READING BOROUGH COUNCIL

REPORT BY DIRECTOR OF ENVIRONMENT

TO:	**PLANNING APPLICATIONS COMMITTEE**		
DATE:	**29th June 2016**	**AGENDA ITEM:**	**7**
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**		
SERVICE:	**PLANNING**	**WARDS:**	**ALL**
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1. PURPOSE AND SUMMARY OF REPORT

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 decision on 28 November 2014 to make a 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 Written Ministerial Statement 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 National Planning Practice Guidance. 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 and its implications for this Council.

2. RECOMMENDED ACTION

2.1 That the Committee notes the Judgement of the Court of Appeal and that, consequently, the Council is considering the interpretation of its adopted policies on the provision of affordable housing in the future determination of planning applications where Policy DM6, in particular, is relevant.

3. BACKGROUND AND ISSUES

3.1 On 28th November 2014, Brandon Lewis MP, in a Written Ministerial Statement to Parliament, announced various changes to the government's planning policies. Subsequently, the NPPG was amended on 28 November 2014 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 Written Ministerial Statement 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 case was heard in the High Court over 2 days on 29th and 30th April 2015 by Mr Justice Holgate. The 2 councils 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 local authorities 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 Written Ministerial Statement 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, who is 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 local authorities.

3.8 As a result, the Written Ministerial Statement was reinstated. DCLG has now republished changes to the NPPG that reflect the original changes that were quashed in the High Court.

The Written Ministerial Statement 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 Written Ministerial Statement. 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 Written Ministerial Statement.

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. He 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.

4.8 It is intended that a report will be presented to the Strategic Environment Planning and Transport Committee on 13th July 2016 on the Court of Appeal result which will make a recommendation on how Policy DM6, in particular, will be interpreted in the light of the WMS and other material considerations, having considered the local circumstances.

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 High Court decision referred to in this report will specifically help the Council in 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 fo 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.

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