READING BOROUGH COUNCIL

REPORT BY DIRECTOR OF ENVIRONMENT

TO:	**STRATEGIC ENVIRONMENT, PLANNING AND TRANSPORT COMMITTEE**		
DATE:	**13 JULY 2016**	**AGENDA ITEM:**	**9**
TITLE:	**DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT VS WEST BERKSHIRE DISTRICT COUNCIL AND READING BOROUGH COUNCIL: REPORT OF THE JUDGEMENT OF THE COURT OF APPEAL AND IMPLICATIONS FOR THE OPERATION OF THE COUNCIL'S AFFORDABLE HOUSING POLICIES**		
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1. EXECUTIVE SUMMARY

1.1 Committee will recall that West Berkshire District Council and Reading Borough Council applied for a judicial review of the Secretary of State's Written Ministerial Statement (WMS) to Parliament on changes to national planning policy. Those changes sought to exempt developments of 10 or less dwellings from planning obligations for affordable housing and social infrastructure contributions and to introduce a new measure known as the Vacant Building Credit. The policy changes set out in the WMS were accompanied by amendments to the section on Section 106 agreements in the National Planning Practice Guidance ("NPPG").

1.2 The High Court handed down its judgement on the case on 31st July 2015. The High Court found in favour of the challenge by the local authorities and quashed the amendments to the NPPG. The Secretary of State appealed the judgement and the Court of Appeal has now quashed the decision of the High Court. This report provides a concise summary of the judgement, its implications for this Council and proposals for how the Council will implement its policies, in particular Policy DM6 of its Sites and Detailed Policies Document, in relation to this new national guidance.

2. RECOMMENDED ACTION

2.1 That the Committee notes the Judgement of the Court of Appeal; and

2.2 That Committee agrees the interpretation, set out at paragraphs 4.12 - 4.25 of this report, of its adopted policies on the provision of affordable housing in the future determination of planning applications where Policy DM6, in particular, is relevant;

2.3 That Option 2, as set out in paragraph 4.21 below, be applied as the basis for determining planning applications where Policy DM6 is relevant.

2.4 That any application involving the application of the vacant building credit be considered on its own merits to assess whether local circumstances in a particular case justify not applying the vacant building credit as an exception to the national policy as indicated in paragraph 4.26 below.

2.5 That Committee agrees that a review of the Council's Community Infrastructure Levy Charging Schedule should be undertaken in due course in the light of significant impact that these changes are likely to have on the viability of development.

3. BACKGROUND AND ISSUES

3.1 On 28th November 2014, Brandon Lewis MP, in a Written Ministerial Statement (WMS) to Parliament, announced various changes to the government's planning policies. Subsequently, the NPPG was amended to take on board the changes announced in Parliament. In summary the main changes affecting Reading Borough were:

- *Due to the disproportionate burden of developer contributions on small scale developers, for sites of 10-units or less, and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions.*

- *A financial credit, equivalent to the existing gross floorspace of any vacant buildings brought back into any lawful use or demolished for re-development, should be deducted from the calculation of any affordable housing contributions sought from relevant development schemes.*

The WMS also referred to different thresholds for designated rural areas and Rural Exception Sites but, while the latter was of relevance to West Berkshire, it had no implications for Reading Borough.

3.2 The challenge by the two Local Planning Authorities to the WMS and the revised NPPG was heard in the High Court over 2 days on 29th and 30th April 2015 by Mr Justice Holgate. The 2 LPAs were represented by David Forsdick, QC and Alistair Mills.

3.4 The grounds pursued at the hearing in relation to the national thresholds for affordable housing contributions and the vacant building credit are summarised as follows:-

1. The Secretary of State failed to take into account material considerations;

2. The national policy is inconsistent with the statutory scheme and its purposes;

3. The consultation process carried out by the Secretary of State was unfair;

4. In deciding to adopt the new national policy the Secretary of State failed to comply with the public sector equality duty in section 149 of the Equality Act 2010; and

5. The decision to introduce the new national exemptions from affordable housing requirements was irrational.

3.5 The Judgement found in favour of the challenge by the LPAs on 4 of the 5 grounds pursued at the hearing. In relation to Ground 5, the judge did not consider that he needed to consider this further in the light of his judgement on the other grounds.

3.6 His judgement quashed the amendments to the NPPG. He also ruled that the policies in the WMS must not be treated as a material consideration in development management and development plan procedures and decisions.

3.7 The Secretary of State appealed the judgement on all grounds. The Court of Appeal, which comprised 3 senior judges including Lord Justice Dyson, Master of the Rolls, the most senior civil law judge, heard the case on 15 & 16 March 2016. The judgement was handed down on 11th May 2016. All four grounds of appeal succeeded and the appeal was allowed. The judgement quashed the decision of the High Court. Costs were awarded against the 2 LPAs.

3.8 As a result, the WMS was reinstated. DCLG has now republished changes to the NPPG that reflect the original changes that were quashed in the High Court. The WMS and the changes to the NPPG therefore now become "other material considerations" in the determination of planning applications.

4.0 COMMENTARY

4.1 This is a very disappointing decision. The Judgment in relation to Ground 2, which was central to the case, revolved around the application of basic legal principles in particular noting that the Secretary of State's power to formulate and adopt national planning policy is not given by statute. It is an exercise of the Crown's common law powers conferred by the Royal Prerogative. This played a major part in the judgment. Ministers have wide and extensive common law powers to do many things. It is up to Ministers to decide whether to exercise them, and if so to what extent.

4.2 The Court determined that, while the development plan is the starting-point for the decision-maker, it is not the law that greater weight is to be attached to it than to other material considerations. The Court also found that policy may overtake a development plan ("… a plan can become outdated and superseded by more recent guidance").

4.3 On Ground 1, The High Court Judge considered that the Secretary of State had failed to take into account certain "obviously material" considerations in developing the policy set out in the WMS. However the Court of Appeal decided the Secretary of State was not obliged to go further than he did into the specifics and in consequence is not to be faulted for a failure to have sufficient regard to relevant considerations in formulating the policy set out in the WMS.

4.4 The High Court judgement had concluded that the Secretary of State had failed to give sufficient reasons for his proposal so as to enable intelligent consideration and responses to be given. The judgement also concluded that the Secretary of State had failed to take the product of the consultation conscientiously into account. In particular he failed to consider evidence that the policy would have a substantial impact on affordable housing provision. The Court of Appeal found no criticism of the Minister both in terms of the fairness of the consultation and the adequacy of consideration to the responses to it.

4.5 The final ground revolved around the failure to undertake any Equality Impact Assessment prior to issuing of the new policy and the adequacy of the Assessment that was produced subsequent to the High Court Challenge. The High Court Judge had been very critical. However, the Court of Appeal considered that the judge was in error by his adoption of a more stringent and searching approach to the Equality Impact Assessment. They considered that compliance with the terms of Section 149 was achieved by what was done in this case.

4.6 While the appeal succeeded on all grounds, the decision provides some pertinent legal advice on the interpretation of ministerial policy. At paragraphs 16 -18, the decision sets out 2 principles:

- The decision maker cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception;
- a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions.

The Court accepted the statement made on behalf of the Secretary of State that, *"local circumstances may justify lower (or no) thresholds as an exception to the national policy."* It is clear therefore that an LPA can seek to demonstrate that local circumstances can be used to justify an exception to the WMS and NPPG. This is an area that local authorities will be picking up and is discussed in more detail below.

4.7 Consideration has been given to seeking leave to appeal to the Supreme Court, the Court of Appeal having refused permission. However, West Berkshire and Reading Borough Council have now made the decision to not to appeal.

Implications of the Decision

4.8 In challenging the WMS, the Council has avoided granting planning permission for applications that did not provide affordable housing or contributions towards infrastructure provision. The Council has operated the Community Infrastructure Levy for all applications determined since April 2015 which means that the provisions in the Statement to exclude developments of 10 dwellings or less from Section 106 infrastructure payments has no effect in the Borough.

4.9 There are currently around 60 planning applications to which Policy DM6 on affordable housing applies. Many of these have been held in abeyance at the applicant's request pending the decision of the Court of Appeal. It is appreciated that applicants have been very patient in requesting that applications are held in

abeyance. The Council will now need to make decisions on these applications. The WMS becomes a material consideration in the determination of these applications.

4.10 Committee should also be aware that a number of developments have been granted planning permission subject to the provision of affordable housing under a Section 106 Agreement, and which have not yet been implemented. In such cases, it is open to the applicant to resubmit an application to carry out the same or similar development and arguing that a Section 106 Agreement securing an affordable housing contribution is no longer necessary. Alternatively they can seek to discharge or vary their Section 106 obligation in existing Agreements.

4.11 As a result of the decision of the Court of Appeal, the Council now needs to set out how Policy DM6, in particular, will be interpreted in the light of the WMS and other material considerations, having considered the local circumstances. Policies on Affordable Housing will also need to be reviewed in the light of emerging policy based on the new measures introduced in the Housing and Planning Act 2016, in particular those measures requiring the provision of Starter Homes. It should be noted that the Council has already received 2 appeal decisions that have given the WMS significant weight, outweighing the need to make decisions in accordance with the Council's policies. As a result both appeals have been allowed without securing an affordable housing contribution.

Interpretation of Policy in the light of the Decision of the Court of Appeal

4.12 The decision of the Court of Appeal has reinstated the WMS and allowed the Secretary of State to issue new guidance in the NPPG which states that, "contributions for affordable housing and tariff style planning obligations should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1000sqm."

4.13 The Guidance also states that "Where a vacant building is brought back into any lawful use, or is demolished to be replaced by a new building, the developer should be offered a financial credit equivalent to the existing gross floorspace of relevant vacant buildings when the local planning authority calculates any affordable housing contribution which will be sought. Affordable housing contributions may be required for any increase in floorspace."

4.14 The assumption is that local authorities will follow WMS and the guidance. However, as indicated above, the Court of Appeal accepted that, *"local circumstances may justify lower (or no) thresholds as an exception to the national policy."* It is clear that an LPA can seek to demonstrate that local circumstances can be used to justify an exception to the WMS and NPPG. Officers are currently preparing a detailed case on behalf of the Council on these grounds.

4.15 Policy DM6 covers the provision of affordable housing on proposals of 1-14 dwellings. The Council adopted an Alteration to its Local Plan on 27th January 2015 (and in so doing has complied with all statutory requirements). This Alteration made minor changes to Policy DM6 in its Sites and Detailed Policies Document based on an up to date viability assessment. The Draft Alteration had been through Examination and the Inspector's final report was received on 17th December 2014. This was after the WMS which was made to Parliament on 28th November 2014. The Inspector found the Alteration to be sound and did not request any modifications. The Council can legitimately argue that Policy DM6, was approved and adopted subsequent to the WMS and this should give it considerable weight.

4.16 The policy seeks to assist the Council in meeting the requirements of the NPPF which state that:

> "*local planning authorities should…use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework,….*"

The Council considers that the policy is essential to assist in meeting the very high need for affordable housing in the Borough and in the wider area in compliance with the NPPF.

4.17 The Borough experiences exceptionally high levels of need for affordable housing. The Berkshire Strategic Housing Market Assessment (BSHMA) found that Reading had almost half of all households in the Western Berkshire Housing Market Area (HMA) that are currently in need of affordable housing and more than twice as many as either Bracknell Forest or Wokingham Borough. This is borne out by the Council's own register which exhibits high levels of homelessness and priority cases for affordable housing. In terms of forecasts, Reading also has significantly higher levels of newly forming households with housing need compared to the other authorities in the Western Berkshire HMA.

4.18 The BSHMA sets out the overall estimated level of Affordable Housing Need per annum for each of the Berkshire Authorities. This provides each authority's Objectively Assessed Need (OAN). For Reading Borough an affordable housing need of 406 dwellings per annum represents 58% of the overall housing need of 699 dwellings per annum. The corollary is that of the OAN of 699 dwellings, the Borough only needs to provide 293 market priced and market rented units per annum. All the rest should be affordable units as currently (pre-Housing and Planning Act 2016) defined. The situation becomes more complicated if we feed in Starter Homes, which are proposed to be defined as affordable housing, into the affordable housing demand and supply equation.

4.19 On the supply side, an average of around 155 new affordable housing units per year has been provided through planning agreements since 2001, partly bolstered in recent years by a small contribution from Policy DM6. Levels of affordable housing delivered in future years are currently looking likely to be less than this average. Reading has seen around 40-50 rented units per year sold through Right To Buy which will also soon apply to Housing Association stock. Policy DM6 was forecast to provide around 45 – 50 new affordable housing units per year, with sites of 10 units or less providing a high proportion of these numbers, certainly at least 25 – 30 units per year. As can be seen, Policy DM6 is intended to provide a significant proportion of the new affordable housing units in the Borough.

4.20 The OAN for affordable housing in Reading is exceptionally high. It is clear that the Council will have to consider all means of achieving affordable housing provision in the Borough if it is to deliver its OAN for affordable housing. The provision of affordable housing on small sites of 10 or less houses will be an essential part of this delivery. In the light of the very high OAN for affordable housing in the Borough, the very limited supply and the large impact should DM6 dwelling units not be provided, the Council contends that exceptional local circumstances justify lower (or no) thresholds as an exception to the national policy.

4.21 In that light of those conclusions, while recognising the change in government guidance, a number of options for the future interpretation of policy DM6 have been considered as follows:

1) Continue to implement Policy DM6 as indicated in the Sites and Detailed Policies Document and as interpreted in the Affordable Housing Supplementary Planning Document.

2) Implement Policy DM6 as above but excluding proposals that solely involve the conversion of an existing property, where the conversion involves the provision of 10 or less dwelling units (i.e. not HMOs), or the replacement of dwellings by the same number of replacement dwellings where there is no net increase.

3) Policy DM6 operates different requirements at different thresholds. The Council could decide not to seek provision for schemes below 5 units (i.e. 1-4 units). However, proposals of this size could contribute significant financial contributions despite the fact that only 10% affordable housing provision is being sought.

4) The Council could decide not to seek provision for schemes below 10 units (i.e. 1-9 units). However, that would mean giving up a major part of the potential contribution that Policy DM6 can provide and is only one unit short of what the WMS requires.

4.22 The very high need for affordable housing implies a pressure to continue to apply the Council's existing policy in full as indicated by Option 1. However, the WMS talks about reducing "disproportionate" burdens on developers. While the work the Council has undertaken on viability of the development of small sites indicates that affordable housing provision in accordance with adopted policies does not impose disproportionate burdens on developers, some of the smaller developments provide limited financial contributions that it is difficult to argue will provide a meaningful contribution towards the provision of affordable housing. Officers are of the view that proposals involving conversions of buildings to provide residential uses, usually in the form of flats and replacement dwellings where there is no net increase in the number of dwellings (Option 2)) should no longer be subject to a requirement to provide a contribution towards affordable housing. As such, developments providing no or relatively little new floorspace are caught by the provisions of the vacant building credit (see below). Inevitably, because of the high existing use value of the existing floorspace, viability assessments often conclude that such developments can only contribute relatively small sums that would only make up a small proportion of the cost of providing an affordable unit. It is difficult to argue that such small developments will make any more than a very small contribution. It is therefore questionable that it can now be successfully argued that seeking such small contributions justifies being considered as an exception to national policy.

4.23 Analysis of financial contributions, sought and agreed following the submission of a viability appraisal and negotiation, point to the fact that proposals involving net increases in dwellings of 1-4 units (Option 3) can provide quite sizeable contributions towards affordable housing provision. The provision of a single additional unit can provide tens of thousands of pounds that can make a significant contribution to providing units of affordable housing. It is therefore reasonable to argue that seeking such contributions justify being considered as an exception to

national policy. Obviously that argument is more reasonable to justify in relation to larger proposals involving 5 or more units.

4.24 Having considered the above options, officers recommend that option 2 be used as the basis for determining planning applications where Policy DM6 is relevant particularly given the recent appeal decisions attached.

4.25 The financial credit referred to in the WMS and in the changes to the NPPG, will also have a significant impact on affordable housing provision in Reading. Reading Borough is almost wholly urban and relies on previously developed land for nearly all its new development. Under its adopted policies, the Council seeks affordable housing on the whole scheme and then considers any viability evidence that points to reducing the requirements. The change in government policy now introduces a financial credit to count against the affordable housing requirement. Essentially, any existing floorspace on a site will be deducted from the total new floorspace of the development before any calculation of the affordable housing requirement is made. Perversely, in accordance with the NPPF and existing local authority policies, applicants will also be able to continue to argue that the viability of a scheme cannot support even the new lower level of provision. This mechanism will have an impact on the provision of affordable housing but that impact is unclear. Officers recommend that, for the moment, any application involving the application of the vacant building credit be considered on its own merits to assess whether local circumstances in a particular case would justify not applying the vacant building credit as an exception to the national policy.

4.26 The Court of Appeal decision, and the measures coming out of the Housing and Planning Act 2016, will have significant implications for the viability of developments on small sites. It would therefore be prudent for the Council to consider reviewing its Community Infrastructure Levy Charging Schedule in due course in the light of the significant impact that these changes are likely to have on the viability of development in the Borough.

4.27 The Council is currently developing a replacement Local Plan which will provide an opportunity to review and update its adopted Policies. Any revisions to Policy DM6 will need to take account of the Government's position in relation to thresholds and starter homes as well as the local housing circumstances in the Borough. A robust case to continue to secure affordable housing contributions from development will be made as part of this process.

5. CONTRIBUTION TO STRATEGIC AIMS

5.1 The Planning Service contributes to the Council's strategic aims in terms of:

- Seeking to meet the 2015 -18 Corporate Plan objective for "Keeping the town clean, safe, green and active."
- Seeking to meet the 2015 -18 Corporate Plan objective for "Providing homes for those in most need."
- Seeking to meet the 2015 -18 Corporate Plan objective for "Providing infrastructure to support the economy"

The matters referred to in this report will have an impact on the Council's ability to achieve the provision of affordable housing to meet the need for such housing in the Borough.

6. COMMUNITY ENGAGEMENT AND INFORMATION

6.1 The High Court judgement had highlighted the importance of ensuring that consultation documentation provides sufficient reasons for the proposals and that the product of, and responses to, consultation must be taken conscientiously into account before finalising policy. However, this is substantially watered down, certainly in relation to government policy in the light of the decision of the Court of Appeal

7 EQUALITY IMPACT ASSESSMENT

7.1 Where appropriate the Council must have regard to its duties under the Equality Act 2010, Section 149, to have due regard to the need to—

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

7.2 The Court of Appeal judgement appears to play down the importance of carrying out an Equality Impact Assessment as part of the development of policy and did not sanction the publication of a policy in the absence of such an assessment. However, it does not take away the clear need to undertake EQIA before finalising policy so that any policy is informed by such an assessment.

8. LEGAL IMPLICATIONS

8.1 These are dealt with in the Report.

9. FINANCIAL IMPLICATIONS

9.1 Costs have been awarded against the challenging councils by the Court of Appeal. There will, therefore, be financial implications resulting from judicial review. The Council's share of the costs of taking the case through the 2 court cases amount to nearly £40,000. A further £20,000 is now to be paid towards the costs of the Secretary of State.

9.2 Indirectly, the challenge has enabled the Council and other local authorities to benefit from the result of the High Court Challenge. The Council has been able to apply existing development plan policies that seek direct provision, or contributions towards the provision, of affordable housing and infrastructure within the Borough. Since the date of the Written Ministerial Statement, it is estimated that agreements have been signed for the provision of 3 affordable housing units and contributions of £1.2m towards affordable housing. In addition, as indicated in the main report, no planning application involving the provision of 10 or less dwellings has been approved to which the Community Infrastructure Levy will not apply. If the challenge had not been made, the Council would have had to approve planning applications before the introduction of the Community Infrastructure Levy that could not have been required to make any contributions towards infrastructure provision via a Section 106 agreement.

9.3 The changes now introduced as a result of the Court of Appeal Decision could have a significant impact on the provision of affordable housing and/or affordable housing contributions.

9.4 It is likely that the Council's position on this matter will be challenged through the planning appeal process. In the event that an appeal is made, the Council will submit a detailed case to the Inspectorate to justify its position. Should the Inspectorate find the Council's case to be unconvincing officers will need to reconsider the position taken in relation to Policy DM6. The Council can award costs against the Council should it consider that the Council has acted unreasonably.

10. BACKGROUND PAPERS

Approved Judgements in Case No: CO/76/2015:

High Court
West Berkshire District Council and Reading Borough Council -and - Department for Communities and Local Government, July 2015.

http://www.bailii.org/ew/cases/EWHC/Admin/2015/2222.html

Court of Appeal
Department for Communities and Local Government,-and- West Berkshire District Council and Reading Borough Council, May 2016.

http://www.bailii.org/ew/cases/EWCA/Civ/2016/441.html