

# Insights and Commentary from Dentons

On March 31, 2013, three pre-eminent law firms—Salans, Fraser Milner Casgrain, and SNR Denton—combined to form Dentons, a Top 10 global law firm with more than 2,500 lawyers and professionals worldwide.

This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

# Practice & Law

**A**s the requirement to adopt positive and up to date plans in the National Planning Policy Framework (NPPF) begins to bite, and local authorities move on from old plans and policies, attention is shifting towards viability and how it should shape development plans.

## Control shift?

The government is taking development viability seriously and successive ministerial statements have emphasised the importance of planning for growth and housing delivery. Localism has to accommodate a more muscular approach to delivery and, for those who fail to find the right balance, the centralising measures contained in the Growth and Infrastructure Bill could come into play.

Local development plans are once again simply “local plans” and the process for adopting them has been simplified. The NPPF has replaced and reduced guidance on local plan content and process in PPS3: Housing and PPS12: Local Spatial Planning. The statutory requirement to have regard to the NPPF, other national policies and “the resources likely to be available for implementing proposals” means that viability is a key issue for the local plan process.

## Continuity and change

The NPPF changes less than has been suggested and requires a more proactive, structured and transparent approach to deliverability. It requires needs to be met in full as they arise and local plans to be “deliverable”, “viable”, “realistic” and “flexible”. The cumulative effect of planning requirements should not put implementation of the plan itself at serious risk. The NPPF explicitly brings the point of assessment and judgment forward in the process and intensifies the level of scrutiny.

The requirement for allocations and policies to be viable across the plan period under PPS12 was accepted as common sense in *Barratt Developments plc v City of Wakefield Metropolitan District Council* [2010] EWCA Civ 897. Factoring in the cumulative effect of all national and local burdens (design, environmental mitigation, building regulations, affordable housing) is nothing new.

There is devil in the detail, though. Viability must be “ensured” by only



## PLAN OF ATTACK?

**National Planning Policy Framework** Roy Pinnock and Stephen Ashworth consider the framework for new local plans and the challenges and opportunities it presents

imposing local requirements (including affordable housing) that do not jeopardise “acceptable returns to a willing land owner and willing developer”. Plans must also “facilitate” development “throughout the economic cycle”, not just across it (unlike the policy examined in *Wakefield*, where it was acceptable to plan for deliverability in favourable conditions). This may mean that policies should take explicit account of viability factors and requirements should change in response to changes in the market.

There is no basis in the NPPF for suggesting that land value and viability

trump good planning, though. It advises that harm to sustainability objectives should rarely be tolerated and that the planning process should creatively search for the best alternatives to deliver growth. Deciding how to deal with the tension between delivering growth, ensuring sustainability and protecting competitive returns for owners is a headache for local authorities and local plan examiners that has not necessarily been well thought through.

Authorities must still maintain a five-year supply of immediately deliverable housing land. If not, their housing supply



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## ONLINE THIS WEEK

The High Court this week rejected a claim that, under PPG2, outdoor sport or recreation such as paintball is automatically deemed to preserve the openness of the Green Belt. See [www.egi.co.uk/news/757406.nw](http://www.egi.co.uk/news/757406.nw)

REX FEATURES

policies can be declared out of date (and overridden by the NPPF presumption in favour of sustainable development). There will need to be far more focus at both the plan making and development control stage on the viability and deliverability of development, including housing supply.

Affordable housing is a need to be met and also a burden. It is usually the biggest loser in viability debates. Indeed, affordable housing supply is already being undermined by the introduction of CIL, in some cases with charging authorities setting CIL at levels that they acknowledge will prevent the delivery of policy-

compliant housing schemes.

Affordable housing policies will need to be sufficiently flexible to reflect changing market conditions. There will be real scrutiny of how well existing and future policies meet this requirement, and the mechanisms needed to give it effect, primarily through short-life permissions and variable section 106 arrangements.

Local authorities should have nothing to fear if their approach to facilitating development throughout the economic cycle is clearly explained and justified by reference to robust evidence and clear

consideration of all the reasonable alternatives. Ironically, developers may have more to fear since, if good economic times return, there will be a clear justification for reviewing some policy requirements, and good local plans will have a framework within which that can be achieved. Recent case law illustrates the scope for challenge where authorities get it wrong.

### Downside risk

The courts are prepared to intervene where authorities fail to deal adequately with deliverability and inspectors approach viability as a tick-box exercise. In *Linden Homes Ltd v Bromley Borough Council* [2011] EWHC 3430, a consortium of owners of a key allocation site objected to its treatment in a development plan. *Linden Homes* relied on detailed evidence to show that delivery of the allocation was unrealistic unless it was value engineered as they proposed. The local authority relied on an out of date assessment.

The inspector's conclusion – that the plan was “essentially sound”, being viable across the plan period as a whole – was held to be purely speculative and without the benefit of consideration of alternatives.

## Plans will have to be drafted to accommodate change throughout the economic cycle

The judge was able to modify the plan, but chose to quash parts of it and directed the authority to progress a site-specific allocation instead.

*Linden Homes* confirms that plan allocations and policy requirements must be grounded in a genuine understanding of viability and a meaningful assessment of alternative strategies. The quality and consistency of evidence matters; clear guidance on how viability is to be interpreted or tested is therefore critical to avoid planning appeals being used to arbitrate technical disputes.

### Guidance on the guidance

RICS guidance note: *Financial Viability in Planning* (August 2012) defines viability and establishes parameters for a residual-value approach. It is intended for valuers and is already relied on in planning appeals. It usefully provides content for the residual approach and defined terms. The critical issue is how far land values, and to a lesser extent development profit, can acceptably be squashed by planning requirements.

The guidance rejects the use of existing use value (plus an uplift necessary to incentivise a sale) as a benchmark and instead recommends that appraisers use market value (depressed by policy requirements), subject to a subjective minimum land value “boundary” beyond which market value is not to be depressed

by policy requirements and CIL.

The Local Housing Delivery Group (LHDG), which includes the Home Builders Federation and Local Government Association, has published its own collaborative guidance on local plan viability testing. Unlike the RICS, it suggests that “existing use plus” is adopted rather than market value and recognises that affordable housing, good design, and sustainability measures are, in some cases, not optional. It also confirms that backwards-looking sales value mechanisms with section 106 agreement will often be appropriate to hedge uncertainty.

The benefit of professional guidance should lie in establishing clear templates for assessment, including ways of assessing developer returns that go beyond the blunt instrument of residual appraisals for some sites. The conflicts between the different guidance offered to date will cause difficulties for local authorities as best practice emerges from practical experience.

Authorities should not be drawn into a battle over who has the most comprehensive, up to date and persuasive viability evidence during the examination process. The NPPF is clear that evidence should be proportionate, appropriate and available.

As such, as the LHDG guidance suggests, they should set the approach in consultation with stakeholders early in the process and fully justify their approach to satisfying the NPPF requirements. The process should not descend into what the Lands Tribunal described in *Ridgeland Properties Ltd v Bristol City Council* [2009] UKUT 102 (LC) as a “farcical level” of contested costs and values that is wholly disproportionate to the issues.

### Alternatives

Guidance must recognise that the ultimate purpose of an iterative viability testing process should not be to mechanistically reduce development costs until land would hypothetically be released. It should be to refine policy needs until they are real, not surrogate value capture, and discard sites that cannot come forward acceptably and find others that can.

The pursuit of “sustainable development” as defined in the NPPF requires land value to adjust to policy requirements to a greater extent than policy to adjust to values. Residual land value should be truly residual after all requirements – the examination report for the Mayoral CIL recognised that part of the function of CIL, for example, is to reduce land value expectations. The LHDG Guidance assumes that policy burdens will be reflected in land values, but in reality this will only happen if the policy approach

is clear that permission will generally not be granted unless proposals comply with policy.

Review mechanisms (taking into account sales values achieved by development) should form part of the policy approach, and are beginning to be stitched into the fabric of development plans themselves. That is one way of setting policy requirements at a level that facilitates development throughout the economic cycle.

Reviews must be designed to avoid indiscriminate use by authorities and abuse by developers and enable ongoing failure to deliver against policies to be dealt with. To avoid that, the starting point should be that unviable sites are not allocated and other alternatives are used. That should incentivise authorities to be realistic about burdens and owners to be realistic about values.

If no sites (or too few) sites can be identified that a willing owner would bring forward with a willing development partner, in light of the constraints to value imposed by necessary policies, it may be time to explore the use of compulsory purchase powers.

### Conclusions

Viability has long been a factor in the plan making process, and been the subject of long development control inquiries. It will become even more important in plan making. For developers, this is likely to mean that they have to demonstrate that proposed allocations are viable and deliverable – with the planning authority threatening that if they cannot do so then alternative sites will be found.

In some cases, both developer and authorities will seek to establish that competing allocations are unviable. As a result, there is likely to be more competition between sites.

Plans will have to change and policies drafted so that they accommodate change throughout the economic cycle. It is likely that there will be more allocations of land for affordable housing and other low-value uses, to offer more protection. The Growth and Infrastructure Bill allows affordable housing requirements to be modified. If modified by the secretary of state, the development has to be completed within three years. If it is not, then development must cease. Local plan policies may explore similar approaches to be reflected in future agreements and obligations. Viability is a double-edged sword.

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