The purpose of this paper is to examine the latest theory and perhaps more importantly the practice with respect to the challenge of delivering affordable housing and other planning gain in current market circumstances. At the heart of this matter lies the question of viability and how this is being approached by the planning system which itself is now undergoing a period of radical reform.

Specifically the paper will consider the following questions:

- Why has viability become of such growing significance within the planning process?
- What has the response of policy makers and practitioners been and how effective has this been in enabling delivery?
- What are the main legal decisions on viability and affordability?
- What are the main decisions of the Secretary of State on viability issues?
- How are decision makers dealing with the issue of viability within planning from a legal standpoint?
- What are the practical implications for those involved in the planning and development process both from the standpoint of negotiating a way through the planning process and putting in place appropriate legal delivery mechanisms?
Why is viability of such growing significance?

3. The development market is by its very nature subject to peaks and troughs of activity. Development cycles come and go and most professionals have experienced both buoyant and depressed market conditions. Most people recognise that the recession from which we are currently emerging – albeit somewhat hesitantly – was to significantly more severe than previous property slumps. This was due in part to:
   - the long period of uninterrupted growth lasting from the mid 1990’s up to the collapse of Lehmans in September 2007
   - the availability of cheap and easy finance from banks and financial institutions who abandoned prudent lending practices.

However all property booms are fuelled by speculative purchases made in the collective belief that the only way is up.

4. Thus the crash, when it came was painful and prolonged. From peak to trough commercial property values fell by nearly 50%. With the exception of Central London and a few regional hotspots office development has all but stopped as have town centre retail development. Schemes simply do not stack up and if they do obtaining development finance is virtually impossible.

5. In the housing market while headline prices have not fallen as much as some commentators anticipated (we may be about to witness the second stage of a house price correction) volumes have fallen dramatically. Mortgage approvals have fallen back to historically low rates and we are told that house building now stands at levels not seen since the 1920’s.

6. Housebuilders and their backers are operating in a highly selective manner focusing on low risk schemes which enable them to achieve target rates of return on capital employed. Marginal locations, large complex schemes and high density apartments which involve locking up capital are out of favour as developers seek better returns from reduced capital resources.
7. So it is clear that there are fundamental market factors influencing the viability of development schemes. This is not unusual after a property slump but this time round viability is becoming a much greater issue for the planning system. Planners who were taught that viability was something which they didn’t need to take into account except in exceptional circumstances, are now attending courses on development economics. Is this simply a result of the length and depth of the recession or has something else changed?

8. Following on from Kate Barker’s Reports into Housing Supply (HM Treasury, Delivering stability: securing our future housing needs, Barker Review of Housing Supply - Final Report, 2004) and Land-Use Planning (HM Treasury, Barker Review of Land Use Planning Final Report, 2006) delivery of public goods such as physical and social infrastructure and affordable housing became more and more dependent on the speculative land development model as a key funding and delivery mechanism. The planning system became the means by which the goose was to deliver the golden eggs driven ‘top down’ through national planning statements and regional spatial strategies. To reinforce the link, the funding of local planning authorities was driven by the planning delivery grant and the public sector became increasingly dependent on land receipts to fund their capital programmes. Policy makers had well and truly hitched their wagon to the booming development market in the belief that it would keep on rolling.

9. Well, as we know the wheels came off the wagon! However the planning system has remained dependent upon the capture of development surplus through S106 or the newly proposed community infrastructure levy to deliver funding for affordable housing and other public benefits.

10. Since the formation of the Coalition Government in May it is clear that we are in the process of a significant reform of the planning system. This is clearly going to take longer than originally envisaged by Eric Pickles but the Localism Bill does away with top down targets and Regional Spatial Strategies and promotes a simplified system of neighbourhood planning. Incentives for local
communities to accept development are to be introduced by way of a New Homes Bonus and local communities are to share in any receipts from Community Infrastructure Levy. It is clear therefore that developers will be required to continue to make financial contributions through the planning system. This is scarcely surprising given the squeeze on public expenditure as a result of the Chancellor’s deficit reduction measures. Indeed S106 and CIL may be seen as one of the few areas of local taxation over which local authorities have much discretion. Thus despite the promised review of business rates, the question of planning contributions and viability of development is going to remain a hot issue particularly as weak market conditions are likely to last for the foreseeable future.

What has been the policy response?

11. A variety of policy responses to this crisis of delivery can be observed. These have all been concerned with addressing the fundamental issue of viability which has beset many schemes. By the end of 2008 it was apparent that a high proportion of housing schemes were ‘underwater’ in terms of their ability to deliver their planned contribution of affordable housing. The Labour Government’s 2009 Budget launched a market support programme through the Homes and Communities Agency known as ‘Kickstart’. Mow in its third round but substantially scaled back by the Coalition, Kickstart has delivered funds to close the viability gap for private sector developers able to deliver stalled schemes. Housebuilders were invited to bid for funds with schemes being the subject of viability assessments using a standard approach developed for the HCA. There is no doubt that Kickstart has helped to maintain some activity and capacity in the private housebuilding sector. However there has been criticism that quantity has been favoured over quality and with funding now drying up this approach cannot be seen as a long term solution.

12. Faced with different market circumstances many developers have sought to redesign schemes and renegotiate planning and S 106 agreements to assist delivery. Generally the response of local planning authorities has been
sympathetic in the face of such requests as illustrated by the findings of an Audit Commission survey. This reflects guidance which emanated from the Department of Communities and Local Government (CLG), the HCA on the need for flexibility.

13. Atlas – the advisory arm of the HCA (see www.atlasplanning.com) - has issued a series of practice notes on responding to the challenge of delivery in difficult market conditions which are recommended reading. These highlight a number of potential approaches to maintaining delivery including:

- granting a planning consent for a longer period than the 3 year minimum
- extending the life of existing planning consents
- re-negotiating affordable housing planning obligations which are no longer viable, having regard to the policy reasons why the obligation was considered necessary in the first place
- supporting the delivery of affordable housing through flexible management of planning obligations on new planning applications.

14. Possible solutions include deferring planning obligations on phased developments and agreeing mechanisms for revisiting them at some point in the future. For large scale housing developments a ‘cascade’ approach is proposed which provides a flexible framework within which the scale and nature of the affordable housing component can vary over time depending on both viability and the availability of Social Housing Grant.

15. An example of a response by an individual authority which shows a willingness to address market realities is Plymouth City Council’s Planning Obligations & Affordable Housing Supplementary Planning Document – Market Recovery Scheme 2010/2011.
For a defined period of time this offers discounts to developers on development tariffs for certain types of development as follows:

• Up to 100 % discount on tariff for development of B1/B2 industrial and office developments.
• Up to 50 % discount on tariff for other development on brownfield sites.
• Up to 25 % discount on tariff for other development on greenfield sites.
• Up to 50 % reduction of the full affordable housing requirement may be considered, together with the possible use of gap funding to support affordable housing delivery.

The following conditions must be met to benefit from these discounts / flexibilities:

1. The case for these discounts shall be proven, unless otherwise specified below, through an open book viability appraisal which establishes that under current conditions the development may not achieve an acceptable level of viability.
2. Developers must agree to a two-year consent, and to make a substantial start on the approved development within two years of the grant of consent.
3. Substantial start will be defined in the Planning Agreement, but is likely to require the completion of key sections of infrastructure or the substantial completion of the first units.
4. In appropriate cases, consideration will be given to making the consent personal to the applicant.
5. For strategically significant development proposals, where the affordable housing provision is critical to the achievement of the Core Strategy’s Affordable Housing target, the Council reserves the right not to agree to a relaxation of the affordable housing requirement.
6. Flexible phasing of payments of the discounted tariff may be considered where this is justified by the financial appraisal, subject to ‘clawback’ provisions being incorporated as part of the planning agreement.

15 While Plymouth claims some success in maintaining delivery against the targets in its Core Strategy nationally the picture looks less encouraging. Figures published by CLG in October 2010 reveal the extent of the collapse in new build completions in the last year of the Labour Government.
16. Looking forward the Coalition Government’s proposed changes to the planning system, against the background of public expenditure cuts, seem unlikely to result in a significant change in the level of new housebuilding for a number of years. Indeed it is likely that the type of policy responses outlined above will only impact at the margins. A return to higher levels of delivery of both new mainstream and affordable housing will be dependent on favourable market conditions. Whether and how quickly these will be re-established is not something to speculate on today although one suspects that we may be faced with a different set of market drivers.

17. Whatever the future holds it is likely that viability will remain an increasingly significant consideration in planning decisions. It is therefore appropriate to review both historic and recent cases in relation to this issue.

The Main Legal Decisions on Viability and Affordability

A) Decisions Relating to the Setting of Development Plan Policies

18. The main authorities relating to viability and affordability concern the Development Plan process. There have been two key decisions in recent years. These are the Blyth Valley and Wakefield decisions.

19. The Blyth Valley Decision: Most of you will by now be familiar with the seminal decision in Blyth Valley Borough Council v Persimmon Homes (North East) Limited and Others [2008] EWHC Civ. 861. The important aspect of the
decision for today’s purposes is that the case draws into sharp focus the fact that para. 23 of PPS3 requires LPA’s to balance the need for affordable housing against the need to ensure that the tariff is not set so high that it renders developments unviable:

“Local Planning Authorities should set an overall (i.e. plan wide) target for the amount of affordable housing to be provided….. It should also 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, including public subsidy and the level of developer contributions that can reasonably be secured.”

“Local Planning Authorities will need to undertake an informed assessment of economic viability of any thresholds and proportions of affordable housing proposed, including their likely impact upon overall levels of housing delivery and creating mixed communities.”

20. Blyth Valley Borough Council’s study of housing needs concluded that the need was so high that it would equate to 83% of the Borough’s annual housing land requirement. However, the study recommended a 40% requirement because its authors concluded that an 83% requirement would not be economically viable. The council then lowered the figure to 30% to be consistent with the neighbouring authority of Wansbeck, with which it formed a single housing market. Policy H4 of the draft Core Strategy was accordingly put forward in the following terms: “At least 30% affordable housing will be provided as a proportion of all new housing developments in the borough.”

21. At the independent EIP house builders objected that the 30 percent figure “has been arbitrarily selected and is not derived from a robust and credible evidence base.” They argued that the target was not based on an assessment of the likely economic viability of housing land within the Borough, and made the rather telling point that the private firm which had
written the council’s study had itself submitted evidence at an inquiry that a requirement of 30% would render a scheme unviable, resulting in a negative land value. The council’s response to all this was that the target was based on custom and practice, and was in line with targets set elsewhere.

22. The Inspector endorsed the 30% target, finding that lower targets would not adequately meet the need. He observed “there is no evidence to suggest that committed sites will not be brought forward with a target of 30% affordable housing or that such a target will risk the delivery of sites identified in the UCS.”

23. But when the matter went to Court, Policy H4 was quashed by the Judge, a decision upheld by the Court of Appeal. Collins J in the High Court ruled “The 30 per cent has been produced on the basis of material which is not supported by the guidance and which ignores a highly material factor, namely the economic viability of the relevant target.”

24. When the Council challenged the decision, the Court of Appeal upheld the judgment of Collins J suggesting the Inspector’s “reasoning is, to put it mildly, obscure and either is irrational or reflects a failure to take account of the evidence...”

25. The moral of the story is that LPAs simply must carry out an economic viability assessment to justify any demands for affordable housing in their Core Strategy. But the lesson is not one to be learnt by only the forward planners and the policy section of the LPA. When it comes to making a decision at the development control level, development control planners must ask whether they should recommend refusal of a proposal which does not offer affordable housing at the percentage demanded by policy. The answer depends on the robustness of the policy. If the policy cannot be justified by reference to an economic viability assessment it is likely to attract only limited weight if the matter falls to be tested at inquiry.

26. The Wakefield Decision: One of the housebuilders, Barratt, was back in Court in November 2009. It was seeking to make a similar challenge to the affordable housing policy adopted by Wakefield MDC in their Core Strategy.
The challenge was brought under section 113 of the PCPA 2004 (as amended by the Planning Act 2008). The Claimant argued the Core Strategy was outwith the appropriate powers of the Act because it failed to conform to sections 19 and 24 of the PCPA 2004.

27. The Wakefield Core Strategy policy under consideration was CS6 ‘Housing Mix, Affordability and Quality’. Various criticisms were levelled at Wakefield’s policy and evidence base and, more particularly, also levelled at the Planning Inspector who reported on the soundness of the Core Strategy. Again, as in the Blythe Valley litigation, the key issue was the evidence on economic viability to support the Council’s affordable housing policy. As Pitchford J explained,

“The claim raises the practical question what are the legitimate approaches which Councils and Planning Inspectors formulating local development plans may adopt when national policy for the provision of affordable housing is temporarily undermined by current economic conditions.”

28. But if the Barratt was hoping for an easy ride, as in Blythe Valley case, it was mistaken. In a judgment which extends to 75 paragraphs, his Lordship set out a very careful analysis of the factual background which stood in stark contrast to the facts of the Blythe case. More importantly, the case provides a very clear assessment of what LPAs should do about assessing the viability of providing affordable housing in the current economic climate, when few housing schemes can actually support large scale affordable housing provision.

27. When it comes to setting an affordable housing target in a Core Strategy, the crucial parts of national policy are paragraph 29 of PPS3 and paragraphs 4.26-4.38 and 4.44 and 4.46 of PPS12. I do not rehearse the full content of those paragraphs here but the key sentences are as follows:

“29. …The [AH] target…should also 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 assessment of the likely
levels of finance available for affordable housing, including public subsidy and the level of developer contribution that can reasonable be secured.”

“4.36 Core strategies must be justifiable: they must be:

• Founded on a robust and credible evidence base;”

“4.44 Core strategies must be effective: this means they must be:

• deliverable
• flexible; and
• able to be monitored”

28. Policy H4 of the RSS for Yorkshire and Humberside Plan (May 2008) made clear that LDFs should set targets for the amount of affordable housing. But it also suggested a provisional estimate of the proportions across the region, with 30-40% in Kirkless, Leeds, Wakefield and Sheffield.

29. Wakefield submitted its draft core strategy to the Planning Inspector, Mrs. Shelagh Bussey on 17 January 2008. Draft policy CS6 contained this sentence:

“At least 30% of new dwellings on developments across the district which meet the threshold should be dwellings which can be defined as affordable, with a split of approximately 80% social rented and 20% intermediate tenure.”

30. The Inspector called an exploratory meeting with interested persons on 20 February 2008. A pre-hearing meeting was held on 2 June 2008. The Inspector was not satisfied the Core Strategy was sound. Of principal relevance to the litigation was her conclusion that the Strategy for affordable housing was unsound because there was no SHLAA, no SHMA, and, most pertinent, no robust economic viability testing to justify Wakefield’s affordable housing policy.
Further meetings were adjourned in August 2008 to enable Wakefield to bring its evidence base up-to-date. The SHLAA and SHMA were completed. DTZ were instructed as experts to carry out an evaluation of the economic viability of the Core Strategy for affordable housing. Their work was completed in October 2008.

There were many grounds of challenge raised by Barratt. But the central complaint was whether CS6 was based on “robust economic viability testing”. Such testing is required to ensure compliance with PPS 3, paragraph 29, and PPS 12, paragraph 4.36. It is needed to ascertain what policy could, realistically, be delivered (PPS 12, paragraph 4.44) in a time of unprecedented recession in the housing market. DTZ’s Economic Viability Assessment (“EVA”) became an essential part of the case.

The EVA reached various conclusions. Several have been familiar to us for many years: sites in high value areas tend to have the capacity to deliver highest levels of affordable housing while remaining profitable; and profitability increased as the tenure split is adjusted to include a greater proportion of intermediate tenures.

But the report also contained some more profound conclusions. As at August 2008, the baseline date, it was demonstrated that across the District there was little scope to deliver any housing development, let alone affordable housing:

“The delivery of any housing development is potentially unviable and unlikely due to extended build periods, uncertainty in the financial market and a fall in property values. The impact of the unprecedented market conditions at the baseline date of valuation means that if the affordable housing policy were formulated based solely on this analysis, an affordable housing requirement of 0% would be deliverable.”

But the report went on to point out that the housing market is inevitable cyclical, offering this additional conclusion:

“Howeover, over the course of the Core Strategy and the life of any affordable housing policy it is recommended to expect, having regard to
the cyclical nature of the housing market, that the market conditions will vary significantly. WMDC need to ensure that any policy they put in place is flexible enough to deal with these changes in market conditions.”

36. To try and identify a suitable policy figure when the current crisis is over, the authors of the report focused on conditions at the height of the market in early 2007. These showed that 30% affordable housing could viably be delivered at a 50/50 split between social rented and intermediate tenures. But at the same time the report also contained this warning:

“…this is the highest level of affordable housing which has been deemed viable in all the modelling work which has been undertaken... Wakefield's original target of 30% affordable housing is ambitious in the current market, and in the short to medium term, until the market recovers. Without social housing grant, schemes will be unviable for standard section 106 sites. The percentage of affordable housing requested by Wakefield over the coming years will have to be flexible.”

37. The report concluded with a recommendation that a range of between 0% and 30% affordable housing can be delivered across the district depending upon market cycles/variables and affordable housing tenure splits. In so doing, it assumed construction costs of £90 per square foot for apartments and £80 per square foot for houses, and assuming an IRR (internal rate of return or profit) of 18%-20% during more stable conditions. On this basis the authors believed an affordable housing rate of 30% was viable.

38. The public examination took place in October 2008. The Inspector distributed a document setting out various questions for discussion. It included the question “What evidence is there to support the 30% affordable housing provision threshold and tenure split thresholds contained in Policy CS6?” She also asked whether there was evidence to support the thresholds and whether these had been tested for viability. In their written answer, Wakefield replied with reference to the fact they had commissioned an economic viability appraisal and the fact the policy was flexibility. They
themselves suggested an amendment to the policy, deleting the words “at least” before the figure 30%.

39. The Inspector endorsed the policy. In so doing she reached various conclusions including these:

- “The SHMA confirmed a need for affordable housing across the district of about 971 dwellings per annum;
- 30% affordable housing was the most which could reasonably be sustained in times of normal economic conditions…
- to provide the flexibility advised by the EVA, the text of the policy should be amended to provide that negotiation should take place with developers on a site by site basis”

40. Barratt argued that the 30% target failed to reflect the EVA. A 30% target throughout the 17 year duration of the Strategy was not justified on the basis of a robust and credible evidence base. Also the policy required that all proposals for additional housing on qualifying sites must make provision for suitable sufficient affordable housing to meet identified needs. Inevitably, the Claimant drew the Court’s attention to the Blythe Valley case.

41. Pitchford J accepted that if policy CS6 imposed a target of 30% across the whole of Wakefield District for the life of the plan it (1) would fail to reflect the DTZ assessment of economic viability; (2) would not be justifiable as founded on a robust and credible evidence base; and (3) would not be effective because it would be neither flexible nor deliverable.

42. But the Judge went on to explain why he did not accept that CS6 imposed a target of 30% across the District for the next 17 years. In so doing he,

(i) Rejected the suggestion that the policy lacked a robust and credible evidence base. The housebuilder might well have disagreed with some of the assumptions in the EVA such as build costs. But it was not the role of the Inspector to resolve such details. She was presented with the DTZ report, the general methodology of which had been accepted
by all involved at the examination meeting. The policy was based on that evidence base.

(ii) The EVA and the policy made assumptions about the housing market in the future but as the Judge put it “That assumption seems to me to be based reasonably on experience. Everyone knows the housing market is cyclical”;

(iii) The Judge rejected the argument that the EVA should have led the Council to adopt a range of percentage figures depending on the prevailing economic circumstances and the geographical location of sites within the District; and

(iv) most importantly, the Judge pointed out that the policy, although poorly drafted, specifically allowed for flexibility in its application. The last paragraph of the policy read as follows: “The actual amount of affordable housing to be provided is a matter for negotiation at the time of a planning application, having regard to any abnormal costs, economic viability and other requirements associated with the development.”

43. The key point about this case is that the facts are very different from the Blythe Valley case. Five key matters arise from the facts of the Wakefield case:

(i) under the exemplary direction of the Inspector, the Council had in place a robust and credible independent report on the economic viability of providing affordable housing in the District;

(ii) the policy was judged acceptable precisely because it specifically allowed for flexibility and for decisions to be made on a site by site basis: crucially, the words “at least” were deleted before the words “30%”,
(iii) the need for flexibility in the wording of the policy was entirely consistent with the evidence base and the advice from the independent consultants;

(iv) on the basis of this judgment, it is possible to have a robust and credible evidence base to support an affordable housing policy even when the economic circumstances mean it is presently impossible to deliver any affordable housing; and

(v) it is not essential to have a policy which stipulates different affordable housing rates for different parts of the economic cycle or even different parts of the Borough or District.

44. In this instance, the LPA were saved humiliation by the Inspector. As many already know, PINS decision to hold exploratory meeting and take a more proactive stance is becoming increasingly common. It does raise some concerns about the role of the Inspector. But the message which one hopes local authorities are hearing is simple. It is essential that they obtain market facing advice on economic viability from external consultants on the issue of economic viability.

45. Despite the clarity of his judgment, the Judge did allow leave to appeal to the Court of Appeal. But in the summer, the Court of Appeal had no hesitation in upholding his Judgment.

B) Court Decisions Relating to Viability as a Development Control Issue

46. There have been two very recent Court cases which concern viability issues in the context of development control decisions. These are the Vannes decision and the National Football Centre decision.

47. The Vannes Decision: The first is the Court of Appeal decision in Vannes KFT v Royal Borough of Kensington and Chelsea and the SSCLG [2010]. The
Court overturned the decision of Sir Michael Harrison, who had been critical of the Inspector’s handling of viability issues.

48. The developer Vannes, had applied for planning permission to convert a London hotel into nine self-contained residential units. The site was subject to planning guidance which set a target whereby 50 per cent of all additional housing should be "affordable". Vannes did not make any proposal for affordable housing on the site and the Council refused the application.

49. The Inspector conducted an inquiry as to whether Vannes was obliged to provide such housing. That issue depended, in turn, on other matters, one of which was whether the redevelopment would be economically viable. Toolkit results based on Vannes input values showed that it would not be viable. In contrast results based on the first respondent local authority’s input values indicated that it would be.

50. The Inspector concluded that none of the toolkit results was sufficiently robust to enable any significant weight to be attached to it in determining the provision of affordable housing. Instead he expressly considered other policy considerations, including the need to encourage residential development and Vannes stated position that the redevelopment was unlikely to go ahead if affordable housing was required. The Inspector concluded that it would be unreasonable to require affordable housing provision in relation to the proposed redevelopment, and granted planning permission.

51. In the High Court, Sir Michael Harrison quashed that decision on the basis that the Inspector had erred in law by failing to grapple with a "principal important controversial issue", namely the economic viability of providing affordable housing.

52. Having lost in the High Court, the developer appealed to the Court of Appeal. The Appellant defined the three main issues as follows

(i) Whether the Inspector was obliged, as a matter of law, to determine which "input" figures he preferred in relation to the various aspects of the economic viability of the proposed scheme. And whether a decision
not to make such a determination meant that he had failed to reach a conclusion on a "principal important controversial issue" and so had erred in law.

(ii) If the Inspector was not so obliged, his decision was vitiated by any other aspect of his consideration of policy or other relevant matters concerning the provision of affordable housing.

(iii) Whether the Inspector's conclusion that it would be unreasonable to require affordable housing was vitiated by his taking account of X's statement that if affordable housing was a condition then the scheme was unlikely to go ahead.

53. The Court of Appeal decided the case on each of these three main issues as follows:

(i) The planning guidance stipulated that "economic viability" was a part of the question of affordable housing. However, it also stated that Boroughs had to have regard to the need to encourage rather than restrain residential development and that they should take account of the individual circumstances of a particular site. The economic viability of providing affordable housing was not therefore a "principal important controversial issue" at the inquiry; it was a sub-set of the "principal important controversial issue" of whether there should be a provision for affordable housing in the scheme proposed. The inspector was bound to evaluate the evidence on the input figures, and there was no doubt that he did "grapple with" the various figures. However, it did not follow that he had to choose one or other of the figures proposed as input values and then follow through with those figures to a conclusion that the proposed development was, or was not, economically viable. If the inspector concluded that the rival input figures were unreliable, he was duty bound to say so. An unreliable conclusion on the economic viability of the proposed development would be an unsound basis on which to reach any conclusion on whether there should be a provision of "affordable housing" in the proposed development. The inspector
had not therefore erred in law in deciding that he could not use any of the input figures to arrive at a conclusion on the economic viability of the proposed development.

(ii) The Inspector took account of other relevant policy considerations. He expressly stated that he would consider other policy considerations. Accordingly, there was no error of law in his approach in dealing with other policy factors when deciding on whether there should be a requirement of "affordable housing".

(iii) The Inspector's statement on Vannes position was a simple statement of fact. It did not depend on the inspector accepting Vannes evidence about the input values or the results of the toolkit exercise, and there was nothing to suggest that Vannes position was dependent on such a conclusion. Accordingly, taking Vannes position into account did not vitiate the inspector's decision on the issue of whether there should be a requirement of affordable housing.

54. This case highlights the limitation of using toolkits, over the more conventional method of presenting evidence prepared by a character surveyor. The problem with toolkits is they are just a device and the decision maker must have confidence in how they operate. In this case the Inspector had no such confidence in what he was being told by the Council. The Court of Appeal upheld the Inspector in that view.

55. When seeking to address viability issues raised by a local planning authority, one of the key issues for developers is confidentiality. There has been a recent High Court case which addresses this concern. It concerns the proposals for the National Football Centre due to be built at Burton on Trent.

56. **The National Football Centre decision:** The case is R (on the application of Ian Frazer English v East Staffordshire Borough Council and National Football Centre Ltd [2010]. Mr English was a local resident close to the proposed NFC. He applied for permission to apply for judicial review of a decision of the Council to grant planning permission to NFC Ltd to build 28 houses as part of the scheme.
57. NFC Ltd is a wholly owned subsidiary of the Football Association (FA). It applied for planning permission for the houses in order to enable the implementation of the football centre. Planning permission had originally been granted for the centre but construction had been suspended due to financial constraints. A revised application was made to provide for the football centre and for a 228 bedroom hotel to provide appropriate accommodation.

58. NFC Ltd submitted a financial report explaining how the erection of the houses would fill part of the funding gap. The report contained financial information which could have damaged the FA and NFC’s commercial interests. It was provided to the Council’s planning department on the basis that it was confidential and should not be disclosed to any third party. NFC Ltd also indicated that the report was exempt from disclosure under the Freedom of Information regimes.

59. The Council accepted NFC Ltd’s submission but commissioned an independent review. That review confirmed a funding gap existed and the development might plug as much as 85 per cent of the gap. The planning committee met and granted permission.

60. Mr English submitted that the procedure adopted by the Council was procedurally unfair on the basis the non-disclosure of the financial information and the planning committee’s decision was perverse as it had not seen the financial report.

61. In the High Court in Birmingham, Mr Justice Flaux concluded that there was nothing procedurally unfair in the non-disclosure of the financial report and the review. Mr English had the opportunity to challenge the viability of any estimates in relation to the figures put forward from the information at the meeting, which amounted to the gist of the financial report. The gist of the financial report was sufficient to enable E to run any argument it chose to at the meeting. Accordingly, the challenge on the basis of procedural unfairness was unarguable. H also dismissed the claim that the decision was perverse.

62. It is difficult not to have some sympathy with Mr English’s position. But in light of this decision, developers do now have some ability to request that their
appraisals are not made public. However, one suspects that the real test remains one dependent on the views of the LPA. If they are happy to deal with the matter on a confidential basis that will be fine. But it will perhaps be difficult for a developer to insist on this.

The Main Appeal Decisions of the Secretary of State on Viability Issues.

Appeal Decision: Lydney Bypass, Gloucestershire

63. There have been many appeal decisions in the last 12 months in which viability is an issue. One important case was the Secretary of State’s decision on Land off Lydney Bypass, Lydney, Gloucestershire. The decision was issued at the end of 2009.

64. The Appellants were not willing to offer the 40% affordable housing required in the Forest of Dean Local Plan. Contrary to the Appellant’s assertions, the Secretary of State took the view that "as a starting point for negotiation" such a figure was neither unrealistic nor unreasonable. In rejecting the Appellants case he concluded as follows:

"Like the Inspector, the Secretary of State considers that the evidence of the current reduction in rental levels and mortgage interest rates is not on its own sufficient to support a view that such a reduction must produce a reduction in levels of housing need and that, in the context of the lengthy timespan of the proposed development, the downturn represented by the ‘credit crunch’ can be regarded as a temporary and relatively short-term element."

"…the degree to which the current appeal proposal falls short of the proportion of affordable housing sought by the Council represents a highly significant disadvantage…and he has accorded this matter substantial weight."

65. Had the Appellants been willing to offer affordable housing through an appropriate section 106 agreement with a ‘clawback’ provision, the situation might well have been different. There is a more than a clue indicating that is
the approach which should have been taken in the Secretary’s of State’s reasoning. However, the Secretary of State also took the view the proposal made inadequate provision for community facilities and youth/adult public open space; and that the highway and education contributions were inadequate because they failed to provide bonding to guarantee the relevant payments.

66. It is clear in this case that the developer tried to get away with paying very little. The Inspector and the Secretary of State were clearly having none of it. As this decision confirms, flexible section 106 agreements with clawback provisions seeking for more affordable housing contributions in future years are now inevitable on large sites.

Appeal Decision: Clay Farm, Cambridge

67. Many of you may have heard already of the Clay Farm, Cambridge decision. It was issued by the Secretary of State on 25 February 2010. The proposal sought permission for 2,300 residential units and accompanying community facilities, plus landscaped open areas, including 49 hectares of open space.

68. The key issue was the delivery of affordable housing. Inspector Ava Wood recommended that the Secretary of State refuse permission unless a supplementary planning obligation could be completed to deliver housing on the basis of 30% affordable housing in the first phase and 40% overall across the whole scheme. The Secretary of State agreed with the Inspector’s main conclusions on viability. But he firmly rejected the idea the Appellant should be entitled to submit a supplementary planning obligation.

69. In reaching her decision the Inspector specifically concluded that the appellants approach was simply an attempt to protect itself from the price it paid for the site. That was an argument relied upon by a successful Appellant in the Jericho Boatyard, Oxford appeal decision. And interestingly Ava Wood was also the Inspector in that case. But on this larger scheme, the Inspector was not prepared to accept such a fundament transfer of risk. The Secretary of State position was clear:
“In particular, the Secretary of State agrees with the Inspector that the appellants’ approach to assessing viability has the effect of protecting historic land values as well as insulating the developer against a risk for which he is already being indemnified by profit margins and that this would be at the expense of affordable housing levels.” (para 11 of the decision letter; my underlining)

70. The Appellants had argued that the site would remain vacant and undeveloped in the current economic circumstances. The Secretary of State was again clear on this point:

“Whilst the Secretary of State considers the timing and extent of the recovery in the housing market remains uncertain, he agrees with the Inspector that, in this particular case, this factor is likely to be a short term problem given the advantages of these sites as noted by the Inspector…and the possibility of grant funding.” (paragraph 14 of the decision letter)

71. The Secretary of State’s reasons for rejecting the Inspector suggestion of a revised agreement were less clear. What is clear is that the SS felt that it should be submitted with a new scheme. Although it is not surprising that it failed to feature explicitly in the decision, one can see the policy reasons for the SS preferring to simply refuse schemes which do not make an appropriate contribution. The SS was clearly not keen to see the final outcome of the application delayed further. He expressly noted “the amount of time [that had]… already been spent by the parties on this matter during the course of the Inquiry and notes this did not produce an agreed solution.”

Dealing with Viability from a Legal Standpoint

72. Experience across the country varies. But most LPA’s are now seeking flexible agreements which allow for little affordable housing in the current climate, but containing a clawback provision to cater for improved delivery if economic circumstances improve.
73. Most developers accept the need for such a mechanism. Although it does make valuing sites very difficult, especially for developers who wish to sell on a new permission to a housebuilder.

74. One key issue is the scale at which the clawback mechanism should be applied. Following the Lydney and Clay Farm appeal decisions it is clear that it should be applied to large sites. But should it really be applied to sites of just 20 or 30 units. There is no simple answer to this and it will depend on the particular LPA.

Practical implications of dealing with viability

75. There are a number of practical challenges involved in dealing with the question of viability in relation to planning negotiations and decisions. For the most part these are well understood as developers have from time to time sought to play the viability card in seeking to achieve planning consent. The clearest example of this is the ‘enabling development’ argument which is used to secure consent for something which would not normally be acceptable in planning terms in order to deliver a desired outcome. This is used most commonly in relation to heritage assets and English Heritage have developed a clear set of guidance on how to deal with applications made on an ‘enabling’ basis. (English Heritage, Enabling Development and the Conservation of Significant Places, September 2008) Similar arguments can now be made for the approach being advocated by Atlas in negotiating appropriate planning obligations on major schemes.

76. In both instances there is a requirement for the developer to adopt an ‘open book’ approach revealing the basis on which calculations of financial viability have been made. Experience suggests that the willingness of developers to ‘reveal all’ and to present information in such a way that it can be tested varies considerably. In particular there can be sensitivities around certain key issues.. In addition the use of proprietary appraisal models often serves to obfuscate rather than enlighten. In this regard attempts have been made to promote standard approaches such as the HCA’s Economic Appraisal Tool.
77. Of course the input assumptions to such models are critical as is the market knowledge and experience of those using them. For example in a recent s106 negotiation the two parties were so far apart that they couldn’t agree on anything. A key challenge, particularly for planners is recognising where expert advice is needed and having enough understanding of development viability to be able to interpret the quality and implications of that advice and communicating that to members. This can be difficult where developers are seeking to preserve commercial confidentiality as this goes against the spirit of openness and transparency in decision making. 78. Two areas may be seen as particularly challenging to deal with. While the key relationship in any viability assessment is the balance between anticipated receipts/GDV and construction costs finance and land value are frequently a source of trouble in negotiation (most planning authorities recognise that developers require profit to be built into their calculations). However finance and land value are both significantly dependent upon modelling and are therefore extremely sensitive to changes in assumptions.

79. In many ways modelling the cash flows associated with development gets to the heart of risk from both delays in securing the necessary consents, delivering development on the ground and selling or letting the finished product. In this regard it is hardly surprising that s106 negotiations aimed at supporting the viability of schemes have focused on both the quantum and timing of payments.

80. In relation to land value the consequence of market collapse has been that many developers have sought to protect the historic value at which they acquired land. It is evident from the cases referred to above that it is not the role of planning to protect the development industry from risk or bad decisions. Appraisals for the purposes of assessing viability therefore have to be undertaken on the basis of current market values. This in itself can be an obstacle to delivery as many development projects are subject to approval by the funders who in many cases are banks sitting on bad loans which they are seeking to avoid crystallising.

Conclusions
81. All the signs are that the issue of viability is something which will continue to confront the planning and development sector for some years to come. There is a growing need to planning applications, negotiations and consents to be framed in such a way as to allow delivery to continue – probably at lower levels. Planners and their advisors need to be more adept at dealing with the issues arising building on a growing body of advice, practice and law. It is unlikely that the Coalition Government’s planned reforms will result in a significant change of direction in this area as development will continue to be expected to contribute to the funding of local ‘benefits.

Chris Young
No5 Chambers
+44 (0) 845 210 5555
cy@no5.com
www.no5.com

Professor Chris Balch
Plymouth University