

# 39 from 39 Webinar Series

## *Planning and Viability – Negotiating That Slalom*

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# Panel Members |



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**Chairman**



**Matt Spilsbury MRICS MRTPI**  
**Presenter**



**Katherine Barnes**  
**Presenter**



**Richard Harwood QC**  
**Presenter**

# Topics

- ***Outworking the requirements: NPPF, PPG and RICS Guidance and Professional Statement***

**Presenter: Matt Spilsbury**

- ***Holborn Studios (No.2): some challenges and routes through***

**Presenter: Katherine Barnes**

- ***Testing the viability arguments: some reflections***

**Presenter: Richard Harwood QC**

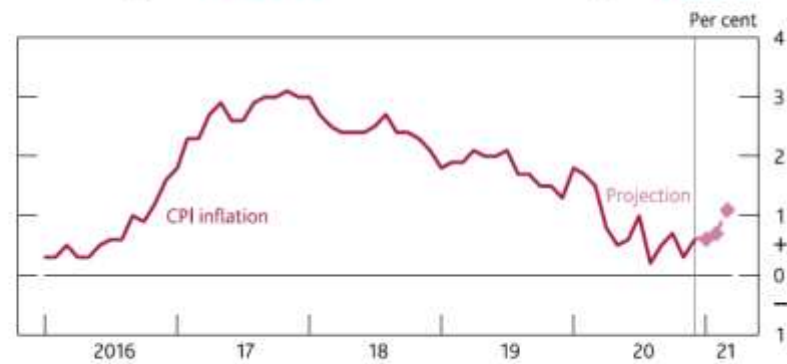
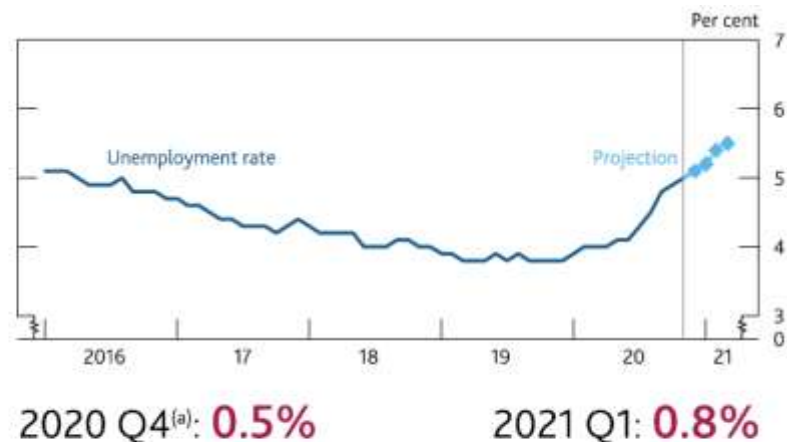
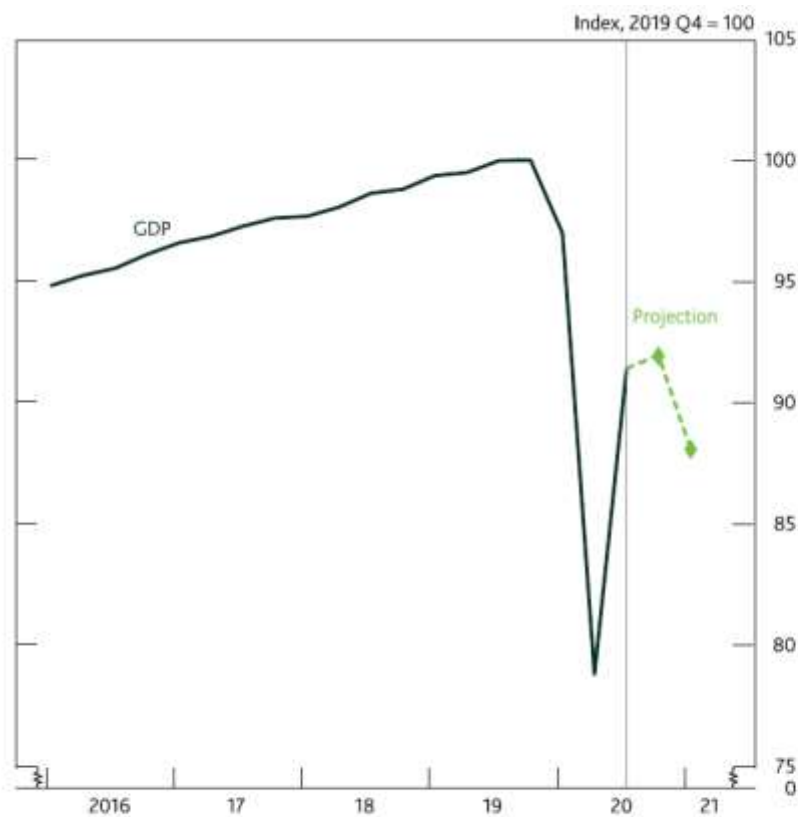
# Matt Spilsbury

## ***Outworking the requirements: NPPF, PPG and RICS Guidance and Professional Statement***



# OUTWORKING THE REQUIREMENTS

## THE ECONOMIC CONTEXT (1)



Sources: ONS and Bank calculations.

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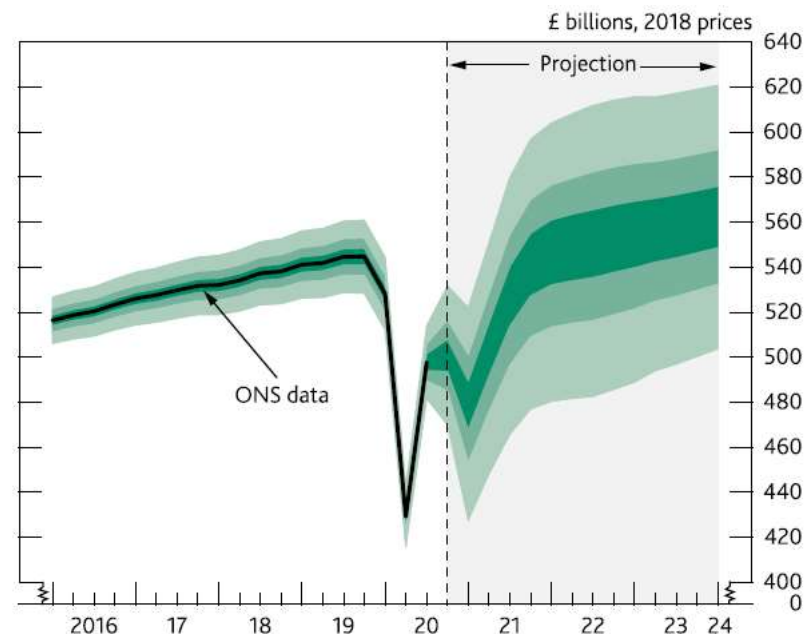
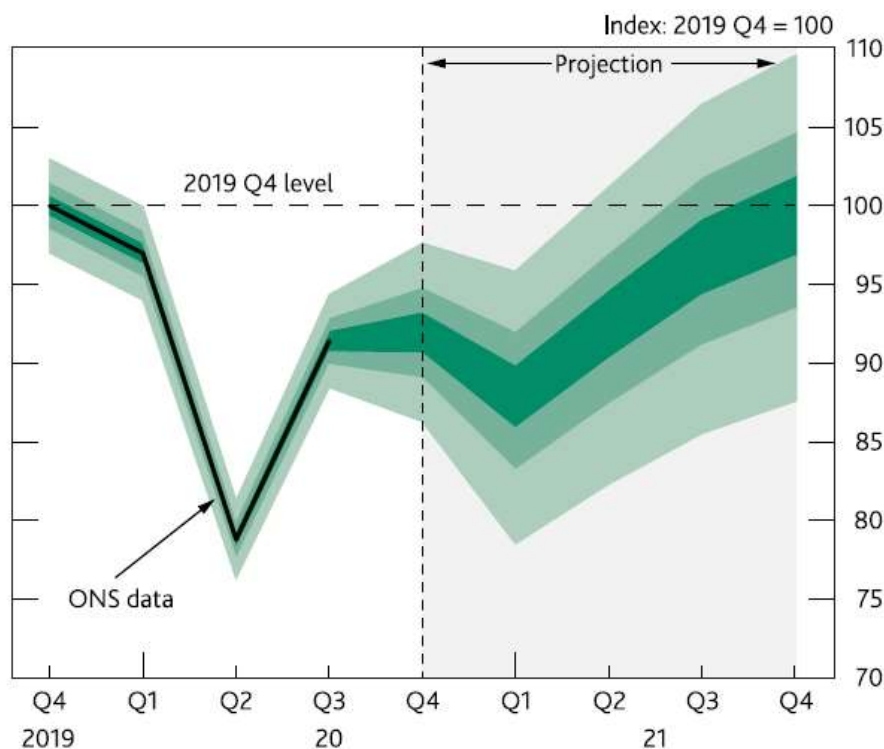
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# OUTWORKING THE REQUIREMENTS

## THE ECONOMIC CONTEXT (2)

- BOE MPC forecasting (Feb 2021)



# OUTWORKING THE REQUIREMENTS

## IMPLICATIONS FOR PROPERTY SECTORS

- Residential
- Offices
- Retail
- Logistics
- Leisure and Hospitality





# OUTWORKING THE REQUIREMENTS

## ROLE OF VIABILITY IN PLANNING

- Market instability, volatility and risks across multiple sectors
- Important for Plan-making and site specific decisions
- Heightened importance of robust viability evidence base
- PPG defines role of viability in planning system to:
  - *“secure maximum benefits in public interest through granting of permission”*
- Balancing act:
  - Plans must be deliverable
  - Policies must be realistic and achievable
  - Flexibility in-built into system
  - Viability process forms ‘release valve’ to avoid sites stalling

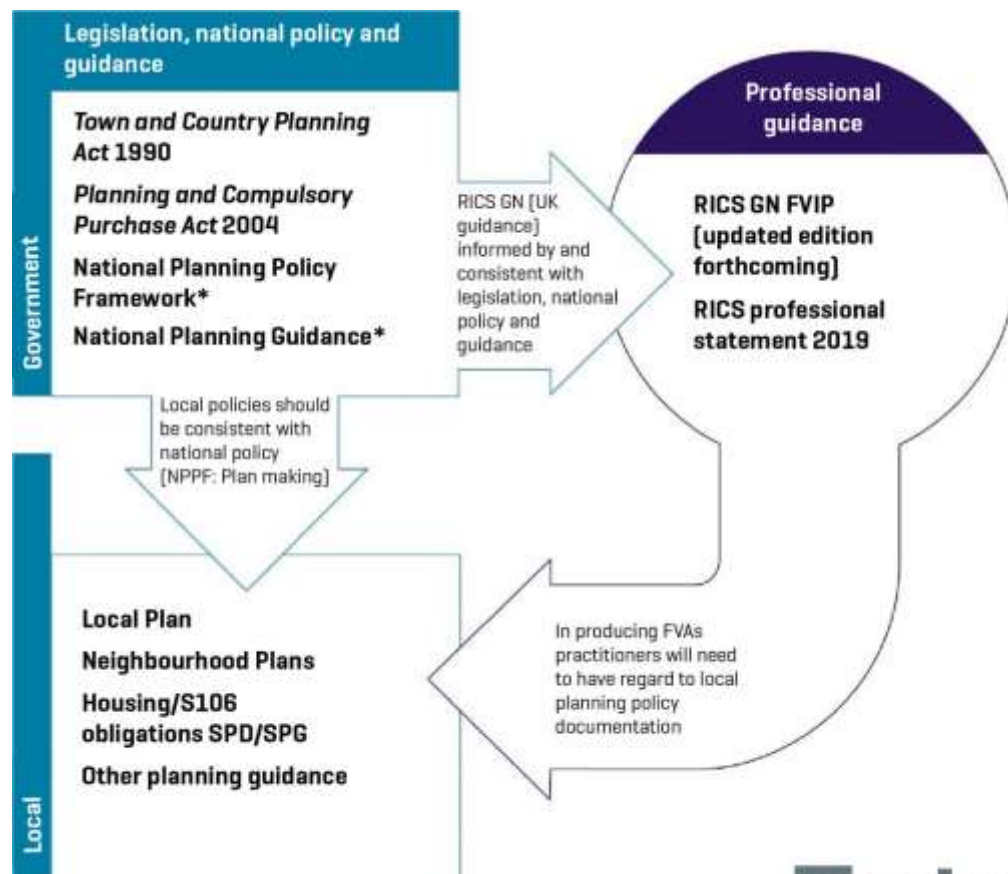




# OUTWORKING THE REQUIREMENTS

## PRACTICE GUIDANCE AND PROF. STANDARDS

- Framework for practitioners:
  - Legislation
  - National policy and Guidance
  - RICS
  - Local policies and guidance



# OUTWORKING THE REQUIREMENTS

## KEY ISSUES IN PRACTICE

- Evolving context:
  - Setting deliverable Local Plan policy and CIL charging costs
  - Regulatory changes add burden to development costs
- Valuation process:
  - Total standardisation not possible – matters of professional opinion
  - Achievable current market values and realistic construction costs
  - BLV: calculation of EUV and determination of minimum ‘premium’
  - Risk adjusted market return for project
- The system:
  - Consistency and standards – using RICS regulated chartered practitioners:
    - Await refined RICS Financial Viability in Planning Guidance document
  - Transparency and building stakeholder trust in the system
  - Implications on timescale for decision making – capacity and skills

# OUTWORKING THE REQUIREMENTS

## CONCLUDING THOUGHTS

- Property market instability and fluctuation in near-term
- Volatility expected to increase as UK economy weaned off fiscal stimulus:
  - Are we actually out of the woods yet?
- Development viability expected to increase in importance:
  - Support and inform deliverable and realistic Local Plans
    - Backdrop of increasing costs on development
  - Form a flexible 'release valve' to avoid delivery stalling
- Challenges remain:
  - Capacity, consistency, trust and transparency critical
  - Inherently complex process: cannot be wholly standardised or removed

# Katherine Barnes

## ***Holborn Studios (No.2): some challenges and routes through***



# R (Holborn Studios Limited) v London Borough of Hackney [2020] EWHC 1509 (Admin)

## FACTUAL BACKGROUND (1)

- C = Holborn Studios, leaseholder and operator of photographic studios at Eagle Wharf Road in Hackney
- IP seeks residential and commercial redevelopment of Holborn Studios
- 1<sup>st</sup> PP granted in 2016 was successfully challenged on basis Council had failed to consult on amendments
- 2<sup>nd</sup> app made offering £757k towards off-site affordable housing (policy required on-site affordable housing unless exceptional circs). Viability evidence submitted to show on-site affordable housing unviable



# R (Holborn Studios Limited) v London Borough of Hackney [2020] EWHC 1509 (Admin)

## FACTUAL BACKGROUND (2)

- Two iterations of viability assessment. 1<sup>st</sup> published with numbers redacted; summary published of 2<sup>nd</sup>
- C requested assessment to be published in full so they could understand it and make representations on it if relevant
- 2<sup>nd</sup> PP granted in 2019. C judicially reviewed it on the basis that the limited and incoherent viability documentation published was unlawful
- Claim succeeded



# R (Holborn Studios Limited) v London Borough of Hackney [2020] EWHC 1509 (Admin)

## LEGAL FRAMEWORK(1)

### Section 100D Local Government Act 1972 – Inspection of background papers

- (1) [...] [I]f and so long as copies of [...] a report for a meeting of a principal council are required by section 100B(1) [...] to be open to inspection by members of the public-
- (a) those copies shall each include a copy of a list [...] of the background papers for the report [...] and
  - (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.
- (4) Nothing in this section-
- (a) requires any document which discloses **exempt information** to be included in the list referred to in subsection (1) above [...]
- (5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which-
- (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
  - (b) have, in his opinion, been relied on to a material extent in preparing the report



# R (Holborn Studios Limited) v London Borough of Hackney [2020] EWHC 1509 (Admin)

## LEGAL FRAMEWORK (2)

### “Exempt information”

- Includes information relating to the financial and business affairs of a person (Para 3 of Part 1 of Sch 12A to the LGA 1972)
- BUT only if “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information” (Para 10 of Part 2 of Sch 12A to the LGA 1972)

### Previous approach and change to policy framework

- Previously (e.g. *R (Perry) v Hackney London Borough Council* [2014] EWHC 1721 (Admin)) the courts supported non-disclosure of viability evidence on confidentiality grounds
- BUT C argued material change to policy framework since then should change assessment of “public interest” in this context (esp para 57 NPPF which says viability assessments should be “publicly available”, plus PPG)

# R (Holborn Studios Limited) v London Borough of Hackney [2020] EWHC 1509 (Admin)

## COURT'S APPROACH (1) – BREACH OF S.100D (Dove J)

- In light of affordable housing issue, at least some of the undisclosed viability evidence contained “important facts or matters on which the report [recommending the grant of PP [was] based” – therefore undisclosed information within s.100D(5)
- Remaining issue was whether undisclosed viability evidence counted as “exempt information”. Court concluded that, in light of the new policy framework, it did not:

*“It is clear from the material in the Framework and the PPG that save in exceptional circumstances the anticipation is that viability assessments, including their standardised inputs, will be placed in the public domain in order to ensure transparency, accountability and access to decision-taking for communities affected by development. The interests which placing viability assessments into the public domain serve are clearly public interests, which in my view support the contention that such assessments are not exempt information unless the exceptional circumstances spoken to the PPG arise and solely an executive summary should be put in the public domain.”*

# R (Holborn Studios Limited) v London Borough of Hackney [2020] EWHC 1509 (Admin)

## COURT'S APPROACH (2) – Was the breach material?

- The Council argued that even if technically s.100D had been breached, it did not matter in substance because enough viability evidence had been disclosed to allow C to make meaningful representations on it
- The court rejected this argument given the inconsistencies in the material disclosed (which could not be explained from the public material):
  - Different figures re benchmark land value
  - No explanation of how benchmark land value calculated (not broken down in existing use value and landowner's premium)
  - The material disclosed suggested that wrong calculation method was used (i.e. residual land value)
- Court's conclusion: "the material contained in the public domain at the time when the decision was taken [...] was inconsistent and opaque"
- Breach of s.100D material and PP quashed

# R (Holborn Studios Limited) v London Borough of Hackney [2020] EWHC 1509 (Admin)

## KEY TAKE-AWAYS

- The expectation is that (at least the primary) viability evidence will be made publicly available in an unredacted form. Prepare viability evidence on that basis
- If, in a particular case, there is justification for non-disclosure then:
  - Council needs to be satisfied the relevant information is genuinely commercially sensitive
  - Council also needs to give express consideration to whether the exemption outweighs public interest in disclosure
  - Summary to be published (ensure it complies with the PPG (Para: 021 Ref ID: 10-021-20190509))
- Viability evidence must identify clearly the various inputs and explain how they were calculated
- Prepare viability evidence on the basis an educated member of the public should be able to follow it (if not, alarm bells should ring!)
- Remember, clever people make difficult concepts sound simple

# Richard Harwood QC

## ***Testing the viability arguments some reflections***



# Viability testing

- CIL setting
- Local plan/SPD policies
- Affordable housing and s106 in an application
- Enabling development for heritage
- Viability of compulsory purchase schemes – so the likelihood of proceeding
- Compensation for CPO/negotiated damages
- Licensing and decommissioning costs (e.g. *R(Thornton) v Oil & Gas Authority*)

# *Holborn Studios 2*

- What are the available documents saying?
- Residualised price in development appraisal subsequently said to be benchmark





# *Holborn Studios 2*

- Does the Council understand?
- No explanation how affordable housing offer change
- Not comprehensible at committee
- Also figures changed at committee
- And explanation changed in council evidence
- Frankie Dettori © Nicky Johnston



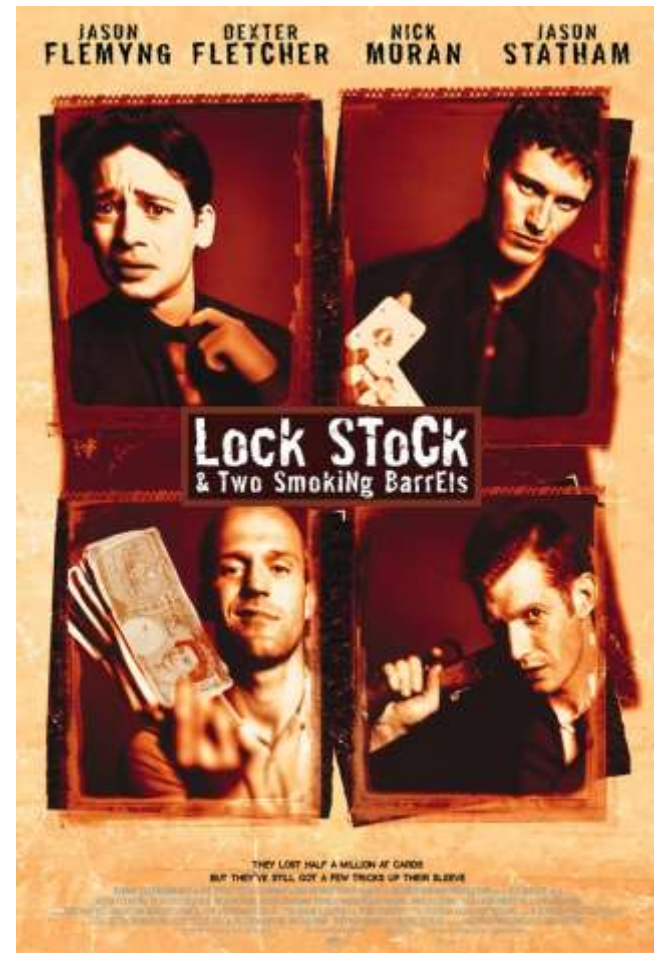
# *Holborn Studios 2*

- Missing material
- How was the benchmark land value made up?
- Later explanation raised questions



# Areas to probe

- Development value judgments
- Build costs
- Land acquisition values
- Benefits of expert advice (valuer/QS) and forensic consideration
- Lock, Stock and Two Smoking Barrels © Adam Lawrence



# Lands Chamber decision

- Warning against inappropriate use of tools  
'leaving much of the essential detail  
obscured from view' *Oaklion Properties*  
[2021] UKUT 49 (LC)

# Viability and damages

- *Ury Estate v BP Exploration* [2019] CSOH 36
- Damages claim under a servitude for losses caused by pipeline through property
- Claim that it prevented a 5 star hotel development
- Problems in evidence of what was being assessed; found to be unbuildable and unviable

# Brighouse

- Developer funded CPO for retail scheme
- Issue of scheme viability
- Profit fell from 12% to (AA accepted) 3.7%
- SoS refused to confirm CPO on viability grounds



# Q & A



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