

Crossing the Threshold

The Mayor last Thursday published his Supplementary Planning Guidance on Affordable Housing and Viability, which was first seen in draft in November of last year. Now that we have the settled guidance, what has changed? Have the Mayor's recent comments with regards to viability proven to be the precursor of a major shake-up? Is this the start of a new viability regime in the Capital and prophetic of the sorts of changes that we might anticipate throughout the country?

In the draft SPG the Mayor had suggested that its main aims would be to "speed up planning decisions and increase the amount of affordable housing delivered through the planning system". The focus now appears to be on an increase in speed "for those schemes which deliver more affordable homes"; a clear indication of the intent behind the SPG and also the direction Mayor proposes to take going forwards.

Call-in

Interestingly there is express reference to the possibility of the Mayor exercising his powers of call-in so as to determine applications that he considers to be a "missed opportunity" with regards to the level of affordable housing provision. As we saw in the draft SPG the Mayor is now pushing for increased transparency with regards to viability documentation and it seems that both Applicant and LPA viability assessments will now need to be made publicly available on a more regular basis. There remains some limited scope for redaction of certain commercially sensitive elements of these, but the scene is very much set for the Mayor exercising his call-in powers in the event that Applicants and LPAs fail to publish adequate detail as to the viability position of schemes. This introduces an interesting

new dynamic to Stage 2 referrals and the leverage the Mayor may be able to exercise over (inter alia) Section 106 Agreements with regards to affordable housing provision and viability review mechanisms (a point on which the Mayor has a considerable amount to say within the SPG).

Viability Review

There remains reference to the previously discussed "Fast Track Route" for schemes that reach 35% affordable housing onsite (without public subsidy) and meet local development plan requirements with regards to tenure mix etc; these schemes will only be subject to viability review in the event that implementation has not taken place within 2 years of permission being granted. In our experience this is already settled practice within a large number of boroughs on the back of the draft SPG, and in any event is of no concern to developers who wish to get on with the business of rapid delivery of housing.

What does appear to be new, however, is reference to the fact that those schemes going down the Viability Tested Route will be pushed to what can be viably provided rather than merely reaching policy compliance:

"where an LPA or the Mayor determines that a greater level of affordable housing could viably be supported, a higher level of affordable housing will be required which may exceed the 35% threshold."

To our mind this is a marked shift away from the usual approach to viability, and in particular review mechanisms which have traditionally focused on attaining policy compliance. It is not clear what rationale the Mayor has for adopting such a stance

and the circumstances in which this greater – than – policy compliant level of affordable housing may be required, or the criteria for assessing that.

Worth noting is the new requirement for a headline summary of the financial viability assessment which is intended to provide “key findings, inputs and conclusions” for review by the LPA, Mayor and members of the public. No prescribed format is given for such summaries and given the broad nature of this guidance, it seems that it would be advisable for careful consideration to be given as to just how much detail is left in this summary and what conclusions might be drawn from it, given that this will no doubt be the first port of call for anyone seeking to make the case that additional affordable housing should be provided within a given scheme.

Where the 35% threshold is not met there are to be both early stage and late stage viability reviews. The first of these will fall if an agreed level of progress (possibly reaching ground floor slab level of works) is not made within 2 years of permission having been granted. Late stage reviews will come into effect upon sale (or occupation, in the case of Build to Rent schemes) of 75% of units. Early stage reviews are intended to provide additional onsite units, whereas late stage reviews are only to provide for additional affordable housing contributions towards offsite provision.

Profit Sharing

The Mayor has suggested that an appropriate split of any surplus shown at a late stage review should be split 60/40 in favour of the relevant LPA. This is somewhat less favourable than a 50/50 split as has previously been the norm in review mechanisms, but is considerably better for all involved than the proposals that we have seen put forward by some boroughs of late which can include in some circumstances no element of profit share whatsoever, with all surplus up to the level of policy compliance to be retained by the Council. Hopefully this guidance will put an end to the wild variability that has been seen between some local planning authorities in negotiating the appropriate level of profit share, even if it does mark a move away from the norm of a 50/50 split.

Section 73

The Mayor has now included express guidance addressing the manner in which he expects Section 73 applications to be dealt with. This includes the anticipated provision that the Mayor should be consulted where scheme amendments would change the level of affordable housing from that secured by the original Section 106 Agreement, and also requires that schemes that fail to meet the 35% threshold as a result of any Section 73 application should be subject to the same viability transparency requirements as a fresh application.

RPs

A point of note that may be of particular interest to Registered Providers is that the settled guidance now proposes that schemes that provide 75% or more affordable housing may be eligible for the Fast Track Route (i.e. without the provision of the detailed viability information that is otherwise required) where there is some deviation from the preferred tenure mix set out in the guidance, provided this is supported by the relevant LPA. It will be interesting to see the extent to which LPAs are willing to put their support behind such schemes and whether this leads to a glut of predominantly shared ownership developments in boroughs that have traditionally failed to meet their affordable housing targets.

Build to Rent

There is also more detail in the definition of what amounts to Build to Rent.

There has been some relaxation of the management requirements which now do not require full time dedicated onsite staff, but merely “some daily onsite presence”.

The requirements with regards to tenancy agreements have become somewhat stricter. These include a fixed requirement for tenancies of 3 years or more to be offered and, most intriguingly, the provision of break clauses on a rolling basis after the first 6 months, allowing tenants to give just 1 month’s notice to exit the Tenancy Agreement.

The need for “rent certainty” is also highlighted with a need for formula linked indexation of any rents for the period of the tenancy.

The final change to the definition from the draft is a requirement that no fees be levied on tenancies, meaning that only deposits and upfront rent can be asked for prior to tenants taking on the property – this is no doubt linked to the general political dislike of agency fees in general.

The Mayor has also confirmed that no Build to Rent schemes will be eligible for the Fast Track Route, instead all schemes will be subject to the more thorough viability checks, on the basis that the market is still too immature to provide any meaningful data as to what a suitable threshold level would in fact be for determining which route a scheme should go down.

We can expect to see new guidance on this point as the market develops and the Mayor has expressly promised to keep such an option under review. Notably any viability review mechanism is not, broadly speaking, to include any cash in lieu of affordable provision, instead any build to rent viability review mechanism is expected to make provision for additional onsite provision of discount market rent units or deeper discounts to those units already to be provided.

Conclusion

Whilst there have been no radical departures from what we have seen in the draft forms of the SPG, there are a few notable changes. In particular the Mayor's new willingness to exercise his powers of call-in in relation to affordable provision is a point we will be keen to keep under review.

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