



Viability assessments and challenges to planning decisions

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1. This paper discusses the use of viability assessments (“**VAs**”) in support of planning applications. It asks whether VAs might ever have to be disclosed to objectors to the proposed development, and whether a planning permission might ever be quashed by the courts if VAs were not disclosed.
2. Two recent decisions of the High Court have taken a restrictive approach to these questions, enabling planning decisions to be taken without disclosure (or with only limited disclosure) of VAs.
3. However local planning authorities (“**LPAs**”) are subject to statutory freedom of information requirements imposed by the Freedom of Information Act 2000 (“**FOIA**”) and the Environmental Information Regulations 2004 (the “**EIRs**”). In recent appeals under the EIR regime, the First Tier Tribunal (“**FTT**”) has ordered relatively substantial disclosure of VAs. This may mean, amongst other things, that common procedures for taking planning decisions need to be modified.

Viability Assessment

4. VAs are used to evaluate the economic viability of proposed development. When they are submitted in support of planning applications, they are a tool for influencing the requirements which a LPA might otherwise impose on the planned development.
5. Most frequently, VAs are used to seek a reduction in the amount of affordable housing which a LPA’s policy would otherwise require. The LPA’s policy might, for example, dictate that 40% of the residential units created by a new development are sold at below market rates to support the provision of affordable housing. If the developer can show that this would make the development economically unviable, it can argue for an exception and a corresponding reduction.
6. Similarly, it is possible to seek exemption from other planning obligations for reasons of viability (both at the time of applying for planning permission and in subsequent applications to vary planning obligations), or to obtain exceptional relief from Community Infrastructure Levy requirements on viability grounds.¹
7. This use of VAs is supported by the National Planning Policy Framework (“**NPPF**”), with the caveat that LPAs are expressly permitted to refuse permission where the planning obligation which the developer seeks to reduce is necessary to ensure the acceptability of the development.²
8. The current Planning Practice Guidance on viability notes that a site will be viable “*if the value generated by its development exceeds the costs of developing it and also provides sufficient incentive for the land to come forward and the development to be undertaken*”.³ According to the guidance, the factors relevant to the assessment are the “gross development value” (likely income from the development), the cost of the development (including planning obligations), the land value and the need for a competitive return both for the landowner and developer.⁴
9. VAs will therefore generally include a projection of the developer’s income from the development, an estimate of its build costs, and its anticipated profit margin. Significant parts of this information will be business-sensitive, and it is likely to be the developer’s preference to keep as much of the VA as possible confidential. Objectors to the proposed development, on the other hand, will be able more effectively to challenge the developer’s request for a derogation from the LPA’s general policy if they can review and challenge the data contained in the VA.

¹ Community Infrastructure Levy Regulations 2010 (SI 2010/948), regulations 55(1), 55(3), 57(1), 57(4), 58

² NPPF paragraphs 173, 176, 205; PPG Viability (<http://planningguidance.planningportal.gov.uk/blog/guidance/viability-guidance/>), paragraph 19

³ PPG Viability (above), paragraph 16

⁴ Paragraphs 20-24

Treatment of viability assessments in the planning process

10. It is common practice for VAs to be protected from disclosure in the planning process by withholding them from LPA planning committees. The LPA's planning officer commonly prepares a report for the committee giving details of his or her conclusions on the viability issue, and summarising the VA in a way which reveals none of its confidential content. The officer will generally also commission an expert third party review of the VA, and include in his or her report the expert third party views. The officer's report will be disclosed to the public (as a document which was before the committee), but the VA and the expert third party report are commonly withheld from the committee and the public on grounds of commercial confidentiality.
11. The same mechanism is not available if the planning application is "called in" for decision by the Secretary of State under section 77 TCPA 1990. In that context, it falls to the developer to make its case by putting forward supporting evidence, which will be disclosed to other participants, including objectors. Whether the matter can be determined without disclosure of the VA depends on the way in which the developer frames its case (and the evidence that it feels it needs to substantiate its application for planning permission). As will be seen in one of the recent High Court decisions, even where a planning application is called-in, there is no requirement that a VA should be disclosed in full (or indeed at all) as part of the inquiry process and an inspector will not necessarily have acted unlawfully on public law grounds for arriving at a decision favourable to the developer without the benefit of disclosure of the VA.
12. In either situation, an objector participating in a planning process in which a VA is not disclosed will be at a disadvantage. This was the cause of the two most recent High Court decisions in this context.
13. The case of *R (Perry) v London Borough of Hackney* [2014] EWHC 3499 (Admin) (Patterson J, 24 October 2014) concerned a planning application for a mixed retail and residential development in Stoke Newington, London. Relevant policies required 50% affordable housing, but the developer submitted a VA seeking to justify a much smaller proportion. The LPA's planning officer commissioned a third party review, and summarised the viability issues in his report; based on the report, the planning committee recommended the grant of permission, requiring only 17% affordable housing. The Claimant was a local resident opposed to the scheme, and brought an action for judicial review, arguing that the LPA's decision was unlawful because it had not disclosed the VA publicly.
14. In *Turner v SSCLG* [2015] EWHC 375 (Admin) (Collins J, 26 February 2015) the developer applied for permission to redevelop the Shell Centre (next to the London Eye), submitting a viability assessment which argued that only half of the required proportion of affordable housing could be provided. Lambeth Council's planning officer obtained a third party review and summarised both documents in his report to the planning committee, which resolved to grant permission. The Secretary of State then called in the application, because of its potential effect on views from Parliament and St James' Park. The inspector recommended approval, and the Claimant brought a challenge under section 288 TCPA 1990, arguing (among other things) that, because the VA had not been disclosed in the course of the inquiry, the inspector had insufficient evidence to reach a proper conclusion on viability.
15. Both claims for orders quashing the planning permissions were dismissed. The two decisions take a restrictive approach to the disclosure of VAs, founded on a significant degree of protection for the confidentiality of developers' information. In summary:
 - a. In both decisions, the court seemed prepared to take a broad view of the confidentiality of VAs as a whole. Rejecting an application for specific disclosure in *Perry*, Patterson J noted that it was in the public interest that LPAs and developers are able to discuss development proposals, and "the content of publically beneficial packages", in a confidential way; if the court were to order sensitive matters to be disclosed, developers might become reluctant to disclose relevant information.⁵ In the same judgment, Patterson J referred to the FTT's decision in *Lend Lease* (below), noting that the FTT in

⁵ [2014] EWHC 1721 (Admin), paragraph 25

that case had also been prepared to withhold some information to protect the developer's interests in future commercial negotiations. However (unlike the FTT) she did not subject the VA to line-by-line scrutiny to decide whether individual aspects are or are not confidential. In turn, because she accepted that the VA was confidential, Patterson J rejected arguments to the effect that the common law, and the provisions of sections 100B et seq. of the Local Government Act 1972, required disclosure.

- b. Both Collins J and Patterson J endorsed the mechanism whereby the planning officer summarises viability issues in his or her report to the committee, thus protecting the underlying documents from disclosure to committee members and to the public.⁶ In *Perry*, the Claimant argued that this amounted to an abdication by councillors of their decision-making responsibility, in that they allowed the officer to decide the planning application on their behalf. Patterson J rejected this argument, citing case law to the effect that a decision-maker was entitled to rely on advice, so long as nothing which is necessary for him to know is left out of account. The Councillors had been told enough about the VA, the third party review and the view of their officers to decide whether they needed more information. That was normal and acceptable local government practice.
- c. Collins J was prepared to accept that an inspector can decide on viability questions without full sight of the developer's VA. In *Turner* the developer disclosed the third party review (obtained by the LPA's planning officer) to the inquiry, but did not disclose the VA. Collins J rejected the Claimant's argument that the inspector did not have sufficient information to reach a properly reasoned decision.⁷ Unfortunately, again the judgment does not address the detailed content of the two reports, so that it is not possible to tell what degree of information was missing from the third party review.
- d. Patterson J was not prepared to consider the application of the EIRs, because there was a separate appeal mechanism available under the Regulations, of which the Claimant in *Perry* was making use.⁸ Patterson J's judgment in *Perry* does not mention the fact that any information which the Claimant did obtain pursuant to the Regulations would come too late for the purposes of his JR claim.
- e. As a result, based on the *Perry* and *Turner* decisions, there seems to be very little room for the argument that deciding a planning application without disclosing VAs can amount to procedural unfairness. This view was echoed by Holgate J in *R (Luton BC) v Central Bedfordshire Council* (decided on 19 December 2014), where he cited *Perry* in support of the proposition that:

*"it is well-established that (a) [VAs are] to be treated as confidential in the process for determining a planning application, (b) the court is most unlikely to order disclosure of such material in a judicial review and (c) non-disclosure does not afford a ground for challenging a grant of planning permission, whether because of procedural unfairness, irrationality, or otherwise".*⁹

Recent decisions under the Environmental Information Regulations 2004

16. LPAs are obliged by the EIRs to disclose "environmental information" on request, unless the requested information is covered by an exception.
17. The EIRs implement EU Directive 2003/4, which was in turn designed to implement the EU's obligations as a signatory to the Aarhus Convention. The definition of "environmental information" for the purposes of the EIRs is derived from those instruments, and is broad, including information about "*the state of the elements of the environment such as...land, landscape...*" and measures and activities affecting or likely to affect such factors as well as measures or activities designed to protect those elements. It has so far been assumed that most planning matters fall within this definition (especially those which involve significant infrastructure and which are, therefore, likely to have a significant impact on landscape). The FTT in *Lend Lease* (see below) expressed some

⁶ *Perry* [2014] EWHC 3499 at paragraphs 62-70; *Turner* (above) at paragraph 15

⁷ *Turner* (above) at paragraphs 16, 25

⁸ *Perry* [2014] EWHC 3499 at paragraph 106

⁹ [2014] EWHC 4325, paragraph 182

reservation¹⁰, but was content to assume that a VA supporting a proposal for large-scale residential development was caught. It may be a rare case in which a planning matter, at least one involving construction, falls outside the Aarhus definition.

18. The EIRs contain exceptions to the duty to disclose for commercially confidential information, but they are qualified by the public interest balancing test. This means that, even where an exception is engaged, disclosure can only be withheld if, on balance, the public interest in maintaining the exception outweighs the public interest in disclosure. For the purposes of deciding where the balance lies, an LPA is required to apply a presumption in favour of disclosure.
19. Where a LPA refuses disclosure in response to a request under EIR, an objector can seek a review by the LPA, and subsequently a determination by the Information Commissioner (“ICO”). Either party can appeal against the ICO’s decision, to the FTT. The FTT has recently had occasion to consider two separate requests for disclosure of VAs, leading to the development of its own jurisprudence.

Lend Lease – The Elephant & Castle Redevelopment

20. In assessing the FTT’s approach to disclosure, the starting point is the decision in *London Borough of Southwark v The Information Commissioner* EA/2013/0162 (known as “Lend Lease” after the name of the developer). This was the decision that was referred to by Patterson J in *Perry*. The LPA had refused to disclose, upon request by an objector, the VA which was submitted with the planning application which concerned the redevelopment of the notorious Heygate Estate. Although the local authority had disclosed a heavily-redacted copy of the VA after the objector complained to the ICO, the ICO issued a decision in the objector’s favour requiring the LPA to disclose the VA in its entirety (excluding any personal data). The LPA appealed to the FTT.
21. At the time that the planning application was submitted, the LPA had a policy on affordable housing which required all planning applications for residential developments which were medium-sized or larger to be supported by a VA where the affordable housing target of 35% could not be met. As the developer could not meet the 35% target, it prepared and submitted a VA (supporting a 25% target) with its outline planning permission application on the strict basis that the VA was private and confidential (and commercially sensitive) and that it did not form part of the planning application. The assessment was scrutinised by the District Valuer Service (“DVS”) and multiple updates to the assessment were made as negotiations between the developer and the DVS ensued. Outline planning permission was subsequently obtained.
22. The FTT was satisfied that the VA fell within the ambit of the EIR regime (rather than the FOIA regime) and that numerous exceptions (for intellectual property rights and commercial confidentiality, among other things) were potentially engaged.¹¹ The critical questions were whether the exemptions were applicable to the content of the VA and, if so, whether disclosure should be withheld on the grounds of an outweighing public interest.
23. The FTT had little difficulty disposing of the LPA’s argument that there was always a public interest in the maintenance of confidentiality, and that the important relationship between the LPA and the developer within the context of a public/private partnership might be adversely affected by a breach of confidence. On this point, the FTT commented: “*It seems to us that this approach gives insufficient recognition to the fact that the legislature has intervened in public authority relationships through FOIA and EIR. The legislature must be taken to intend that it is not always in the public interest for a public authority to choose to keep information confidential. There is no “breach of trust” when a public authority fulfils its statutory obligation under FOIA or EIR. Private sector partners and their consultants are aware of the legal limits. They recognise in contracts that in an individual case, depending on the circumstances, the public authority may have a duty to disclose*”¹².

¹⁰ “We are inclined to agree...that there may be a tendency to overuse EIR; almost an assumption that, for example, anything to do with land or anything to do with the planning process in England and Wales is outside the scope of the FOIA” (at paragraph 29).

¹¹ EIR regulations 12(5)(c), (e) and (f)

¹² At paragraph 42.

24. In the circumstances, the FTT was not persuaded that there would be knock-on consequences for other developments in London if the VA was ordered to be disclosed.
25. As to the interaction between disclosure and the developer's rights under the ECHR and the HRA 1998, the FTT observed: "*In principle, we doubt very much that a properly conducted balancing exercise under Regulation 12 EIR would result in a decision contrary to the Human Rights Act 1998. This is because the balancing exercise, especially as here in the case of a private/public partnership, includes giving proper consideration to the public interest in the maintenance of what might otherwise be seen as private rights. It is of course important to pause and consider whether the decision reached is in breach of any Convention rights. In our view, the decision we have reached is not*"¹³.
26. As acknowledged in Patterson J's judgment in *Perry*, the FTT's approach was to conclude that the public interest impacted differently on different parts of the information contained in the VA. In summary, the FTT concluded that:
- a. The developer's development model (which was an appendix to the VA and was referred to within the body of the VA) was trade secret and that the harm to the developer's commercial interest if the model was disclosed would outweigh, in the public interest balancing exercise, the benefits of disclosure. The FTT further added that: "*...preventing disclosure of a trade secret might encourage other developers to maintain an open book approach to their local authority partners although each case...will always be considered on its merits*"¹⁴;
 - b. Information contained in the VA about sales and rentals were of great commercial sensitivity and that there was a real risk that future commercial customers could use the developer's projections as a negotiating advantage (with a consequent impact on the developer's profit and, in turn, the viability of the project). In the result, the FTT was of the view that the public interest in maintaining the exceptions outweighed the public interest in disclosure in relation to such information (although it was careful to make it clear that its conclusions did not apply to sales to private purchasers or to property which was destined for a social housing provider); and
 - c. The other information contained in the VA should be disclosed. In relation to such information, the FTT held: "*The other information in the viability assessment seems to us to be less commercially sensitive; and the arguments against disclosure have much less force in respect of them, once we have safeguarded the operating model and the projections on commercial negotiations. When it comes to the rest of the information, in our judgment the balance is different and the importance, in this particular project, of local people having access to information to allow them to participate in the planning process outweighs the public interest in maintaining the remaining rights of [the developer] and those subcontractors who contributed to the document. Again, we take into account that all of them were conscious that their work was always potentially subject to a freedom of information regime*"¹⁵.
27. In the result, the LPA was required to disclose information in the VA that had been previously redacted (but not information related to the development model or to sales and rentals to other businesses). The decision was, in some respects, a halfway house between the position adopted by the LPA and the decision adopted by the ICO.

The Greenwich Peninsula Development

28. The same FTT judge in *Lend Lease* subsequently considered a similar appeal in *Royal Borough of Greenwich v The Information Commissioner EA/2014/0122*. Like in *Lend Lease*, the LPA appealed against a decision of the ICO requiring it to disclose a VA in full.

¹³ At paragraph 44.

¹⁴ At paragraph 55.

¹⁵ At paragraph 58.

29. The Greenwich Peninsula Development involves the building of just over 10,000 homes (over a period of 20 to 25 years). Pursuant to planning obligations agreed in 2004, the developers were required, *inter alia*, to ensure that 38% of the homes would be affordable. As a result of delays experienced with the project, the effect of the financial crisis and the loss of a significant housing grant, the developers applied to the LPA for a variation of their planning obligations regarding the provision of affordable homes. The revised proposal, which related to just eleven of the plots, moved some of the affordable homes away from the attractive areas of the site which have river views, and reduced the overall number of affordable homes by about 500. In order to support their application, the developers commissioned a VA from BNP Paribas Real Estate. This assessment was subsequently scrutinised on behalf of the LPA by a third party consultant and a further report was produced.
30. Successive variations to the deed of planning obligation were approved by the LPA. An objector requested that the LPA disclose both viability reports, which were provided in heavily redacted form. Dissatisfied with the extent of the redactions, the objector took the matter to the ICO, which ordered disclosure in full, prompting an appeal from the LPA to the FTT. It is, therefore, the extent of the redactions which formed the subject-matter of the appeal. The authority relied upon the commercial confidentiality exception prescribed by reg.12(5)(2) of the EIRs.
31. Like in *Lend Lease*, the FTT rejected with little difficulty the proposition advanced on behalf of the LPA that there was general public interest in the maintenance of confidentiality. The FTT once again emphasised that: *"...the basis of the confidentiality in this case cannot be the absolute keeping of confidences. The basis of the confidentiality is that those supplying the information to Greenwich recognised that the information would be subject to a freedom of information regime. The obverse of a general public interest in the maintenance of confidentiality is a general public interest against disclosure. This cannot form part of the public interest balancing exercise"*¹⁶.
32. The FTT further observed that:
- a. There was more force in the argument that there is a public interest in the prevention of harm to economic interests (which is, after all, precisely what the relevant exception was directed at). There is a strong public interest in protecting commercially sensitive decisions about price and in preventing others from obtaining, for free, expertise which belongs to a developer;
 - b. Developers who engage openly with public authorities should not be disadvantaged as against their competitors who do not; and
 - c. The suggestion that developers would be less likely to engage openly with LPAs in relation to future development opportunities was of lesser force in the context of a case which concerned, not an original application for planning permission, but an application to vary planning obligations.
33. So far, so *Lend Lease*. The FTT did not, however, stop there. Without making any reference to its decision in *Lend Lease*, it arguably tilted the balance substantially further in favour of disclosure. Notably, it held that:
- a. *"We find 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, and discussion of the "point in time" nature of the viability models is frustrated"*¹⁷;
 - b. In a rather unusually reasoned passage – *"It was said that rivals might be able to undercut a developer if more information were freely available. It is by no means clear to us why such market forces are contrary to the public interest...When pressed, [the developer] argued that the commercial disadvantage that his firm would suffer from the release of the redacted figures was exactly analogous to that of an apple seller whose*

¹⁶ At paragraph 14.

¹⁷ At paragraph 18.

*purchase price was made known to a potential buyer. However, he had no answer to the question of how the seller gave anything away to the buyer in terms of his bargaining position if all that he was actually revealing was the price at which he bought or would have sold his apple at a particular point in time. The market price for an asset at a later point is more likely to be determined by a purchaser's estimate of the value of the asset, and the number and purchasing power of potential buyers, than any information on the price paid or the expectations as to price or ambitions for profit levels of the vendor*¹⁸; and

- c. In the circumstances of the case, there were a number of factors which considerably diluted the potential harm that might result from disclosure – *“First, as we have indicated, eventual sales prices will always, it seems to us, be dictated far more by the market at time of disposal than by any assumptions recorded in the disputed information. This would apply not just, as is conceded, to private house sales but to, for example, the amount which insurance companies or other investors would pay for the right to receive ground rents or the potential for other developers to take over provision on particular plots or social housing providers to take on affordable housing. All such purchasers will have their own idea of what the market worth of an asset is to them. This will be influenced more by competition than by knowledge of the vendor's negotiating position. Second, we should not overlook the amount which competitors will already know. They can make their own assumptions about the market and costs – and may be thought likely to regard their own judgements as more accurate than a competitor's. The disputed information does not involve any “trade secrets”; rather it consists of conclusions drawn from information much of which is widely available...Finally, the value of the information to any competitor diminishes over time...Disclosure will serve as a benchmark for the wisdom of the variation decision, which will tend to be exposed more effectively to the cruel tests of hindsight if appraisal values, and in particular projected sale value and final profitability, are disclosed from the outset*¹⁹.

34. In the result, unlike in *Lend Lease*, the FTT ordered full disclosure of the VA. In reaching this conclusion, it claimed to be heavily influenced by the following two factors: *“First, the number of affordable homes to be provided on this enormous development, as well as their location, is an important local issue on which reasonable views are held strongly on both sides. Second, this is a case where a company, robust enough to take on the development of a huge site over a period of 20 years, acquiring its interest in 2012 and increasing its share in 2013, immediately asks to be relieved of a planning obligation freely negotiated by its predecessor. It justifies this change on the basis of a downturn in house prices it knew about at the time of purchase, using a valuation model that looks at current values only and does not allow for change in the many factors that may affect a valuation over time. It seems to us that in those circumstances the public interest in openness about the figures is very strong*²⁰.

35. The FTT went on consider the decision of Patterson J in *Perry* and noted, in effect, that the jurisdiction of the FTT and the administrative court are different and that the FTT were not bound to apply *Perry* in any particular way when assessing public interest in individual cases.

Perry...Again

36. In parallel with the judicial review proceedings instigated by the claimant in *Perry*, the claimant issued a complaint to the ICO as a result of the LPA's failure to disclose the VA (including the third party report commissioned by the LPA) in full. The LPA had disclosed a redacted version of the VA to the complainant (relying on the commercial confidentiality exceptions prescribed by the FOIA and the EIRs).

37. In summary, the ICO determined that:

- a. The requested information in the VA was commercial in nature;

¹⁸ At paragraph 19.

¹⁹ At paragraph 22.

²⁰ At paragraph 27.

- b. In light of the requested information and the fact that the information was requested by the complainant whilst commercial negotiations between the developer and the LPA were on-going, the LPA owed the developer a duty of confidence (and that the requested information had the necessary quality of confidence); and
 - c. In all the circumstances, disclosure of the redacted information could adversely affect future negotiations and prejudice the commercial interests of the developer and that this was a sufficient basis on which to accept the application of the exception to this information.
38. In relation to the application of the public interest balancing test, the ICO had the following general comments: *“The Commissioner is of the view that there is a public interest in overall transparency and accountability, particularly in the area of planning and the granting of permission. He accepts the public should have access to information that enables them to understand more clearly why planning permission has been granted or rejected in a particular case as such decisions have a great impact upon the community and environment in which they live. The Commissioner also considers that there is a public interest in 106 agreements and how these agreements have been reached between the planning authority and the applicant...However, in this case, the Commissioner considers there is a stronger public interest in maintaining the exception due to the specific circumstances at the time of the request and the very fact that no commercial negotiations had been entered into between the developer and its own prospective clients...The Commissioner has accepted that the disclosure of the information would adversely affect the developer’s ability to compete fairly in the market place and secure the best deal and terms it possibly can. Disclosing truly commercial information is not in the public interest. It damages the commercial interests of third parties and would lead to negative consequences for the public authority”²¹.*
39. It is interesting that nowhere in the ICO’s decision is reference made to *Lend Lease* or the Greenwich Peninsula Development case. The result adopted by the ICO in *Perry* is broadly consistent with *Lend Lease*, in that the developer’s forecasts of its revenues from commercial negotiations were protected from disclosure, but the same protection did not extend to the other information contained in VA. Given the proximity of the decision of the FTT in the Greenwich Peninsula Development case to the ICO’s decision in *Perry*, it is not entirely clear whether the ICO had the benefit of submissions on the Greenwich case at the time that it produced its decision. Given the clear shift in favour of disclosure in the Greenwich Peninsula Development case, it may well be that the ICO would approach the matter less restrictively in the future.

What does this mean for the future?

40. The FTT’s decisions show a willingness to scrutinise on an item-by-item basis claims that the information contained in VAs is confidential. Individual decisions will depend on their facts, and it may be that some aspects of VAs will continue to be protected by confidentiality; there is particular uncertainty regarding how the FTT in the future will regard the developer’s projections of its income from commercially negotiated agreements. However the FTT’s decisions are likely to favour disclosure to a greater degree than appears to result from recent High Court decisions.
41. The interplay between the jurisdiction of the administrative court and the FTT/ICO is interesting, and there is a jurisprudential conflict and tension. It remains to be seen whether the administrative court will (or indeed can) reign in the FTT’s decision-making, which stands in marked contrast to the restrictive approach adopted by the administrative court and the deference shown to commercial confidentiality in planning matters.
42. For developers, this probably means that increased care should be taken in the design of VAs. Blanket claims for confidentiality are unlikely to be respected under the EIRs, and it is doubtful whether forecast revenues from private residential sales will be recognised as confidential. Developers may be able to influence subsequent disclosure decisions to a limited extent by preparing disclosable VA documents, with any trade secrets or projections of commercial income contained in confidential annexes.

²¹ At paragraphs 87 to 91.

43. For LPAs, there are perhaps three questions:

- a. Whether to disclose a VA submitted by a developer – this will depend on the circumstances, and there is a risk of an action for breach of confidence if the LPA discloses a document submitted on a confidential basis without justification. A large part of this question will be determining, when a request is made for disclosure of a VA, whether the EIRs apply (and the applicability of any exception claimed); if so, an action for breach of confidence will be substantially more difficult.
- b. When to disclose – the key issue in this context will be procedural fairness. It is important to avoid disclosing VAs at a very late stage, as the courts might be prepared to quash a planning decision simply on the basis that objectors did not have sufficient time to consider the VA, even though the court would not have ordered disclosure.
- c. How to deal with developers who submit VAs – some pre-application discussion of the possible need for disclosure is likely to be advisable.

44. For individuals who object to development proposals, the EIRs may provide an increasingly useful tool. But it is important to make a request for disclosure early in the planning process, as LPAs can take up to 40 days to provide an initial response (in complicated cases), and a further 40 days for review in the event of an initial refusal.²² Obtaining VAs during the planning process will enable the objector to challenge the developer's calculations, and the decision-maker (whether the planning committee or the inspector) will have to take the objector's arguments into account. In contrast, obtaining VAs after planning permission is granted will be of much lesser use, because of the limitations imposed by the permissible grounds for judicial review.

45. One question which still seems open is whether an objector has any legal recourse if he or she is still (unsuccessfully) trying to obtain the VA at the time when the application comes up for consideration. There is no explicit requirement in the EIRs (or in the underlying Directive) that environmental information must be provided in good time to enable members of the public to participate in the relevant decision. But there is perhaps an argument with some force to the effect that this is implicit in the Directive and the Aarhus Convention. An adventurous objector could invite the LPA to defer consideration of the application until the EIR request has been answered. If the LPA declines, the objector could seek JR to postpone consideration of the planning application until his or her EIR request is answered, on the grounds that it is a breach of the Directive for the information to be provided after the planning decision is taken. For this ambiguity in the legislation to be resolved would probably require a reference to the ECJ. But this would be made easier by the likely availability of an Aarhus protective costs order under CPR 45.41.

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²² Environmental Information Regulations 2004 (SI 2004/3391), regulations 5(2), 7(1); EIR Code of Practice, February 2005 (https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf), paragraph 63