

REPORT TO: Planning Portfolio Holder 11 December 2017
LEAD OFFICER: Stephen Kelly, Joint Director Planning and Economic Development

Affordable Housing Threshold

Purpose

1. The purpose of this report is to advise the Portfolio Holder of a revised approach to the affordable housing threshold following legal advice in light of the Written Ministerial Statement of 28 November 2014 and the comments recently made by the Local Plan Inspector in working correspondence with the Council.
2. This not a key decision.

Recommendations

3. It is recommended that the Portfolio Holder notes the approach that all Developments of 11 dwellings or more, or on sites of less than 11 units if the combined gross internal floorspace of the proposed development exceeds 1,000 sqm will provide affordable housing (in accordance with the WMS¹).

Reasons for Recommendations

4. Since the publication of the WMS in 2014, the Council has sought to demonstrate local circumstances to justify a departure from National Policy and allow a lower affordable housing threshold, both through the submitted Local Plan and in decision making, in part pending the outcome on the Local Plan examination process. The Local Plan Inspectors have now concluded, in written correspondence associated with the preparation of proposed Modifications for consultation, that local circumstances have not been demonstrated and has invited the Council to make modifications to reflect the threshold as set out in the WMS.
5. Legal advice has been sought. The advice received is that, given the Inspector's conclusions, set out in working correspondence, that local circumstances do not justify departure from the WMS, it would no longer be appropriate or reasonable for the Council to continue to rely on adopted development control policy HG/3, which is not consistent with the WMS and therefore, for the purposes of relevant decisions, the policy approach in the WMS should prevail.

Background

6. On 28 November 2014 the Minister of State for Housing and Planning issued a Written Ministerial Statement the effect of which was to introduce a new national threshold, below which affordable housing and tariff style s106 contributions could not be sought. On the same day the Planning Practice Guidance (PPG)² was updated and which now reads³.

¹ House of Commons: Written Statement (HCWS50)

² <https://www.gov.uk/guidance/planning-obligations> Paragraph 11

³ Paragraph: 031 Reference ID: 23b-031-20161116 Revision date: 16 11 2016

7. The circumstances where affordable housing and tariff style s106 contributions should not be sought are;
- *contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1,000 square metres (gross internal area)*
 - *in designated rural areas, local planning authorities may choose to apply a lower threshold of 5-units or less. No affordable housing or tariff-style contributions should then be sought from these developments. In addition, in a rural area where the lower 5-unit or less threshold is applied, affordable housing and tariff style contributions should be sought from developments of between 6 and 10-units in the form of cash payments which are commuted until after completion of units within the development. This applies to rural areas described under section 157(1) of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty*
 - *affordable housing and tariff-style contributions should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home*
8. On 18 February 2015 the Planning Portfolio Holder made an Executive Decision⁴ to accord with the WMS to the extent that officers were directed to issue permissions without a section 106 agreement securing tariff style contributions, for example for public open space, in accordance with government policy. The Portfolio Holder determined that affordable housing should continue to be secured below the new WMS threshold in accordance with the policy HG/3 of the adopted development plan.
9. On 4 March 2015 Planning Committee passed the same resolution in respect of no longer seeking tariff style contributions⁵ but continuing to secure affordable housing below the new WMS threshold in accordance with adopted policies.
10. A Judicial Review resulted in the quashing of the WMS until the Government successfully appealed that Judgement. The Planning Practice Guidance was updated on 19 May 2016 reintroducing the principle of the policy albeit with a small number of changes to the original text.
11. As recognised by the Minister, in the context of plan making, a local planning authority's evidence base and local circumstances may justify a local plan policy with a different or lower threshold than set out in the WMS. As part of the Local Plan examination the Council presented its case for a lower affordable housing threshold at the hearing session Matter SC5 – Delivering High Quality Homes (12 September 2016) and following this up with a letter dated 15 March 2017 setting out the reasons it considered a threshold for the delivery of affordable housing lower than that advised in the WMS was justified in South Cambridgeshire.
12. Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990 requires decisions on planning applications to be made in accordance with the development plan unless material considerations indicate otherwise. Adopted Development Control Policy HG/3 requiring the provision of affordable housing from a lower threshold has therefore been the starting point for decision making on thresholds. The Council has, following the reintroduction of the WMS, contested a number of planning appeals where some (but not all) Planning Inspectors have required the provision of affordable housing below the WMS threshold in accordance with policy

⁴<http://moderngov/documents/d9510/Printed%20decision%20Section%20106%20Obligations%20following%20Ministerial%20Statement%20of%2028%20November%202014.pdf?T=5>

⁵<http://moderngov/documents/s79366/Report%20to%20PC%20on%20Planning%20Obligations.pdf>

HG/3, in spite of giving the WMS considerable weight. This position was able to be adopted due to the weight which could be given to adopted policy HG/3.

13. However, the Local Plan Inspector examining the emerging Local Plan that also included a lower threshold has now advised in working correspondence with the Council that the local circumstances for adopting a Local Plan policy threshold lower than the WMS has not been demonstrated and has invited the Council to amend the wording of the policy in a proposed Modification in order to remove the conflict with the WMS.

14. The Local Plan Inspectors have advised;

The proposed modification SC-MM192 to Policy H/9 of the draft plan would not be consistent with the Written Ministerial Statement, November 2014 (as amended in March 2015) [WMS]. This issue was considered at the hearing on 1 December 2016 in respect of Matter SC5B.

We have considered all of the evidence provided by the Council in support of the proposed modification in terms of viability and local circumstances. We have also given consideration to the judgement by the Court of Appeal in the case of the Secretary of State for DCLG v West Berks Council.

We are also aware of the appeal decisions cited. Whilst those decisions covered similar ground in terms of viability and local circumstances, in those cases, the relevant policies were adopted before the Court of Appeal decision. The Inspectors were therefore able to rely on the provisions of paragraph 196 of the NPPF that the planning system is plan led and the WMS was a material consideration which, on the basis of the evidence in those cases, did not outweigh the relevant adopted plan policy.

Furthermore, an appeal decision relates to a particular site and local circumstances at a given point in time whereas allowing a relaxation from national policy in a local plan has far greater long term implications. We are also mindful of Paragraph 7.33 of Policy H/9 which provides for viability testing for individual sites. However, the purpose of the WMS is not to ensure that small scale developments are rendered viable. Rather, it is to encourage development on smaller brownfield sites and to help diversify the house building sector by providing a boost to small and medium sized developers.

We are therefore inviting the Council to amend the wording of the policy in order to remove the conflict with the WMS.

15. In response to the Inspectors' letter, as part of the ongoing working correspondence, officers have provided proposed modifications to policy H/9 as follows:

1. All developments of 11 dwellings or more, or on development sites of less than 11 units if the total floorspace of the proposed units exceeds 1,000 sqm, will provide affordable housing as follows:

16. The Inspectors have not asked for any further changes to this modification and we therefore anticipate that it will be included in the forthcoming public consultation on proposed modifications, subject to their formal confirmation in due course.

17. Legal advice has been sought and concludes that in light of the Inspectors' written explanation in the recent correspondence it is no longer reasonable to continue to give greater weight to the adopted plan than the WMS. The advice received is that, given the Inspector's conclusions that local circumstances do not justify departure from the WMS, it would no longer be appropriate or reasonable for the Council to

continue to rely on adopted development control policy HG/3, which is not consistent with the WMS and therefore, for the purposes of relevant decisions, the policy approach in the WMS should prevail. Whilst legal advice is that it would not be appropriate to give significant weight to proposed Modifications to the emerging Local Plan in decision making unless and until they are confirmed in the Inspectors' report in due course, the issue here concerns the weight to be attached to HG/3 compared to the WMS in light of the Inspector's conclusions, rather than the weight to be attached to the proposed modifications. Legal advice is that the Inspector's conclusion that local circumstances do not override the WMS in South Cambridgeshire is a decisive factor and, in light of this factor, it would no longer be reasonable for the Council to rely on HG/3 rather than the WMS approach.

18. Under such circumstances officer advice moving forwards will be that the Council should not seek affordable housing on planning applications which fall beneath the WMS threshold. Applications where Planning Committee has already agreed to delegated authority to approve, subject to the completion of a section 106 agreement that secures affordable housing, will have to be reconsidered if the applicant wishes to amend the proposal to a full market scheme.

Considerations

19. Although 11 applications requiring affordable housing beneath the WMS have been approved, since the reintroduction of this policy in May 2016, only 1 of these developments has been implemented.
20. Of the remaining 10, a total of 20 onsite affordable dwellings would be provided (with commuted sum payments in lieu of a further 4 affordable dwellings) and are now at risk of being 'lost' should the owner wish to submit fresh applications.
21. There is only one undetermined planning application approved by planning committee giving rise to an affordable housing commuted sum and which is in the process of being approved with the necessary legal agreement.
22. Were the Council to continue to seek affordable housing beneath the WMS threshold this could only happen for a short time before the adoption of the Local Plan and in all likelihood land owners will either submit new applications or seek to amend any permissions issued after the Local Plan is adopted. In practical terms, the continued application of HG/3 now is therefore unlikely to deliver any affordable housing. Indeed, on the contrary, it would be likely to have the effect of holding up the delivery of smaller housing sites which would contribute to the Council's housing numbers. Moreover, to seek, in light of the Inspector's conclusions, to continue rely on HG/3 rather than the WMS would be unlikely to be upheld at appeal, and the Council would be putting itself at the risk that a S78 Planning Inspector could find the Council to have acted unreasonably in defending an appeal on these grounds.
23. The Council is a self-build vanguard authority and earlier this year concluded its examination into opportunities and barriers for the sector, with action points for SCDC, together with recommendations for government, business and other Vanguard. The Council presented its findings to the All Party Parliamentary Group for Housing and Planning, which had been appointed to investigate the ways in which the country can address the shortfall in its housing supply. Some of the recommendations put forward by the District Council are included in the Housing White Paper 'Fixing our broken housing market' published in February 2017. One barrier to delivering self build housing for the 600 people registered on our custom and self build register is the low affordable housing threshold used by the Council. By increasing the affordable housing threshold to that of

the WMS the Council will be providing a substantial incentive to increasing the delivery of housing under its self build programme.

Options

24. In light of the legal advice received, it is considered that there are no other reasonable options available to the Council.

Implications

25. In the writing of this report, taking into account financial, legal, staffing, risk management, equality and diversity, climate change, community safety and any other key issues, the following implications have been considered: -

Financial

26. None

Legal

27. None

Staffing

28. None

Risk Management

29. None

Equality and Diversity

30. None

Climate Change

31. None

Consultation responses

32. None

Effect on Strategic Aims

Objective B Homes for the future

Secure the delivery of a wide range of housing to meet the needs of existing and future communities

- i. Influence developers to increase the pace of housing and infrastructure construction, including delivery of affordable housing

Background Papers

Where [the Local Authorities \(Executive Arrangements\) \(Meetings and Access to Information\) \(England\) Regulations 2012](#) require documents to be open to inspection by members of the public, they must be available for inspection: -

- (a) at all reasonable hours at the offices of South Cambridgeshire District Council;
- (b) on the Council's website; and

- (c) in the case of documents to be available for inspection pursuant to regulation 15, on payment of a reasonable fee required by the Council by the person seeking to inspect the documents at the offices of South Cambridgeshire District Council.

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