

Note for Councillors

IMPORTANT UPDATE: This note has been revised following confirmation of areas of Shropshire being designated as Rural Areas under Section 157 Of the Housing Act 1985

Shropshire Council Position Statement in relation to the application of its affordable housing policy following the Court of Appeal judgment of 11th May 2016 in the case of *Secretary of State for Communities and Local Government (1)West Berkshire District Council(2)Reading Borough Council [2016] EWCA Civ 441*

This case concerns the Governments Policy for affordable housing on sites of 10 or less dwellings and the note describes the impact on Shropshire. There will be a separate report to Cabinet in June to confirm the approach.

Background

Shropshire Council's Core Strategy was adopted in March 2011 with the founding principle of seeking to create the context for "A Flourishing Shropshire". The Shropshire Council policy requires anyone developing a new open market dwelling (subject to exceptions) to make an Affordable Housing Contribution (AHC), which depending on the development size and the prevailing target rate, could be a financial contribution and/or on site provision.

Written Ministerial Statement

The Minister of State for Housing and Planning, Brandon Lewis MP issued a Written Ministerial Statement (WMS) on 28th November 2014 announcing that Local Authorities should not request affordable housing contributions on sites of 10 units or less (and which have a maximum combined gross floor space of 1,000sq m), or 5 units or less in designated protected rural areas.

Reading and West Berkshire Councils sought to challenge the WMS at the High Court (Case Ref 76.2015) and on 31st July 2015 Mr Justice Holgate found the WMS to be unlawful. The Government subsequently withdrew relevant commentary from the National Planning Practice Guidance. From this point Shropshire Council continued to apply its affordable housing policy.

The Government challenged this decision through the Court of Appeal which over turned Mr Holgate's decision in a 13,000 word judgement on 11th May 2016 (Case Ref C1/2015/2559). Consequently the WMS still applies and it is anticipated that the NPPG will be amended shortly. Importantly the WMS was confirmed as Government policy, not simply guidance and as such it has similar standing to the NPPF.

In addition to this the Housing & Planning Act gained Royal Assent on May 12th 2016 and this gives power to Government to make secondary legislation to achieve the same result – i.e. set minimum thresholds for affordable housing contributions.

It is understood that West Berkshire and Reading Councils are considering whether to challenge the Court of Appeal decision in the Supreme Court.

At this juncture, in accordance with the view of the Planning Inspectorate it is considered that the WMS is a material consideration. It is therefore **accepted** that the WMS applies as a significant material consideration and this means that the Council will not automatically require an AHC for applications for 10 or less dwellings and less than 1,000sq m floor area in the majority of cases where the site is not located in a designated rural area.

However this is cannot be a blanket rule and as such there may be exceptions to this. The Court of Appeal judgement referred to a statement made by the Government's Counsel in the High Court that (my emphasis added):-

*“(i) As a matter of law the new national policy is **only one of the matters which has to be considered under section 70(2) of TCPA 1990 and section 38(6) of TCPA 2004 when determining planning applications or formulating local plan policies (section 19(2) of PCPA 2004), albeit it is a matter to which the Secretary of State considers ‘very considerable weight should be attached’;**”*

The Court of Appeal agreed with this proposition and confirmed that the development plan remains the starting point for decision taking although it is not the law that greater weight must be attached to it than other considerations. The WMS is policy not binding law and does not countermand the requirement in s38(6) of the 2004 Act or s70(2) of the 1990 Act. The judgement also confirmed that the Secretary of State is entitled to give greater weight to his policy than that of a local plan.

The position is therefore that the WMS is a significant material consideration but it does not replace or automatically override the development plan as the starting point for planning decisions. Consequently there may still be cases where the Council considers that the Councils policy attracts greater weight in the planning balance than the WMS. This might include cases where there is evidence of significant housing need and a lack of delivery against policy or cases where the application is for the removal of a restrictive occupancy condition, i.e. change of use from holiday let to open market house. Also there may be cases where in spite of the WMS an applicant offers affordable housing contributions in accordance with or exceeding Shropshire Council adopted policy – that then would also be a material consideration.

Designated Rural Areas

On 19th May 2016 the Housing (Right to Buy) (Designated Rural Areas and designated regions) (England) Order 2016/587 was laid before Parliament and comes into force on 20th June. This included 107 parishes that had been submitted by Shropshire Council for consideration in an application to Government made on 13th November 2013. The Parishes affected are listed below and in these parishes Shropshire council will apply a lower 5 unit or less threshold. The National Planning Practice Guidance has been updated and confirms that for developments of between 6 and 10 units in Designated Areas payments will be commuted until after the development is complete and the Council will revise its precedent S106 accordingly for such cases.

Dealing with current and extant planning applications & appeals

Outstanding applications

Officers will consider outstanding applications on a case by case basis and update their reports as necessary. Resolutions already reached will have given positive weight to the provision of an AHC and this will need to be adjusted. Where it is concluded no AHC will be sought, decisions will be issued on this basis. If the application has been to committee it will need to be referred back in the light of the WMS as an additional material consideration which is now relevant. Applications for outline permission which could potentially accommodate more than 10 dwellings or 1000m² and this would not be precluded by the terms of the outline consent will require a section 106 to secure affordable housing based on a trigger of exceeding the thresholds in the WMS. Officers will work through those applications that were awaiting section 106 agreements but which may not now need them in turn, I am therefore asking agents and applicants to be patient as we work through those applications.

Appeals

Officers will consider these on a case by case basis and if asked we would advise that Shropshire Council position is that it accepts the WMS is a significant material consideration and so the Council will not automatically require an affordable housing contribution as outlined above.

Sites with planning permission and a signed s106 Council policy will apply as the decision has been issued and the s106 was a material consideration in the granting of that permission.

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25/05/16

Housing (Right to Buy) (Designated Rural Areas and Designated Regions) (England) Order 2016/587

Schedule 1 Designation of rural area from: June 20, 2016

In the area of the council of the county of Shropshire, the parishes of Acton Burnell, Acton Round, Adderley, Alderbury with Cardeston, Alveley, Ashford Bowdler, Ashford Carbonel, Astley Abbots, Astley, Aston Eyre, Atcham, Badger, Barrow, Baschurch, Beckbury, Berrington, Bicton, Billingsley, Boningale, Boraston, Boscobel, Burford, Chelmarsh, Cheswardine, Chetton, Child's Ercall, Claverley, Cleobury Mortimer, Clive, Cockshutt, Condoover, Cound, Deuxhill, Donington, Eardington, Ellesmere Rural, Ford, Glazeley, Gobowen, Selattyn and Weston Rhyn, Great Hanwood, Great Ness, Greete, Grinshill, Hadnall, Hinstock, Hodnet, Hordley, Ightfield, Kemberton, Kinlet, Kinnerley, Knockin, Little Ness, Llanyblodwel, Llanymynech and Pant, Loppington, Ludford, Meverley, Middleton Scriven, Milson, Montford, Moreton Corbet and Lee Brockburst, Moreton Say, Morville, Myddle and Broughton, Neen Savage, Neen Sollars, Neenton, Norton in Hales, Oswestry Rural,

Petton, Pimhill, Pitchford, Prees, Quatt Malvern, Richard's Castle, Romsley, Rudge, Ruyton-XI-Towns, Ryton, Shawbury, Sheriffhales, Sidbury, St. Martins, Stanton upon Hine Heath, Stockton, Stoke upon Tern, Stottesdon, Sutton Maddock, Sutton upon Tern, Tasley, Tong, Uffington, Upton Cressett, Upton Magna, Welshampton and Lyneal, Wem Rural, West Felton, Westbury, Weston Rhyn, Weston-under-Redcastle, Whitchurch Rural, Whittington, Whixall, Withington, Woore and Worfield.