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Superseded by Case Law- West Berks DC& Reading BC v SSCLG[2015] EWHC 2222 (Admin)

Changes to government policy (incorporating Nov 14 and Mar 15 changes)

The policy follows last year's consultation on affordable housing and S106 planning obligations, and introduces a threshold under which S106 planning obligations for affordable housing will not be sought.

The threshold is 10 or less, except in designated rural areas where authorities may choose to implement a lower threshold of 5-units or less. The policy change also introduced these same thresholds for tariff style S106 contributions where these are still in use and meet the tests in the Community Infrastructure Levy regulations 2010 (as amended).

This ministerial statement is government policy on this issue, which results in an amendment to the **Planning Practice Guidance** (PPG), Planning Obligations section (paragraphs 12-23). The response to the government consultations can be read here: **Planning Contributions (Section 106 planning obligations): Government response to consultation** (PDF 10 pages).

You can also read a speech by **Brandon Lewis, Minister of State, Department for Communities and Local Government** (PDF 3 pages).

Rt Hon Eric Pickles, in his statement to the House on 25/3/15, clarified that the changes in the Minister's (Brandon Lewis) statement on the 28 November 2015 were a change to national policy and went on to further clarify the **vacant building credit policy**.

Ministerial Statement Frequently Asked Questions

PAS has put these questions and answers together to help local authorities implement the Ministerial Statement and guidance released on the 28 November 2014. Some of these answers reflect the verbal responses of DCLG and PINs representatives to questions relating to these changes at POS and PAS events. These policy and guidance changes are the subject of a judicial review by several councils. They have been updated following RT Hon Eric Pickles statement of the 25 March 2015 and subsequent changes to the PPG.

Please note that this note is PAS's opinion only and DCLG have not endorsed or commented on these answers below.

If you want to comment/improve on any of these answers please contact:
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(If you click on a question below, it will 'jump down' to the answer.)

Status of the November statement and decision making

1. When did the new guidance and ministerial statement come into effect?
2. What weight should the new affordable housing threshold and affordable housing vacant buildings financial credit be given in decision making?
3. As this is just guidance does that mean the authority can ignore it and follow its evidence based recently adopted local plan policy?
4. Could a local authority in some circumstances use either para 14 of the NPPF (as the adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole?) or Paras 54 and 159 of the NPPF (planning housing developments to reflect local needs, particularly for affordable housing) as a reason not to apply this new policy?

Implementing new affordable housing thresholds

5. Does this threshold apply to appealed applications currently with the Planning Inspectorate (PINs) for determination?
6. Does the new policy apply to planning applications that have been to committee and have a resolution to grant subject to a s106 Obligation?
7. In the Ministerial Statement and the PPG is there any reference to restricting on-site provision of affordable housing? The guidance only relates to financial contributions towards off-site provision as there is no reference to on-site provision
8. There is some confusion with reference to this line in the Ministerial statement: '... authorities may choose to implement a lower threshold of 5-units or less, beneath which affordable housing and tariff style contributions should not be sought'..—so it says that LPAs cannot then seek any contributions. This may just be poorly worded in the statement; please can you clarify?
9. The lower threshold of 5 appears to be an option in rural areas (apart from exception sites) but only for rural areas designated under s157 of the 1985 Housing Act. This section of the act only allows for 3 possibilities: AONBs, national parks and areas designated as rural by the Secretary of State under this provision. Councils would like clarity on up to date designations/maps
10. On the point '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' – do both measures need to be met or is it one or the other?

11. If a council wants to 'choose' to adopt the lower rural threshold how should this be implemented?
12. The rural policy refers to 'if the 5-unit threshold is implemented then payment of affordable housing and tariff style contributions on developments of between six to ten units should also be sought as a cash payment only'- how should this be calculated?
13. How does this new Government policy translate to local policy? We have an adopted affordable housing SPD, which hangs from our adopted, but now out-of-date (due to the policy statement), affordable housing policy in the Local Plan. Surely, it should be reasonable for the Council to update its SPD if we're clear why we're doing it, but the grey area lies in the fact that it won't be hanging from an up-to-date policy. Can we hang an SPD from a national policy?

Tariff style Contributions

14. What is a tariff style contribution? Is it a contribution towards say education or flood relief measures that is collected on every unit in an area and will be pooled together to provide the necessary local infrastructure?"

Vacant Building Financial Credit

15. Does the financial credit for vacant building just apply to development of 10 units or less(as it is contained in a ministerial statement entitled 'Small-scale developers')?
16. Does the financial credit only apply to financial contributions and not provision of affordable units. If it also applies to affordable units then how can a financial credit and number of affordable units to be provided be calculated?
17. Does the financial credit for vacant buildings mean that on regeneration sites, where industrial floorspace is being replaced by residential, we can no longer get any affordable housing?
18. Would the vacant building credit apply to vacant agricultural buildings. Given the premise of the vacant building credit seems to be encouraging the bringing back in to use of brownfield/ previously developed land and given that agricultural uses are not classified as previously developed, do you think it would be right to interpret that the vacant building credit should not apply to agricultural buildings
19. The financial credit refers to 'gross' floorspace- how should this be calculated? Is it gross external floorspace, as referred to in most planning application considerations, or gross internal, as referred to in CIL?

20. What is a 'vacant building'? Is it defined by planning unit? Or does the whole of a physical building structure need to be vacant e.g. if a small retail unit is occupied on the ground floor of a mixed a multi-storey retail and office building(with numerous planning units) the 'building' is not vacant (like CIL)
21. What constitutes being 'vacant' and 'abandoned' for the purpose of this paragraph – how long does a building have to be vacant before it potentially benefits from the credit? How long does it have to remain vacant before it is abandoned? How is abandoned defined for the purposes of this policy, is it the same as in the CIL regulations i.e. - contains a part that has been in lawful use for a continuous period of at least six months within the period of three years

Combined threshold and vacant building policy credits

22. Can you require affordable housing from a development of less than 10 units that is more than 1000 sqm on a site where there is vacant buildings that would bring the new floorspace to below 1000sqm?

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1. When did the new guidance and ministerial statement come into effect?

28 November 2014.

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2. What weight should the new affordable housing threshold and affordable housing vacant buildings financial credit be given in decision making?

These measures are national planning policy supplementing the NPPF so are a material consideration that local authorities need to take account of. This applies to planning applications where a decision notice has not yet been issued (e.g. awaiting s106 obligations.) These changes are also explained in more detail in the Planning Policy Guidance (PPG).

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3. As this is just guidance does that mean the authority can ignore it and follow its evidence based recently adopted local plan policy?

This is more than guidance. It is Government policy as it was announced by Brandon Lewis, Housing and Planning Minister in the 'House' on 28th November 2014. This was re-emphasised by RT Hon Eric Pickles in his statement on the 25th March 2015. So it is just like the NPPF and has as much weight as the NPPF. It is a material consideration and it is up to the decision makers how much weight to give the material consideration – that said if it goes to appeal the Planning Inspector would base his decision on the new government policy.

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4. Could a local authority in some circumstances use either para 14 of the NPPF (as the adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole?) or

Paras 54 and 159 of the NPPF (planning housing developments to reflect local needs, particularly for affordable housing) as a reason not to apply this new policy?

A - This is a change to national policy so is a material consideration that local authorities have to have regard to when determining applications. This was re-emphasised by RT Hon Eric Pickles in his statement on the 25th March 2015. The weight given to the policies and material considerations is for the decision maker, and may subsequently have to be defended at appeal.

5. Does this threshold apply to appealed applications currently with the Planning Inspectorate (PINs) for determination?

Yes. It is national policy and PINS will have regard to it when determining appeals from 28 November 2014 (including the small sites threshold).

6. Does the new policy apply to planning applications that have been to committee and have a resolution to grant subject to a s106 Obligation?

It applies to all applications that have not been determined. Applications awaiting s106 being signed will need to be subject to review based on this change to national policy (and potentially re-consultation).

7. In the Ministerial Statement and the PPG is there any reference to restricting on-site provision of affordable housing? The guidance only relates to financial contributions towards off-site provision as there is no reference to on-site provision

The ministerial statement states..'**affordable housing and tariff style contributions should not be sought...**' It does not state cash or financial contributions should not be sought. 'Contributions' is a catch all for both on site provision and financial payments towards off site provision.

8. There is some confusion with reference to this line in the Ministerial statement: '... authorities may choose to implement a lower threshold of 5-units or less, beneath which affordable housing and tariff style contributions should not be sought'..—so it says that LPAs cannot then seek any contributions. This may just be poorly worded in the statement; please can you clarify?

In designated rural areas, including National Parks and AONBs, local authorities can apply a lower threshold where affordable housing and tariff-style contributions should not be sought from sites of 5-units or less.

9. The lower threshold of 5 appears to be an option in rural areas (apart from exception sites) but only for rural areas designated under s157 of the 1985 Housing Act. This section of the act only allows for 3 possibilities: AONBs, national parks and areas designated as rural by the Secretary of State under this provision. Councils would like clarity on up to date designations/maps

DCLG have a list of these **rural designated areas** – in the case of an area designated by map these can be obtained from DCLG.

10. On the point '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' – do both measures need to be met or is it one or the other?

This is to prevent a perverse incentive where developers may choose to bring forward larger housing just under the 10-unit threshold. So either floorspace or unit number applies. i.e. you can have schemes of less than 10 units but if it is above the 1000sqm threshold this affordable housing threshold does not kick in and your relevant affordable housing policy applies.

11. If a council wants to 'choose' to adopt the lower rural threshold how should this be implemented?

There is no guidance or advice from DCLG on how this should be done. It will be up to individual authorities to decide. It is recommended to report the policy change to the relevant portfolio holder and/or committee and then to seek approval for the rural threshold and publicise the change to applicants and the wider public.

12. The rural policy refers to 'if the 5-unit threshold is implemented then payment of affordable housing and tariff style contributions on developments of between six to ten units should also be sought as a cash payment only'- how should this be calculated

The method of calculating the cash payment is not given in the guidance and it will be up to the planning authority to devise a payment methodology.

13. How does this new Government policy translate to local policy? We have an adopted affordable housing SPD, which hangs from our adopted, but now out-of-date (due to the policy statement), affordable housing policy in the Local Plan. Surely, it should be reasonable for the Council to update its SPD if we're clear why we're doing it, but the grey area lies in the fact that it won't be hanging from an up-to-date policy. Can we hang an SPD from a national policy?"

It appears that you cannot hang an SPD from national policy. Therefore, if you created a new supplementary guidance document, it would be contrary to adopted local plan policy and therefore the Regulations.(see Reg. 8(3) below).

The Town and Country Planning (Local Planning) (England) Regulations 2012

Form and content of local plans and supplementary planning documents: general

- 8. (1) A local plan or a supplementary planning document must—**
(a) contain the date on which the document is adopted; and

(b) indicate whether the document is a local plan or a supplementary planning document.

(2) A local plan or a supplementary planning document must contain a reasoned justification of the policies contained in it.

(3) Any policies contained in a supplementary planning document must not conflict with the adopted development plan.

(4) Subject to paragraph (5), the policies contained in a local plan must be consistent with the adopted development plan.

(5) Where a local plan contains a policy that is intended to supersede another policy in the adopted development plan, it must state that fact and identify the superseded policy.

14. What is a tariff style contribution? Is it a contribution towards say education or flood relief measures that is collected on every unit in an area and will be pooled together to provide the necessary local infrastructure?

No, a tariff style obligation is where an authority have pooled funding 'pots' intended to fund the provision of general infrastructure in the wider area. It is not a contribution towards infrastructure that is required by policy to make a development sustainable and to mitigate the impact of the development (meeting the tests in the CIL Regs) and then pooled together to develop the required infrastructure

15. Does the financial credit for vacant building just apply to development of 10 units or less(as it is contained in a ministerial statement entitled 'Small-scale developers')?

No, the financial credit applies to all scales of development

16. Does the financial credit only apply to financial contributions and not provision of affordable units. If it also applies to affordable units then how can a financial credit and number of affordable units to be provided be calculated?

It applies to both the requirement for a financial amount and to the provision of affordable units. This is clarified in the Minister's statement on the 25th March 2015 and the subsequent change to the PPG. The approach to this was clarified in the changes to the PPG on 26th march 2015.

Reference ID: 23b-022-20150326 ' ...This will apply in calculating either the number of affordable housing units to be provided within the development or where an equivalent financial contribution is being provided. ...The existing floorspace of a vacant building should be credited against the floorspace of the new development. For example, where a building with a gross floorspace of 8,000 square metre building is demolished as part of a proposed development with a gross floorspace of 10,000 square metres, any affordable housing contribution should be a fifth of what would normally be sought...'

17. Does the financial credit for vacant buildings mean that on regeneration sites, where industrial floorspace is being replaced by residential, we can no longer get any affordable housing?

Provided the floorspace in the industrial buildings has not been abandoned that amount of vacant floorspace will have to be deducted from the amount of new floorspace, and it will only be the new additional floorspace that will have to provide affordable housing in accordance with your policies. Therefore, if there is no additional floorspace you cannot request any affordable housing.

18. Would the vacant building credit apply to vacant agricultural buildings. Given the premise of the vacant building credit seems to be encouraging the bringing back in to use of brownfield/ previously developed land and given that agricultural uses are not classified as previously developed, do you think it would be right to interpret that the vacant building credit should not apply to agricultural buildings.

No, the distinction is not made between agricultural buildings and others - therefore it is just any vacant building that would be a credit (as long as it is not abandoned).

19. The financial credit refers to 'gross' floorspace- how should this be calculated? Is it gross external floorspace, as referred to in most planning application considerations, or gross internal, as referred to in CIL?

This method of measurement is not specified and is therefore open to the interpretation of the authority. It would seem logical to opt for Gross Internal Area (floorspace -GIA) as this provision is very similar to the CIL provision.

20. What is a 'vacant building'? Is it defined by planning unit? Or does the whole of a physical building structure need to be vacant e.g. if a small retail unit is occupied on the ground floor of a mixed a multi-storey retail and office building(with numerous planning units) the 'building' is not vacant (like CIL)

There is no definition given for this - it could potentially be any of these and local authorities will have to decide on a definition and await case law.

21. What constitutes being 'vacant' and 'abandoned' for the purpose of this paragraph – how long does a building have to be vacant before it potentially benefits from the credit? How long does it have to remain vacant before it is abandoned? How is abandoned defined for the purposes of this policy, is it the same as in the CIL regulations i.e. - contains a part that has been in lawful use for a continuous period of at least six months within the period of three years

It is not the same as the CIL requirement - there is no reference to time period in this affordable housing financial credit policy or the guidance. Further clarification is given in the changes to the PPG indicating that the VBC should not apply to buildings that are vacant because of redevelopment or that are covered by a planning permission or recently expired permission for essentially the same development. The case law on abandonment should be used to assess whether or not the financial credit applies. However, as assessing whether

something is abandoned can take a great deal of research, it would be advisable to have a working definition of abandonment, whilst ensuring that all those involved in assessing whether the policy applies understand that there is a more complex legal position.

22. Can you require affordable housing from a development of less than 10 units that is more than 1000 sqm on a site where there is vacant buildings that would bring the new floorspace to below 1000sqm?

Worked example below:

- A scheme of 9 homes has a combined gross floor area (gfa) of 1100sq m.
- Original building is demolished which had a gfa of 150 sq m.
- The net increase is therefore 950 sq m.
- Can you negotiate an affordable housing contribution?

A – Yes - Firstly, is it a development of more than 1000 sqm? The development scheme has more than 1100 sq m and the policy states ‘... 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...’ Therefore as the development has more than 1000 sqm gross so yes (delete) you can seek affordable housing contributions. The vacant building credit is not directly linked to this policy and the policy does not refer to the ‘net’ developable area (950sqm).

Updated 30 March 2015.