

## **ITEM 9 National Planning Practice Guidance on Affordable Housing and tariff based contributions**

Report of the Planning Policy & Transport Portfolio Holder

### **Recommended:**

**That for the purpose of determining relevant planning applications:**

- a. To reaffirm the designation of the rural parishes of the Borough as a Designated Rural Area (under S157 Housing Act 1985) for the purposes of seeking affordable housing (annex 1 to the report);**
- b. To apply the adopted Local Plan (2016) affordable housing (Policy COM7) as amended (annex 2 to the report);**
- c. To only seek financial contributions towards public open space (Policy LHW1) and highway infrastructure (Policy T1) under S106 of the Town and Country Planning Act 1990 where consistent with national planning guidance;**
- d. That, in respect of any outstanding resolution to grant planning permission from Planning Control Committee or either of the Area Planning Committees, the Head of Planning and Building be authorised to dispense with any requirement of such resolution to secure Affordable Housing and/or financial contributions, where such contributions are inconsistent with the revised policy set out at Recommendations (b) and (c) above.**

### **Recommended to Council**

#### **SUMMARY:**

- To set out the Council's position in response to the recent updates to national planning practice guidance in relation to Local Plan policies for affordable housing and planning obligations

## **1 Introduction**

- 1.1 As a result of the decision in the Court of Appeal, National Planning Practice Guidance has been published which conflicts with the Council's adopted policy in the Local Plan on seeking affordable housing (Policy COM7) and financial contributions towards public open space (Policy LHW1) and Highway Infrastructure (Policy T1). This material guidance requires the Council to review its position.

## 2 Background

2.1 On the 28 November 2014 Government issued a Written Ministerial Statement (WMS) and changed the National Planning Practice Guidance (NPPG). The guidance set out that:-

- i. For sites of 10-units or less (i.e. requirement triggered at 11 units), and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff style contributions should not be sought.
- ii. For designated rural areas under section 157 of the Housing Act 1985 authorities may choose to implement a lower threshold of 5-units or less (i.e. requirement triggered at 6 units), beneath which affordable housing and tariff style contributions should not be sought.
- iii. Within these designated areas, if the 5-unit threshold is implemented then payment of affordable housing and tariff style contributions on developments of between 6 to 10 units should be sought as a cash payment only and payable after completion of units within the development.
- iv. For sites where the threshold applies, planning obligations should not be sought to contribute to pooled funding pots intended to fund the provision of general infrastructure in the wider area.

2.2 In response to this, on the 20 February 2015, the Council resolved to reflect the guidance in the way it determined planning applications. This position was agreed on the basis that the Borough Local Plan (2006) still formed the development plan for the Borough as the Inspector's report and not been received. The position agreed by the Council was that:-

- i. confirm the designation of the parishes<sup>1</sup> in the rural areas of the Borough (under S157 Housing Act 1985);
- ii. to only seek financial contribution towards the provision of affordable housing in rural parishes from schemes of six – ten units.
- iii. To continue to apply the adopted Borough Local Plan (2006) affordable housing policy (ESN04) in relation to the thresholds in undesignated areas of the Borough;
- iv. To continue to seek planning obligations for open space and highway on the basis that they were not tariff style contributions.

2.3 In late January 2015 two local authorities (Reading and West Berkshire) undertook a legal challenge against this guidance. Whilst it was too early to understand the implications of this challenge, it was considered prudent to set out the Council's position in relation to the NPPG.

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<sup>1</sup> All TVBC parishes excluding Andover, Charlton, Enham Alamein, Romsey and Romsey Extra, North Baddesley, Nursling & Rownhams, Valley Park and Wellow.

- 2.4 On the 31 July 2015 the High Court<sup>2</sup> ruled that the NPPG exemption for small developments from affordable housing contributions and tariff style contributions was unlawful and should not be treated as a material consideration. As a result the Government withdrew the respective NPPG paragraphs.
- 2.5 The Local Plan Inspector sought the Council's views on the outcome of the high court decision. The Council responded that Policy COM7 should remain as submitted. The policy was confirmed by the Inspector, with minor modifications. In addition, the Council, at its November meeting, agreed to set aside the previous resolution made in February 2015.
- 2.6 The outcome of the Court of Appeal decision is that the Government is able to reissue that guidance which has previously been withdrawn. This was done on the 19 May 2016. Material weight should now be applied to the Guidance and WMS. In effect reverting the position back to what it was in November 2014. West Berkshire DC and Reading BC have the option to appeal to the Supreme Court but whether they will is unknown at this time.
- 2.7 It should be noted that the changes in national planning guidance will not apply to Rural Exception Sites (Policy COM8).

### **3 Corporate Objectives and Priorities**

- 3.1 The delivery of affordable housing is identified within the 'Live' corporate objective. The 'Enjoy' corporate objective relates to the provision of open space.

### **4 Consultations/Communications**

- 4.1 The proposed approach reacts to a change in national guidance. It is not proposed to undertake formal consultation. Once confirmed the Council's approach will be published on the Council's website.

### **5 Options**

- 5.1 As a result of the Court of Appeal decision the Government has reinstated its guidance relating to affordable housing and planning obligations. The NPPG sets out that an affordable housing obligation cannot be sought from schemes of ten units or less, unless the Council chooses a lower threshold of five units or less in those Designated Rural Areas. The options available are to either a) continue to use policy COM7 as adopted; or b) undertake a review of policy COM7; or c) revise policy COM7 so that it is consistent with national guidance and designate the rural areas.

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<sup>2</sup> West Berkshire District Council & Reading Borough Council V Secretary of State [2015] EWHC 2222

- 5.2 With regard to planning obligations it needs to be considered whether the obligations currently sought by the Council comply with the amended national guidance.

## **6 Option Appraisal**

- 6.1 The Test Valley Strategic Housing Market Assessment indicated that there is a significant net need for new affordable housing. To help meet that need the Council's target is 200 affordable houses completed per year. All options will affect the scale and/or rate of delivery of affordable housing within the Borough.
- 6.2 The options available to the Council are either to continue to apply COM7; or review the policy and its evidence base; or remove those elements of COM7 which are inconsistent with national guidance.

### *Option A) Continue to use Policy COM7*

- 6.3 The Council could continue to apply COM7 on the basis of it forming part of the development plan and that the local evidence justifies going counter to the NPPG. Whilst the NPPG is a material consideration the weight to be applied to it is for the decision maker to decide. The approach would continue to achieve either affordable units or financial contributions.
- 6.4 However, this approach would mean that the lower thresholds in COM7 are inconsistent with national guidance (i.e. the Council would not be in a strong position to refuse planning applications which have not applied the lower thresholds of COM7 as the reinstated guidance is more recent than the adopted policy).
- 6.5 It is also likely to be challenged by developers/ agents because the lower thresholds of COM7 are inconsistent with national guidance. Guidance in the National Planning Policy Framework (para 14) sets out circumstances where permission should be granted where relevant policies are out of date. As a result the Council would not be in a robust position to refuse planning applications which have not applied the lower thresholds of COM7. To choose this option is likely to have implications for determining planning applications and success at future appeals. Counsel advice has recognised that it would be a difficult argument to justify continuing to apply COM7 to a Planning Inspector at appeal.

### *Option B) Undertake a review of Policy COM7 in light of NPPG*

- 6.6 The second option would be to review the whole policy in line with national guidance through a partial review of the Local Plan. In the interim either option A or C could be applied. However a partial review would be a lengthy process taking into account the refresh of the evidence base, public consultation and the examination process. It would be premature to assume that the outcome of the evidence would justify going counter to national guidance.

- 6.7 Coincidentally with the Court of Appeal's decision the Housing and Planning Act 2016 received royal assent on 12 May 2016. This introduces a requirement for Councils to seek discounted starter homes for first-time buyers. This requirement would not have formed part of the viability evidence sitting behind policy COM7. Any review of policy COM7 would be recommended to pick up this change to legislation.

*Option C) No longer apply Policy COM7 to schemes which fall below the threshold contained in the NPPG*

- 6.8 The approach of bringing the policy into line with national guidance would, in effect, take the same course as that taken by the Council in February 2015. It would not trigger a partial review and is unlikely to risk an increase in appeals on the issue of consistency with national guidance. This option would result in the loss in the ability of the Council to deliver affordable units/ seeking equivalent financial contributions to help meet those in housing need.
- 6.9 In applying this approach the Council has the ability to apply a lower threshold to Designated Rural Areas. As defined by legislation<sup>3</sup> the Council already has parts of the Borough designated as a rural area. Annex 1 sets out those parishes which are designated. This excludes the parishes of Andover, Charlton, Enham Alamein, Romsey and Romsey Extra, North Baddesley, Nursling & Rownhams, Valley Park and Wellow. These are classed Undesignated Areas.
- 6.10 If the Council were not to choose to reaffirm the less than five unit threshold this may result in the loss of affordable units coming forward within the designated areas. It is difficult to estimate the number of affordable units that would come forward if the lower threshold was not applied. However, the Council may receive more planning applications from sites in the rural areas as a result of the settlement boundaries in the adopted Local Plan.
- 6.11 The NPPG only allows for financial contributions to be sought from those schemes between 6 – 10 units in designated areas after completion of the development. Whilst the provision of on-site affordable units would be preferred given the NPPG content it is proposed to seek financial contributions from schemes between 6 – 10 units in designated areas.
- 6.12 Annex 2 sets out the amended text to Policy COM7 and its supporting text should the preferred approach be applied.
- 6.13 The earlier edition of the NPPG referred to Councils no longer being able to seek planning obligations which were 'tariff based' from schemes of 5 or less units in defined rural areas and 10 or less units elsewhere in the borough. This would include public open space and highways contributions. This element of the guidance has also been reintroduced. As a result the Council

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<sup>3</sup> Housing (Right to Buy) (Designated Rural Areas and Designated Regions) (England) (No. 2) Order 2004, SI 2004: 2681 made under s157(1)(c), Housing Act 1985

would not be able to seek such obligations. Whilst this would result in the loss of contributions towards infrastructure the introduction of Community Infrastructure Levy on or soon after 1 July 2016 would mean that any loss would be relatively short term.

- 6.14 In order to not delay those planning applications which have committee resolution, but where S106 legal agreements have yet to be signed, it is proposed that the Head of Planning and Building be given delegated authority to enable to amend any requirement for seeking affordable housing or planning obligations which are now inconsistent with national guidance and the preferred option outlined above.

## **7 Risk Management**

- 7.1 An evaluation of the risks associated with the matters in this report indicate that further risk assessment is not needed because the changes/issues covered do not represent significant risks.

## **8 Resource Implications**

- 8.1 There are no significant resource implications of the preferred option. The change in national guidance may result in developers/ agents seeking to vary legal agreements in light of the amended thresholds triggering additional officer workload.

## **9 Legal Implications**

- 9.1 The approach would be consistent with national guidance and the WMS both of which are material considerations.
- 9.2 With regards to designating rural areas in accordance with the Housing Act 1985 and secondary legislation, as referred to above, the Council has the ability to designate areas where a lower threshold can be applied.

## **10 Equality Issues**

- 10.1 The changes to national guidance do affect the delivery of affordable housing and therefore impacting on those socio-economic groups which would benefit the most from continuing the lower thresholds of COM7. Reaffirming the threshold of five units in designed rural areas has the ability for the Council to continue to seek contribution towards affordable units to meet local need.

## **11 Other Issues**

- 11.1 Community Safety – none.
- 11.2 Environmental Health Issues – none.
- 11.3 Sustainability and Addressing a Changing Climate – none.

11.4 Property Issues – none.

11.5 Wards/Communities Affected – all Wards affected.

**12 Conclusion and reasons for recommendation**

12.1 Local Plan Policy COM7 is inconsistent with national guidance, as result of the Government success in the Court of Appeal, with regard to the thresholds for seeking affordable housing. It is proposed to revise how the policy is applied to bring it in line with this guidance. National guidance also sets out that tariff style contributions (which include Policy LHW1 public open space and Policy T1 highways) can also not be sought from schemes below the same threshold. It is proposed to follow the same approach.

Background Papers (Local Government Act 1972 Section 100D)

Test Valley adopted Local Plan (2016)

Confidentiality

It is considered that this report does not contain exempt information within the meaning of Schedule 12A of the Local Government Act 1972, as amended, and can be made public.

No of Annexes:	2	File Ref:	Pt6.3
(Portfolio: Planning Policy & Transport) Councillor Hatley			
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Report to:	Cabinet	Date:	22 June 2016