



PINS NOTE 05/2016r3

To: All Inspectors, England

Relevancy: Planning appeals and Secretary of State Casework;
Local Plan examinations, CIL examinations

Date of Issue: 12 May 2016

Currency: review on 12 January 2017

Last updated: 14 September 2016 – Further amendment to paragraph 5 to clarify the approach for Inspectors to take where a development plan was produced prior to the Written Ministerial Statement, and contains a policy that does not reflect its provisions.

Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council (Planning obligations and affordable housing & tariff-style contributions)

Action

1. Inspectors should note that on 11 May 2016, the Court of Appeal issued judgment¹ on the Secretary of State's appeal against a previous High Court judgment of 31 July 2015² upholding a joint application by West Berkshire District Council and Reading Borough Council which challenged:
 - (i) the Secretary of State's [Written Ministerial Statement of 28 November 2014](#) and his subsequent alterations to the Planning Practice Guidance on planning obligations for affordable housing and social infrastructure contributions;

¹ *Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council* C1/2015/2559 [2016] EWCA Civ 441.

² *West Berkshire District Council and Reading Borough Council v Secretary of State for Communities and Local Government* CO/76/2015 [2015] EWHC 2222 (Admin)

(ii) the Secretary of State's decision of 10 February 2015 to maintain those policy changes following an Equality Impact Assessment, after complaint was made by Islington LBC that he had not complied with his Public Sector Equality Duty pursuant to the Equalities Act 2010 at the time of his November 2014 statement.

2. Rather than that judgment quashing the Written Ministerial Statement itself, a declaration Order was issued on 4 August 2015 which confirmed that the policies in the Statement must not be treated as a material consideration in development management and development plan procedures and decisions, or in the exercise of powers and duties under the Planning Acts more generally.
3. The Court of Appeal has now upheld the Secretary of State's appeal on all grounds.
4. As the High Court judgment from which the Order originated has now been overturned, the policies in the Written Ministerial Statement should once again be considered as national planning policy defining the specific circumstances where contributions for affordable housing and tariff style planning obligations should not be sought from small scale and self-build development, including confirmation that those restrictions do not apply to development on Rural Exception Sites, and of those circumstances where the vacant building credit should be offered to developers.
5. Inspectors will need to give due weight to the policies in the Written Ministerial Statement as Government policy, in their determination of appeals or the examination of development plan documents or CIL charging schedules. Inspectors should, where relevant, refer to these policies as Government policy as expressed in the Written Ministerial Statement dated 28 November 2014, to be read alongside the National Planning Policy Framework. In that context, at appeal, where a development plan contains a policy that does not reflect the provisions of the Written Ministerial Statement but where its wording was affected by the High Court judgment, it is not appropriate to describe that policy as out of date or not up to date. Rather, appropriate weight should be attached to the Written Ministerial Statement as a material consideration which, depending on the evidence put to the Inspector, could justify a decision being made other than in accordance with (that policy of) the development plan. Annex A sets out advice for Inspectors conducting development plan examinations and Annex B refers to CIL examinations.
6. Following the judgment, new and updated paragraphs 013-017, 019-023 and 031 have been added to [the Planning Practice Guidance \(PPG\) section on planning obligations](#). These paragraphs reiterate that national planning policy defines the specific circumstances where contributions for affordable housing and tariff style planning obligations should not be sought from small scale and self-build development, that those restrictions do not apply to

development on Rural Exception Sites, and those circumstances where the vacant building credit should be offered to developers.

7. For an interim period, Inspectors may encounter circumstances in which parties have responded to the High Court judgment from 31 July 2015 in their representations (for example, where an LPA has sought to reinstate the requirements of a local plan policy in effect before the Written Ministerial Statement policy seeking a tariff payment, as a result of the High Court judgment)
8. Inspectors must consider whether they need to offer the parties a suitable opportunity to comment on the position in the light of the Court of Appeal's judgment, applying the usual natural justice approach to seeking such further comments. This would include any cases already sent in for reading or despatch but as yet not issued. As an initial step, Inspectors may wish to consider asking the casework team to write to the parties simply inviting comments as to whether the Court of Appeal judgment has any bearing on the appeal before them. Suggested text for this purpose can be found at Annex C.
9. Given that the effect of the Court of Appeal judgment is to reinstate the terms of the Written Ministerial Statement as regards contributions for affordable housing and tariff style planning obligations for small scale and self-build development, it is not anticipated that additional time would need to be allowed for the purposes of submitting planning obligations.

Background

10. Please note that PINS Notes 07/2015 and 28/2015 have been replaced by this PINS Note and are withdrawn. The Inspector Training Manual chapter on Planning Obligations has been updated to reflect the position following the Court of Appeal judgment.
11. Please contact XXXX if you have any queries on this Note, XXXX for queries regarding appeals casework, and XXXX for queries regarding development plans or CIL examinations.

Annex A: Development Plan Examinations

1. Unless it is clear that the judgment has no implication for the plan that is under examination, the Inspector should seek the view of the LPA initially about how it wishes to proceed. The overall guiding principles for fair and efficient examinations should apply and Inspectors should work with LPAs and other parties as necessary to minimise any delay in the progress of an examination.
2. Depending on the stage of the examination, there are a number of ways in which the implications of the judgment may be taken into account while ensuring that natural justice considerations are properly addressed. The scenarios outlined below are not intended to cover every possible situation but set out the factors to consider at different stages of an examination:
3. **If the examination is at an early stage and hearings have not taken place**, the LPA's initial response should indicate whether it wishes to amend the submitted plan or whether no change is considered necessary. A) If the latter, the Inspector should make any amendments required to the matters, issues and questions, review the examination programme as necessary, and follow standard procedures in ensuring that the examination website is up to date and representors are kept informed. B) On the other hand, if the LPA wishes to amend the submitted plan in the light of the judgment, there are a number of factors to consider. The supporting evidence, including sustainability appraisal if deemed necessary, would need to be in place, and it is likely that at some stage in the Examination public consultation would be required on the proposed amendments to the plan. In liaison with the LPA, the Inspector should consider the need for any adjustments to the programme for the examination, and particularly whether it would be appropriate to consider proposed amendments (in advance of a consultation on this and any other changes) in any scheduled hearings or whether further hearings at a later date are likely to be required.
4. **If the hearings have taken place** and it appears to the Inspector that the plan would not be consistent with the Written Ministerial Statement (WMS), comments should be invited from the LPA in the first instance. A) In some circumstances the implications of the re-instatement of the WMS could be such that the Council's response and any supporting evidence that it wishes to bring to bear will need to be subject to consultation, and an additional hearing may be required in due course. B) In other circumstances, e.g. where the Council and the Inspector are content that the required main modification on this matter can be incorporated into the scheduled consultation on the package of main modifications that appear to be necessary for a sound plan, it may be appropriate for the Inspector and the Council to proceed to that stage as quickly as possible. C) As a variant of either A) or B), if the examination is at a very advanced stage and consultation on main modifications has already

taken place, the Inspector should liaise with the Council, taking account of the considerations above, and decide the most appropriate way of taking into account the judgment and its implications for the plan, having due regard to the principles of fairness and efficiency. In all cases, the examination website should be kept up to date about the progress of the examination.

5. If any change is to be made to a plan at an advanced stage, Inspectors will need to be alert to any implications for a further change to the plan in regard to the overall delivery of affordable housing. Figures elsewhere in the plan or report may need adjusting and, more crucially, any argument about a gap between affordable housing need and delivery and the need (or not) for an uplift in market housing to address that gap may need to be reviewed for consistency.

Annex B: CIL Examinations

1. Depending on the stage that the examination has reached, the Inspector may need to refer back to the charging authority (CA) and relevant representors if the judgment might potentially have a bearing on the residential rates. For example, this might be the case if the CA has proposed lower rates or zero rates for smaller residential schemes because they were expected to provide affordable housing or tariff style planning obligations. This is particularly so if the Council has an existing Local Plan which has policies for affordable housing and/or tariff style planning obligations which reflect the position that was established by the High Court judgment and which has now been overturned.
2. It may also be advisable to refer back to the CA and representors if there are specific representations about rate setting for smaller sites or if this has been a significant issue during the examination, even if there is no proposed differential rate by size. In some cases a brief 'open' question may suffice. For example:

Does the re-instatement of the WMS, following on from the judgment in the Court of Appeal in the case of West Berkshire District Council and Reading Borough Council v SSCLG have any implications for the setting of residential rates?

3. If the examination is at an early stage, it may be possible to deal with the implications of the judgment in any initial questions to the CA, in the issues and questions for the examination and if necessary at the hearing. It will of course be important to ensure that there is sufficient time for representors to consider the CA's response and that any need for public consultation on proposed modifications to the charging schedule is addressed.
4. If the examination is at a more advanced stage, and depending on the CA's and representors' responses, it may be appropriate to convene a further hearing session to discuss the matter and carry out public consultation if necessary on proposed modifications to the charging schedule.
5. The above principles apply equally to both local plans and CIL Examinations. In the former, it should be straightforward to assess whether or not there is consistency with the WMS. The implications for CIL exams are potentially more complex, particularly if the CIL is not being examined alongside a local plan containing the relevant affordable housing policy. In such cases, the adopted local plan policy may not be consistent with the WMS. In addition, in the light of higher thresholds set in the WMS, some Councils may wish to consider changing the CIL charge applicable to developments below the threshold. If the Council wishes to pursue this possibility, then there would need to be appropriate viability evidence and that evidence and any change to the proposed charging schedule would

need to be consulted upon as a Council modification and the representations considered by the Examiner.

Annex C

Suggested text of letter for Inspectors to instruct casework team to send seeking comments from parties (where appropriate):

Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council [2016] EWCA Civ 441

I refer to the Court of Appeal's judgment of 11 May 2016, wherein the Secretary of State for Communities and Local Government successfully appealed against the judgment of the High Court of 31 July 2015, on a joint application of the two Councils in seeking to challenge;

(i) the Secretary of State's Written Ministerial Statement of 28 November 2014, and his subsequent alterations to the Planning Practice Guidance on planning obligations for affordable housing and social infrastructure contributions, and

(ii) his decision of 10 February 2015 to maintain those policy changes following an Equality Impact Assessment.

Subsequent to the Court of Appeal's judgment, the policies in the Written Ministerial Statement as to the specific circumstances where contributions for affordable housing and tariff-style planning obligations should not be sought from small scale and self build development, must once again be treated as a material consideration in development management and development plan procedures and decisions, and in the exercise of powers and duties under the Planning Acts more generally. The Planning Practice Guidance section on planning obligations has also been amended with new and updated guidance in this context.

The Inspector appointed to determine this appeal has asked me to write to you to ask whether, in light of these developments, <you wish><your Council wishes> to make any comments as to whether the Court of Appeal's judgment has any bearing on the appeal.

I would be grateful for your written response within 14 days of the date of this letter. A similar letter has been sent to <the appellant><the Council>, and <the appellant><the Council> should be copied into your response.