

## **Committee: Council**

**Date: 13 July 2016**

Wards: All

**Subject: Court of Appeal amendment to small sites affordable housing exemption**

Lead officer: Director of Environment and Regeneration, Chris Lee

Lead member: Councillor Martin Whelton, Cabinet Member for Regeneration, Environment and Housing

Contact officer: Tim Catley. S106/External Funding Officer (Extension: 3449)

### **Recommendations:**

1. That the council notes the recent Court of Appeal decision regarding the Written Ministerial Statement advising councils not to seek affordable housing contributions from small sites of 10 homes / 1,000 square metres or less within planning decisions.

## **1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY**

- 1.1. This report has been brought before Council due to the reintroduction of government policy via the Court of Appeal which seeks to prevent affordable housing contributions being sought from planning applications on small sites (10 homes or less).
- 1.2. That the council notes that government's 2014 statements (advising councils not to seek affordable housing contributions from small sites) may have greater weight than the relevant part of Merton's 2011 Core Planning Strategy policy CS8 (d). In these cases Merton would currently stop seeking affordable housing contributions from small sites of 10 homes / 1,000 square metres or less.
- 1.3. On 4 July 2016 Merton's Cabinet decided to support this recommendation to give greater weighting to the Government's statements advising councils to stop seeking affordable housing contributions from small sites of 10 homes / 1,000 square metres or less within planning decisions.

## **2 DETAILS**

- 2.1. In **July 2011**, policy CS8(d) of Merton's Core Planning Strategy was adopted, requiring developments involving 1-9 new homes to provide contributions to affordable housing via a financial payment. The same policy requires sites of 10 units to provide these contributions via on-site provision of affordable housing units.
- 2.2. On **28 November 2014** the Government introduced a Ministerial Statement and updates to the National Planning Policy Guidance (PPG) providing a policy exemption from affordable housing contributions so that only sites of more than 1,000 square metres of residential floorspace or sites involving

11 or more new homes would have to contribute to affordable housing. Local authorities proceeded to apply this exemption as a matter of course from this date.

- 2.3. In **July 2015** West Berkshire District Council and Reading Borough Council secured a High Court judgement overturning the government’s policy, and authorities responded by reapplying their affordable housing policies for these small sites.
- 2.4. On **10 May 2016** the government was successful in securing the quashing of the aforementioned High Court decision by the Court of Appeal.
- 2.5. Since the Court of Appeal judgement in mid May, local authorities like Merton with small sites affordable housing policies have had to consider their options. Table 1 sets out the approaches/positions of affected London Boroughs.
- 2.6. It should be noted that not all boroughs have a small sites affordable housing policy.

**Table 1 Positions of other London Boroughs with small sites affordable housing policies.**

BOROUGH		COMMENTS
Islington	Applying policy	Applying policy - see below.
Enfield	Not applying policy	Acting on Counsel advice, have stopped applying their policy. Enfield have very similar evidence to Merton
Haringey	Not applying policy	The Planning Inspectorate confirmed to Haringey that their legal view was that the statement is back in force.
Lambeth	Applying policy but considering their position in light of appeal decisions	Lambeth has already seen five appeals against their 1-9 affordable housing policy.
Richmond	Applying policy	Different circumstances to Merton: very low affordable housing delivery from other sources.

- 2.7. LB Islington’s position is as follows:
  - 2.7.1 “The council [Islington] is aware of the recent West Berkshire Court of Appeal decision and the subsequent re-instatement of the PPG guidance on affordable housing contributions from small sites. The council’s [Islington] position is that it has an adopted development plan which has been through the examination process and is based on robust evidence. Whilst the Planning Practice Guidance (and Written Ministerial Statement which also still applies) are capable of being material considerations in the determination of an application, the council’s [Islington] adopted policies still carry significant weight and a small sites contribution is likely to be required.

- 2.7.2 I note that the Court of Appeal judgement was clear that the Written Ministerial Statement (and by association the Planning Practice Guidance) should not be applied in a blanket fashion in the determination of planning applications. For the purposes of s.38(6) of the 2004 Act and s.70(2) of the 1990 Act, the Planning Practice Guidance and Written Ministerial Statement are material considerations and no more; the weight given to the Planning Practice Guidance and Written Ministerial Statement is a matter for the decision taker on a case-by-case basis.
- 2.8. In Merton, officers have taken legal advice (see Section 7) and carefully studied the rationale and justification currently available for continuing to apply Merton's Core Planning Strategy policy CS8(d) on small sites. Officers are also concerned about the potential for costs awarded against the council on planning appeals, particularly given appeal decisions coming forward in other boroughs where the Planning Inspectorate is applying government's policy and not allowing contributions from small sites.

### **3 ALTERNATIVE OPTIONS**

- 3.1. The council could continue applying its affordable housing policies to the relevant sites at the current time. This approach would require additional resources to update the council's evidence base and to support planning appeals. It is also considered that this approach would pose a financial risk to the council in terms of costs awarded in case of appeals against the council's decision to apply its policy as grounds for refusing planning permission.

### **4 CONSULTATION UNDERTAKEN OR PROPOSED**

- 4.1. All London boroughs were contacted via the Association of London Borough Planning Officers and asked (a) whether they have an adopted planning policy collecting affordable housing from small sites and (b) whether they were still proposing to continue applying the policy. Contact was continued with the five boroughs who had an affordable housing small sites contributions policy.

### **5 TIMETABLE**

- 5.1. As specified within the body of this report.

### **6 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS**

- 6.1. Under the government's policy exemption financial contributions for affordable housing on small sites cannot be sought. These contributions form the basis of grants to third party providers of affordable housing to help deliver more affordable housing in the borough.

## **7 LEGAL AND STATUTORY IMPLICATIONS**

- 7.1. Under the Planning and Compulsory Purchase Act 2004 one of the core provisions for the purposes of development control is section 38(6), which provides that “If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan *unless material considerations indicate otherwise* (emphasis added).” Under section 1(2) of the 2004 Act the “development plan” is a local authority’s development plan documents and (in the case of London Boroughs) the London Plan, which must be in conformity with Government policies – section 1(2) of the 2004 Act. The italicised phrase means that conformity with the development plan is not an absolute requirement and in particular needs to read in conjunction with section 70(2) of the Town and Country Planning Act 1990, which enjoins local planning authorities in determining planning applications to “have regard to the provisions of the development plan, so far as material to the application, *and to any other material considerations.*(emphasis added)”
- 7.2. The Secretary of State’s statement and changes to Planning Practice Guidance are arguably not “policy”, in particular in the context of the Planning and Compulsory Purchase Act 2004. In the context of dealing with planning applications for small sites it is likely that a recent Government policy announcement, albeit not enshrined in the NPPF, would be regarded as a material consideration having considerable weight. It may well be that planning inspectors in the light of the recent Court of Appeal decision will normally regard it as overriding inconsistent policies in local authorities development plans.

## **8 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS**

- 8.1. None for the purposes of this report.

## **9 CRIME AND DISORDER IMPLICATIONS**

- 9.1. None for the purposes of this report.

## **10 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS**

- 10.1. None for the purposes of this report.

## **11 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT**

None

## **12 BACKGROUND PAPERS**

- 12.1. Planning Practice Guidance – paras 16, 17, 20 and 31:  
<http://planningguidance.communities.gov.uk/blog/guidance/planning-obligations/planning-obligations-guidance/>

- 12.2. *R (West Berkshire District Council and Reading Borough Council) v. Secretary of State for Communities and Local Government* [2016] EWCA Civ 441.  
[http://www.landmarkchambers.co.uk/userfiles/documents/R%20\(West%20Berkshire\)%20v%20%20SSCLG%20-%20transcript.pdf](http://www.landmarkchambers.co.uk/userfiles/documents/R%20(West%20Berkshire)%20v%20%20SSCLG%20-%20transcript.pdf)

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