANNING PERMISSIONS

- The principal options include a fresh application for planning permission under s.70 TCPA 1990 or an application under s.73 for planning permission without compliance with conditions previously attached to an existing permission.
- S.73(5): can't be used to extend lifetime of permission (note Simon Gallagher's comments about this in [HWGPIFY Episode 4](#) at 39:35).
- A new permission may be a way of revisiting s.106 obligations associated with an existing consent where reliance on s.106A isn't an option (eg because under 5 years or the demanding s.106A test can't be met)
- Or alternatively of re-engineering the development to be more profitable so as to create the value to service the existing s.106 obligations

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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