COMMERCIAL ESTATES GROUP

OUGHTIBRIDGE MILL ESTATE, OUGHTIBRIDGE, SHEFFIELD

IN THE MATTER OF THE APPLICATION FOR VACANT BUILDING CREDIT

ADVICE

1. I am asked to advise whether Vacant Building Credit ("VBC") is available in respect of a development described as "Demolition of existing buildings and structures and erection of residential development (Use Class C3) with means of site access including a new vehicular bridge and a new pedestrian/cycle bridge across the River Don, and associated landscaping and infrastructure works" ("the Development") at Oughtibridge Mill Estate, Oughtibridge, Sheffield ("the Site").

2. In summary, the Council's suggestion that VBC is not available in this case is based on an erroneous assumption that a decision as to the application of VBC should have regard to the policy position (relating to the Written Ministerial Decision ("WMS")) as at the date of the planning application. This was a clear error of law. Central to the underlying purpose of VBC is the implementation of planning permissions, not merely the obtaining of planning permissions. In this case there are no up to date development plan policies which assist in explaining how the Council will apply the national VBC policy, and the Council's Community Infrastructure Levy and Planning Obligations SPD was adopted after the High Court quashing of the WMS and before its reinstatement by the Court of Appeal, so it too is out of date and inconsistent with national policy. There is a clear national policy which should have led to a decision to apply VBC. There are no up to date development plan policies which should have led to any different conclusion. Certainly there are no development plan policies which could trump the national PPG and the WMS.

3. Planning Policy Guidance identifies VBC thus[1]:

"**What is the vacant building credit?**

National policy provides an incentive for brownfield development on sites containing vacant buildings. Where a vacant building is brought back into any lawful use, or is demolished to be replaced by a new building, the developer should be offered a financial credit equivalent to the existing gross floorspace of relevant vacant buildings when the local planning authority calculates any affordable housing contribution which will be sought. Affordable housing contributions may be required for any increase in floorspace.

What is the process for determining the vacant building credit?

Where there is an overall increase in floorspace in the proposed development, the local planning authority should calculate the amount of affordable housing contributions required from the development as set out in their Local Plan. A 'credit' should then be applied which is the equivalent of the gross floorspace of any relevant vacant buildings being brought back into use or demolished as part of the scheme and deducted from the overall affordable housing contribution calculation. 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.

Paragraph: 023 Reference ID: 23b-023-

[1] Paragraph 21 - Reference ID: 23b-021-20160519

Does the vacant building credit apply to any vacant building being brought back into use?

The vacant building credit applies where the building has not been abandoned. (my emphasis)

The policy is intended to incentivise brownfield development, including the reuse or redevelopment of empty and redundant buildings. In considering how the vacant building credit should apply to a particular development, local planning authorities should have regard to the intention of national policy.

In doing so, it may be appropriate for authorities to consider:

- Whether the building has been made vacant for the sole purposes of re-development.
- Whether the building is covered by an extant or recently expired planning permission for the same or substantially the same development."

4. The VBC was introduced via the WMS which was the subject of a legal challenge by West Berkshire DC and Reading BC, and it was quashed on 31st July 2015 (Holgate J) [2015] EWHC 2222 (Admin). The challenge related to the exception from affordable housing policies on small sites. However, the policy on VBC was also removed from the PPG.

5. On 11th May 2016, the Court of Appeal allowed the Secretary of State's appeal [2016] EWCA Civ 441 and the guidance, including the VBC policy, was reinstated.

6. On 6th June 2016, NLP wrote to the Council setting out the implications of reinstatement of the VBC policy in respect of the Development, which was that all existing buildings on site to be demolished would benefit from a "credit" equivalent to the floorspace of the vacant building, which would then be offset against affordable housing contributions. As such there would be no overall increase in floorspace and therefore the Applications would "not be subject to a requirement for, or contribution to, affordable housing in line with ….PPG".

7. On 11th July 2016 the Council's planning officer replied to NLP explaining the reasons why it considered it inappropriate to apply VBC to the Applications.[2] The following reasoning was given for this stance:

7.1. The purpose of VBC is to incentivise the development of brownfield land, including empty and redundant buildings with the policy implying that buildings or land that perhaps have been empty or redundant for many years and have not come forward for redevelopment, possibly for reasons of viability could benefit from VBC. It is also implied that VBC should not apply as a blanket policy in all cases but instead a local planning authority is within its right to use its discretion when to apply VBC. The purpose in applying VBC in officers' view would be to help release empty and redundant land and buildings for redevelopment that had not previously come forward.

7.2. The application was submitted prior to the reinstatement of VBC in PPG. It should be taken from this that the development of Oughtibridge Mill is not one where a VBC would be applicable in this instance since the site had already come forward for re-development without any financial incentive through VBC.

7.3. Sheffield has a significant need for affordable housing, in excess of 700 units per year, which is currently not being met.

7.4. Core Strategy Policy CS40 expects developers of housing developments in all parts of the city to contribute to the provision of affordable housing where it is viable.

7.5. 10% affordable housing has been shown to be viable in Oughtibridge and is the expected contribution in the SPD for this part of the city.

7.6. Although the PPG now states that VBC should apply to brownfield sites such as Oughtibridge Mill, it is clear from the *West Berkshire* Court of Appeal decision that this is a material consideration to be set alongside others, including the development plan, and the weight to be attached to it is a matter for the decision maker.

[2] Email from Marcus Young (SCC) to Suzanne Phillipson (NLP) dated 11 July 2016

7.7. The Planning Act is clear that the application should be determined in accordance with the Development Plan unless material considerations indicate otherwise.

8. On 27th July 2016 Walton & Co responded to the Council's letter of 11th July.

9. As noted above, the application went to planning committee on 30 August 2016 where there was a resolution to grant planning permission. The officer's report noted as follows with respect the issue of the provision of affordable housing and VBC:

"In the Rural Upper Don Valley Affordable Housing Market Area, in which the application site is located, it has been shown that 10% affordable housing is viable on the majority of sites, and is therefore the expected developer contribution in the SPD for this part of the city. At the time of the application being submitted and as outlined in the supporting planning statement at Paragraph 8.10, the applicant has agreed to provide a commuted sum equivalent to 10% on-site provision, which would be secured through S106 legal agreement, an approach supported by the Council's Housing and Neighbourhood Regeneration Team.

Notwithstanding the above, the applicant is now seeking a zero contribution to the delivery of affordable housing in connection with the development following the reinstatement of Vacant Building Credit (VBC) in the Government's Planning Practice Guidance (PPG) in May 2016. Vacant Building Credit was introduced as Government policy via a Written Ministerial Statement (WMS) in November 2014. The policy stated that vacant buildings brought back into use, or demolished for redevelopment, would benefit from a 'credit' equivalent to the floorspace of the vacant building to be offset against affordable housing contributions. Following a successful legal challenge in July 2015 the Government removed all reference to the VBC from the PPG and this remained the case until May this year. However, in May 2016, the Court of Appeal overturned that earlier decision and as a result the Government's policy on VBC was reinstated as lawful policy.

Planning guidance regarding VBC is contained in PPG Paragraphs 021, 022 and 023. The VBC is an important material consideration, which weight must be given in the

determination of the application. The guidance advices that national policy provides an incentive for brownfield development on sites containing vacant buildings. It details that where a vacant building is brought back into any lawful use, or is demolished to be replaced by a new building, the developer should be offered a financial credit equivalent to the existing gross floorspace of relevant vacant buildings when the local planning authority calculates any affordable housing contribution which will be sought. As an example, the guidance details that where a building with a gross floorspace of 8,000 square metres is demolished as part of a proposed development with a gross floorspace of 10,000 square metres, any affordable housing should be a fifth of what would normally be sought.

The guidance advices that VBC would not be applicable to development proposals where the building has been abandoned or in instances where the building has been made vacant for the sole purpose of redevelopment.

The applicant has stated that they consider that the development should benefit from VBC and as a result, given the amount of gross floorspace of the existing buildings that would be demolished as part of the development exceeding the gross floorspace of the proposed new houses, no contribution towards the delivery of affordable housing should be required. In their support they have detailed the guidance set out within the Written Ministerial Statement (WMS) and guidance contained in PPG is an important material consideration to which local planning authorities must have regard. They state that the Oughtibridge Mill site is subject to ongoing management and has not been abandoned with the site's existing buildings substantially vacant for some time for commercial reasons. As evidence of this, they go onto state that the announcement that commercial operations were ceasing at Oughtibridge Mill came in 2014 and before the VBC was originally introduced as Government policy following the WMS on the 28 November 2014. As such, they contend that the site was vacated for commercial reasons, and not for the sole purpose of development.

In terms of whether the buildings have been abandoned, unfortunately the PPG offers no definition on this, and there has been no court cases or guidance that officers are aware of from which a definitive view can be drawn upon. Officers can only ascertain

from recent history of the site that paper production ceased in 2007 and that an announcement that all operations would close and the site sold off in 2014, upon which the applicant purchased the site in October 2015 with the intent of bringing the site forward at the earliest opportunity for a sustainable residential-led development. Officers would take from this that the industrial use had been abandoned at the time of the site being purchased in October 2015 with the buildings vacated in order to bring forward a residential led scheme.

Despite the applicant's position as set out above, officers hold the view that VBC is not applicable in respect of the application. As stated at Paragraph 023 of PPG, the purpose of the VBC is to incentivise the development of brownfield land, including empty and redundant buildings with the policy implying that it is intended for brownfield sites which need an incentive to come forward for development. The evidence shows that is not the case here. The PPG is clear that in considering how the vacant building credit should apply to a particular development, local planning authorities should have regard to the intention of national policy. It is noted that the outline application was submitted with a commitment by the applicant to provide 10% affordable housing (through a commuted sum) in line with Core Strategy Policy CS40 and the SPD. Given that the application was submitted prior to the reinstatement of the VBC in PPG, officers consider that the development of Oughtibridge Mill is not one where a VBC should be applicable since the site had already come forward for re-development without any financial incentive through VBC. It is the view of officers therefore that this application for VBC does not accord with the intention of the Government policy on such and therefore the policy should not apply in this instance. It is clear from the recent Court of Appeal case that vacant building credit should not be applied by default in all cases but instead a local planning authority is able to use its discretion as to when to apply it, and yet whilst it forms a material consideration, which weight must be given in the determination of the application, is one material consideration to be set alongside others including policies in the adopted development plan.

As Members will be aware, Sheffield has a significant need for affordable housing, which is currently not being met. The 2013 Strategic Housing Market Assessment

(SHMA) identified the backlog of existing need and projected arising need from newly forming households over the 2013-2018 period. The assessment then compared this figure with the projected supply from planned new build programmes and through lettings within existing affordable housing stock. The SHMA arrived at a projected annual shortfall of 725 affordable homes. This equates to a 3,625 affordable homes shortfall for that 5 year period. The shortfall figure of 725/year is therefore not the total need, but the number of affordable homes that would need to be delivered solely through the Affordable Housing Planning Policy if the city's Affordable Housing needs are to be met.

In this case, the requirement for VBC to enable the delivery of this brownfield site has not been justified with officers giving greater weight to the delivery of affordable housing pursuant to Core Strategy Policy CS40. The application was submitted before the court of appeal decision was made, and therefore submitted on the basis that a policy compliant AH contribution would be required. For the applicant to now attempt to benefit from VBC in respect of this site, when a commitment of 10% affordable housing (through a commuted sum) has already been given is considered to be at odds with the clear policy intentions of VBC and its reinstatement in Planning Practice Guidance. On the basis that the development of the site would be financially viable without the financial incentive of VBC and the Council's policy position of CS40 in terms of the delivery of affordable where viable, it is considered reasonable that a contribution is made through the imposition of a condition to secure this.
The applicant has submitted a further statement as part of their case in support of their application in response to officers' views on VBC. They state that it is not reasonable to seek to draw conclusions from the timing of the submission of the application, as it is clear that the evidence does not support the position in which officers has adopted in respect of VBC. They go onto to state that the WMS simply said that the proposal 'was to boost development on brownfield land and to provide consistency with exemptions from the CIL'. Neither WMS nor the advice in PPG states that VBC should only be applied when the applicant has demonstrated that the development would be unviable. They consider to attempt to read a viability test into the application of VBC is misguided and amounts to a misinterpretation of policy. In addition, they consider that the SPD is inconsistent with national planning policy

insofar as it does not address VBC and other elements of the PPG. Sheffield's affordable housing needs amounting to over 700 units per year is based upon its 2013 Strategic Housing Market Assessment (SHMA), which the applicant considers is out of date and does not accord with Paragraph 158 of the NPPF. Lastly, they state that of Sheffield's twelve affordable housing market areas, the location of application site within the Rural Upper Don Valley Affordable Housing Market Area is shown in the 2013 SHMA to have one of the lowest annual shortfalls in affordable housing (just two units).

While these comments are noted, officers contend that it is not appropriate to apply VBC in respect of this application for the reasons set out above. In essence there is a fundamental disagreement between the parties on the circumstances when VBC should and should not apply. It is accepted that the Council's SPD does not address VBC however that is because it was adopted at a time when VBC was not national policy. That said, it does not mean that the Government policy should therefore automatically override the Council's SPD. The Council does not accept that its SHMA is out of date and in addition, the applicant has misinterpreted the Council's affordable housing policy in basing its position on the shortfall of affordable housing in the Rural Upper Don Valley Affordable Housing Market Area. The Council's policy is clear that it can be applied citywide, and therefore it is not considered to be relevant if the area where the site is located contains one of the lowest annual shortfalls in affordable housing.

In order to prevent a refusal on grounds of lack of affordable housing provision, and despite the applicant's view that VBC should be applied to the site in its entirety, thus avoiding any provision of affordable housing, they are agreeable for the Council to attach a condition to the permission that secures the provision of affordable housing in accordance with Policy CS40 and SPD. Should the applicant seek to have this condition removed at a later date, this of course would be subject to a separate application or alternatively the applicant could appeal the imposition of the condition directly to the Planning Inspectorate."

Legal Framework

10. It is trite law that planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise: see s.38(6) PCPA 2004 and s.70(2) TCPA 1990. Crucially the relevant time for applying the above statutory test against relevant policy is at the time the decision is taken: see R (ota Kides) v South Cambridgeshire DC [2002] EWCA Civ 1370.

11. In terms of the relevant policy, the WMS is national policy promulgated by the Government. Its purpose is to incentivise the development of brownfield sites by developers. Central to that purpose is the implementation of planning permissions, not merely the obtaining of planning permissions.

12. Turning to the decision in the *West Berkshire* case, it was central to the decision of the Court of Appeal in considering the first of the five grounds of appeal, that the existence of the WMS does not require "blind adherence" to the terms of the policy (judgment para 16). Further, it is clear that the policy will admit of exceptions (Judgment para 17). However, the issue is also one of weight, having regard to the national policy as contained in the PPG, and the development plan policies. There are no up to date development plan policies which assist in explaining how the Council will apply the national VBC policy, and the Council's Community Infrastructure Levy and Planning Obligations SPD was adopted after the High Court quashing of the WMS and before its reinstatement by the Court of Appeal, so it too is out of date and inconsistent with national policy.

13. In this respect it is relevant that the only relevant policy which was extant immediately prior to the quashing of the WMS in the High Court, the Council's Affordable Housing Interim Planning Guidance 2014 Update, noted as follows: "For any vacant buildings brought back into any lawful uses or demolished for re-development, a financial credit equivalent to the existing gross floorspace should be deducted from the calculation of any affordable housing contributions. This does not apply to any buildings which have been abandoned". In my Opinion, this policy was far more relevant to the determination of the planning application in this case than any of the arguments paraded by the planning officer in his report.

14. In short, there is a clear national policy which should have led to a decision to apply VBC. There are no up to date development plan policies which take account of VBC and which

can lead to any different conclusion. Certainly there are no development plan policies which could trump the national PPG. The suggestion in the officer's report to committee that the decision should be determined on the basis of the policy as it existed at the time the planning application was made is a clear error of law. In effect, the Council has made a decision based on a policy environment which was extant at the time the planning application was made, and which has since been quashed as unlawful.

15. The Council's argument that it has a significant affordable housing need amounting to 700 units a year was considered in detail in Walton & Co's letter of 27th July 2016, and convincingly rebutted in section 5 of that letter (see especially paras (a) to (d)) and not least by the fact that Sheffield has 12 housing market areas and the site falls within the Rural Upper Don Valley Affordable Housing Market Area, and the SHMA 2013 confirms that this has one of the lowest annual shortfalls in affordable housing (just two units).

16. The terms of the policy as it now exists are clear and the Applicant is entitled to expect that the terms of the policy should be applied to the application at the date the decision is made. It is of course true that at the time the application was made, the Applicant was required to offer 10% affordable housing. That offer was made because at the time the application was made, the WMS had been quashed. Thus, so the Council argues, the Site had already come forward for development and there was no requirement for any financial incentive to bring it forward.

17. That argument is misconceived. It confuses the obtaining of planning permission, which in this case involved a significant hurdle given the Site's green belt status – and the implementation of the planning permission.

18. In making a decision to implement the permission, the Applicant is entitled to take the benefit, if such exists, of any enhanced or more favourable policy environment at the time the decision is made. In any event, if (contrary to what I have advised) the issue was to be determined by the terms of the planning application as made, then it would be very straightforward for a further application to be made which did not offer anything by way of affordable housing.

19. I have no hesitation in advising that the Council's stance (as outlined in the officer's report) is legally impermissible and unlawful.

Abandonment

20. However, there is a further issue. The officer's report stated as follows:

> "The applicant has stated that they consider that the development should benefit from VBC and as a result, given the amount of gross floorspace of the existing buildings that would be demolished as part of the development exceeding the gross floorspace of the proposed new houses, no contribution towards the delivery of affordable housing should be required. In their support they have detailed the guidance set out within the Written Ministerial Statement (WMS) and guidance contained in PPG is an important material consideration to which local planning authorities must have regard. They state that the Oughtibridge Mill site is subject to ongoing management and has not been abandoned with the site's existing buildings substantially vacant for some time for commercial reasons. As evidence of this, they go onto state that the announcement that commercial operations were ceasing at Oughtibridge Mill came in 2014 and before the VBC was originally introduced as Government policy following the WMS on the 28 November 2014. As such, they contend that the site was vacated for commercial reasons, and not for the sole purpose of development.
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> In terms of whether the buildings have been abandoned, unfortunately the PPG offers no definition on this, and there has been no court cases or guidance that officers are aware of from which a definitive view can be drawn upon. Officers can only ascertain from recent history of the site that paper production ceased in 2007 and that an announcement that all operations would close and the site sold off in 2014, upon which the applicant purchased the site in October 2015 with the intent of bringing the site forward at the earliest opportunity for a sustainable residential-led development. Officers would take from this that the industrial use had been abandoned at the time of the site being purchased in October 2015 with the buildings vacated in order to bring forward a residential led scheme."

21. As to the suggestion that there is no case law on the principle of abandonment, I have come across nothing in the context of the VBC policy itself; but the principle of abandonment is a well known legal concept in the field of planning law. The issue was considered in Hartley

v Minister of Housing and Local Government [1970] 1QB 413. The approach in Hartley was to ask whether the use has "not merely been suspended for a short and determined period but has ceased with no intention to resume it" (per Widgery LJ). Lord Denning MR put it thus: "when a man ceases to use a site for a considerable time, then the proper inference may be that he has abandoned the former use" (my underlining). In that case the premises had been used for car sales and a petrol filling station. The use then ceased with the owner intending not to resume the use, but four years later a new owner resumed the selling of cars. The Court of Appeal upheld the enforcement notice on the basis that the previous car sales use had been abandoned.

22. Usually a considerably greater period than four years is required to establish abandonment. In Castell-y Mynach v Secretary of State for Wales and Taff-Ely Borough Council [1985] JPL 40 four factors were identified as evidencing abandonment:

    (a) "Physical condition of the building;
    (b) The period of non-use;
    (c) Whether there had been any other use; and
    (d) Evidence regarding the owner's intentions."

    An 18 year gap in residential use was considered sufficient in the circumstances of that case to evidence abandonment.

23. The evidence is clear that industrial use (processing and packaging production) continued at the Site until early 2015. The site was then marketed as an "occupier and development opportunity". Within the body of the sales brochure, relating to "Plot 8A, Main Site" it states: "It is believed that the plot has potential for continued business use or alternative uses, including residential and mixed use redevelopment, subject to planning….In the short term, Plot 8A currently has potential to remain in its current industrial use within the main warehouse facility made operational".

24. There is also further evidence that the owners did not intend to abandon the existing industrial use of the Site. There exists a marketing report dated October 2015 from Capita which states:

"In preparing Oughtibridge Mill Estate for sale a comprehensive marketing campaign was undertaken to appeal to developers, investors and occupiers. Given the location of the property and its historic use as a Paper Mill, it was evident the site would appeal to a range of potential buyers including both owner occupiers and developers….

….Enquiries were received from a range of occupiers, developers and investors; however, the majority of interest came from developers. In terms of interest from other industrial users for owner occupation, there was interest from 2 parties including 1) Delphic Capital based in Manchester who were looking to relocate their business and 2) Royal Mail (via agents BNP Paribas) were looking for a short term warehouse for their Christmas peak.

Capita spoke directly with Delphic Capital who, following receipt of further site details, did not arrange a viewing or make further enquiries. Capita engaged in conversation with Royal Mail's agents, however the site was never viewed as they felt it was an unsuitable location….

….Following a comprehensive and transparent marketing campaign, it was clear that there was a lack of interest from owner occupiers and minimal interest from industrial users. The highest level of interest was apparent from developers and some investors."

25. The above is clear evidence that there was no intention to abandon the existing permissions or use of the Site. To the contrary, it is evident that the owners were concerned to ensure that the existing development and use could be occupied in its existing state. What is abundantly clear is that there no compelling evidence that the owners had formed a firm and settled intention to cease the use of the Site for industrial purposes in all circumstances. The fact that the owners were, at the time, unsuccessful in finding an occupier to take the premises for employment purposes is not evidence that the owners had formed a firm and settled intention to abandon the premises for employment purposes.

26. I am firmly of the view that there is no proper basis for concluding that the Site and its use had been abandoned. In light of the evidence, a suggestion to the contrary would be manifestly unreasonable.

27. My conclusions are set out in the Summary section above. Please do not hesitate to contact me if I can assist further.

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5th December 2016