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# 1. Background to Ark's Assignment



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- The seven local authorities which share a housing market centred on Cambridge wanted to pool and enhance their expertise on achieving affordable housing via the planning system and to improve harmony in policy.
  - The assignment commenced in July 2008, as the full effects of the housing market recession were beginning to be experienced and as some significant planning case law on viability was emerging. Issues associated with viability therefore assumed growing relevance as the assignment unfolded.
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# 1. Background to Ark's Assignment (cont'd)



- The first report was produced in February/March 2009 and more widely disseminated in April of last year.
  - As well as a resume of good practice findings, the report made recommendations for policy improvement in the sub-region and provided, available as a self-standing document, a series of model Section 106 Agreement clauses suited to securing affordable housing provision.
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## 2. The Relevance of Viability to Determining Affordable Housing

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It is helpful to consider the economic viability of development in relation to two aspects of the operation of the spatial planning system:

- Its role in underpinning the formulation of a sound and defensible development plan
  - Its relevance in justifying a departure from a properly established development plan policy
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## 2.1 Formulating the Development Plan



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- Local Development Frameworks should be aligned with national and regional plans. In effect, the emerging Regional Spatial Strategies are the top tier of the development plan.
  - More localised priorities and policies for development, including for the provision of affordable housing, are articulated in the Core Strategy, in supplementary planning documents and possibly also in specific plan documents relating to particular areas or strategic sites like Area Action Plans.
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## 2.1 Formulating the Development Plan (cont'd)



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- Because core strategies are expected to have lengthy time horizons of at least 15 years and be flexible, their specific policies on target affordable housing contributions, in both quantum and mix, are better prescribed in supplementary planning documents, which can be subject to more frequent and straightforward review. This is confirmed in Circular 05/2005 'Planning Obligations'.
  - PPS12 requires that core strategy and linked development plan policies must be sound and part of judging whether a policy is sound is to determine whether it is based on a robust and credible evidence base.
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## 2.1 Formulating the Development Plan (cont'd)



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- PPS3 paragraph 10 expects that the planning system should deliver ‘a mix of housing, both market and affordable’ and paragraph 22 expects the findings of a SHMA to inform the proportions of households that require market or affordable housing and the size and type of affordable housing required.
  - Paragraph 29 expects affordable housing targets to: “... reflect an assessment of the likely economic viability of land for housing within the area, taking account of risks to delivery and drawing on informed assessments of the likely levels of finance available for affordable housing”.
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This Court of Appeal judgement was published during the Ark assignment:

- Council's Core Strategy affordable housing policy not subject to general economic viability assessment.
  - Inspector's report ratified policy, developers sought judicial review and quashed policy. Court of Appeal upheld High Court decision.
  - Process for formulating policy must follow PPS3 expectation that viability implications are assessed and availability of funding is considered and the onus is on the LPA to carry out this work.
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## **Blyth Valley BC and Persimmon, Barratt and Millhouse (cont'd)**



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- Since this judgement, LPAs have become more rigorous in undertaking periodic assessment of the implications for the general economic viability of development of affordable housing planning policies.
  - Adams Integra will describe its specific approach to viability assessment for four of the Cambridge sub-regional authorities. There are often issues connected to the frequency of assessment, the testing of specific allocated sites, consultation with developers and landowners and the reliability of external funding.
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## 2.2 Justifying a departure from Policy



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- Here the onus is on the applicant to provide credible evidence to support a departure from policy or a relaxation by a LPA on the target quantum or mix of affordable housing to be secured.
  - Scheme specific viability is an issue encountered on many, if not most, applications for large residential developments since the downturn in the housing market and certainly for the very large long term sites which also involve significant infrastructure and other Section 106 contributions.
  - Well drafted supplementary planning documents or other guidance to applicants will indicate how applicants should present a case for departing from policy and the quality and veracity of the information expected. Some LPAs specify the precise nature of the information required and how the LPA will validate the data provided.
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## 2.2 Justifying a departure from Policy (cont'd)



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- Frequently encountered issues on scheme specific viability evidence include:
    - ~ Land value treated by a developer as an input to an appraisal when the developer cannot or will not verify actual purchase at that price or when the purchase took place in different conditions and the developer has already written down the value of the land;
    - ~ Developers wishing to rely on BCIS or other general construction cost indices rather than providing their own internal cost estimates;
    - ~ No volumes or rates allowed for infrastructure or abnormal cost estimates;
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## 2.2 Justifying a departure from Policy (cont'd)

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- ~ Unreasonable estimates for development financing costs or significant discounting of development period cash flows with the effect of overstating costs compared with receipts;
  - ~ Unrealistic assumptions on affordable housing receipts, especially for intermediate housing
  - ~ Understated sale values (albeit it is not normally defensible for LPAs to expect developers to anticipate sales value inflation in viability assessments) and overly cautious sales rates.
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# 3. Context for Approaching Viability Assessment



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## 3.1 Relevant Appeal Case Decisions

### **Catteshall Lane and Woolsack Way, Godalming – October 2008**

For reasons of costs and the logistics of development, the appellants appeal against refusal of planning consent by Waverley Borough Council was successful. The appeal decision acknowledged that it was appropriate to use only current market values for the purposes of assessing viability.

*Note: Separately the Planning Inspectorate itself commissioned a report by Atis Real which recommended that viability assessment should forecast for future price change/inflation using evidence of past price trends. This is often referred to as the ‘blended rate’ approach.*

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## **3.1 Relevant Appeal Case Decisions (cont'd)**



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### **Land to the north of Flemingate, Beverley – CP Group, Wykeland Group and Quintain and East Riding of Yorkshire Council**

“The Secretary of State invites the parties to enter into a planning obligation in respect of affordable housing which requires that, prior to the commencement of any phase of the residential element of the scheme, the developer shall, at its own expense, submit to the Council a viability study. The viability study will include information about steps taken to secure funding such as Social Housing Grant. It would be for the Council to determine whether the developers proposal was acceptable.”

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## 3.1 Relevant Appeal Case Decisions (cont'd)



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### Land Off Lydney Bypass and Highfield Road, Lydney – Hitchins Estates and Forest of Dean DC – October 2009

Secretary of State upheld inspectors recommendations to dismiss appeal

- “SHMA cannot be automatically and instantaneously updated”. This also related to general economic viability testing and undermined the developer’s case that the need and viability evidence had not reflected the market downturn.
  - “In the context of larger longer run developments the downturn, even though severe, can be regarded as a temporary and relatively short term element”.
  - Appellant referred to RICS valuation principle that current values and costs should apply. Referred to Godalming decision. Inspector highlighted that Godalming was a smaller site with specific timing issues where phasing was impractical. “Nothing in PPS3 or elsewhere in policy guidance concerning site viability suggests that viability considerations attributable to the general economic situation (as opposed to specific characteristics of the sites themselves, as in the Godalming case) should be used to justify significant reduction in the proportion of affordable housing to be delivered by a site above the threshold.”
  - “The effect of omitting forward projections is therefore to exclude entirely any further benefit to the balance sheet of an upturn in the housing market and in receipts”.
  - In relation to PPS3 paragraph 2.9 “the financial considerations limiting the viability of the appeal site are essentially temporary”.
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## 3.2 Good Practice Guidance

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### **ATLAS ‘Cascades – Improving Certainty in the Delivery of Affordable Housing for Large Scale Developments’**

- An economic viability assessment must clearly identify what can be provided without grant, to form the baseline position.
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## **3.2 Good Practice Guidance (cont'd)**



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### **HCA Good Practice Note ‘Investment and Planning Obligations – Responding to the Downturn’ – July 2009**

Para 7 – ‘Transparent viabilities – To identify principles for a transparent approach to modelling financial viabilities’

Para 19 – ‘A robust affordable housing policy will ensure that good evidence is put forward to support the policy and that in particular, financial viability based upon empirical evidence of local market conditions forms part of the case’.

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## 3.2 Good Practice Guidance (cont'd)



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Don't base a core strategy on a short term view of the housing market – reasoned assumption on what might be a normal market.

Flexibility emphasised but this should not be abused. Full disclosure of financial information should be expected and then validation.

Review affordable housing obligations before commencement of each phase.

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# 4. Flexing Affordable Housing Contributions



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## Recommendation from Ark's assignment :

### Future proofing

- For any scheme which is securing less than the authority's policy expectation and where affordable housing will not be completed within 3 years of the planning consent to require a review of its economic viability/ dimensions
  - The review should only permit an improvement in the agreed affordable housing provision or status quo. Developers should be allowed a 10% improvement in expected return before an additional contribution is required, after allowing for 'overage' commitments.
  - On long term large sites, reviews should coincide with public funding phases
  - Review to follow an agreed template or framework of inputs and outputs
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## 4. Flexing Affordable Housing Contributions (cont'd)



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- Good case law framework for insisting on review or resetting affordable housing contributions, based on viability, on larger, longer term schemes.
  - Principle to apply is that LPA is seeking to recover its reasonable policy expectation when feasible and not that the LPA is sharing in a speculative investment with a commercial organisation where the parties seek an agreed division of improved returns.
  - The latter is the ethos underpinning overage or some 'claw back' provisions on phased schemes and Ark would suggest LPAs remain wary of such arrangements, despite their increasing usage.
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## 4. Flexing Affordable Housing Contributions (cont'd)



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- Overage is based on a sharing of improved returns in the future. So as market conditions improve, the developer retains some of a scheme's improved capacity to meet planning policy. If sale values increase in future then a standard appraisal methodology would base profit on a % of development value and this means the developer is already benefitting.
  - Some claw back or overage arrangements which Ark has encountered are based on monitoring basic indices and then automatically flexing affordable housing contributions where the margin between indices changes. This has the advantage of simplicity, reducing scope for arguments and speed of process. It does however allow developers to avoid sharing information on real scheme outturns, contrary to most policy and good practice guidance. Not surprisingly, this approach to future flexibility is usually favoured by developers.
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## 5. The Model S106 Clauses



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- Section 9 of Ark's report includes the model clauses and this section can be read as a self standing document.
  - The clauses were reviewed by a planning lawyer to improve their applicability.
  - Clauses 2.15 – 2.19 deal with review and these were originated by Ark, there being virtually no comparables to draw upon at the time the assignment was undertaken. There has therefore been little real testing of these in practice.
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