

Our ref: JC

Your ref:

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By email only Steve.McBurney@ceg.co.uk

Dear Steve

Oughtibridge Mill Estate, Oughtibridge, Sheffield
Planning Application Reference 16/01169/OUT (Sheffield City Council (SCC))
and 2016/0350 (Barnsley Metropolitan Borough Council) (“Applications”)
Application of Vacant Building Credit

1. Background

The Applications were submitted in March 2016. It is anticipated that they will be considered at Planning Committee on 30th August 2016. You have asked me to advise further on the application of VBC to the Applications. I have set out my advice below.

2. The Vacant Building Credit (VBC)

PPG¹ explains VBC as follows

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.

¹ Reference ID: 23b-021-20160519, paragraphs 021 to 023

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.

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.

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.*

VBC was originally introduced via a Written Ministerial Statement (WMS) and guidance in the Planning Practice Guidance on 28th November 2014, alongside guidance about affordable housing exceptions for small sites. However the WMS policy was challenged by West Berkshire DC and Reading BC and quashed by the High Court on 31st July 2015.² Whilst the challenge focused nearly exclusively on the exception from affordable housing policies for small sites, VBC was also then removed from PPG. However the High Court's

² West Berkshire District Council Reading Borough Council v Department for Communities And Local Government [2015] EWHC 2222 (Admin) (31 July 2015)

decision was overruled by the Court of Appeal (CA) on 11th May 2016³ and the guidance in PPG was reinstated on 19th May 2016.

3. **Relevant Correspondence**

On 6th June 2016 NLP wrote to SCC setting out the implications of the reinstatement of VBC for the Applications. NLP explained that VBC was applicable to the scheme in its entirety *“such 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.”*

On 11th July 2016 SCC's planning officer replied to NLP explaining the reasons why SCC did not consider it appropriate to apply VBC to the Applications.⁴ The following reasoning was given for this stance:

- (a) 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.
- (b) 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.
- (c) Sheffield has a significant need for affordable housing, in excess of 700 units per year, which is currently not being met.
- (d) 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.
- (e) 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.
- (f) 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.

³ Secretary of State for Communities and Local Government v West Berkshire District Council & Anor [2016] EWCA Civ 441 (11 May 2016)

⁴ Email from Marcus Young (SCC) to Suzanne Phillipson (NLP) dated 11 July 2016

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

4. The Law

The combined effect of section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990 is that planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise. This does not mean that the development plan has absolute authority or must be slavishly adhered to. The matter is one of judgement to be exercised by the decision maker.⁵ The relevant time for assessing whether this duty has been complied with is the time that the decision is taken, not the time at which the application is submitted.

In Tesco Stores Ltd v Dundee City Council (Scotland)⁶ the Supreme Court held that the correct interpretation of development plan policies is a matter for the Court. Policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context. The same is true of national planning policy in the form of the NPPF and PPG. National planning policy is an important material consideration which may in itself justify departing from the development plan, depending upon the particular circumstances of the case.

In *West Berkshire* the CA confirmed at paragraph 20 of the judgment that whilst *"the development plan is under s.38(6) [of the Planning and Compulsory Purchase Act 2004] the starting-point for the decision maker (and in that sense there is a 'presumption' that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations....Secondly, policy may overtake a development plan....Both considerations tend to show that no systematic primacy is to be accorded to the development plan."*

The CA held that whilst *"The language of the WMS is in mandatory terms....Once it is accepted that...the articulation of planning policy in unqualified or absolute terms is not in principle repugnant to the proper operation of s.38(6), this use of language is in our judgment unobjectionable."*⁷ Therefore *"the WMS is not to be faulted on the ground that it does not use language which indicates that it is not to be applied in a blanket fashion, or that its place in the statutory scheme of things is as a material consideration for the purposes of s.38(6) of the 2004 Act and s.70(2) of the 1990 Act and no more. It does not countermand or frustrate the effective operation of those provisions"*.⁸

⁵ City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447

⁶ [2012] UKSC 13 (21 March 2012)

⁷ Paragraph 25

⁸ Paragraph 30

5. Advice

Whilst it is correct that *West Berkshire* has underlined that VBC is a material consideration and that the weight to be attached to it is a matter for the decision maker, the application of VBC must be made upon a correct and objective interpretation of the policy in the PPG, and the WMS which underpins it.

The re-introduction of VBC was not accompanied by any further statement regarding any transitional provision which might have sought to exclude it for applications already 'in the system'. The important date is the date of determination. VBC is as much a material consideration for applications submitted prior to its re-introduction as it is for applications submitted afterwards.

Moreover it is not reasonable for SCC to seek to draw conclusions from the timing of submission of the Applications, relative to the reintroduction of VBC, without any evidential basis for those conclusions. When one then turns to the evidence that *is* relied upon by SCC in the email of 11th July 2016, it is clear that the evidence does not support the position which is being adopted in respect of VBC.

The WMS simply said that the proposal "*was to boost development on brownfield land and provide consistency with exemptions from the Community Infrastructure Levy*". PPG says that 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.

Neither document states that VBC should only be applied where the applicant has demonstrated that the development would be unviable without it. Indeed it would not be that much of an incentive at all if that were the only situation in which it could be applied. SCC's attempt to read a viability test into the application of VBC is therefore misguided and amounts to a misinterpretation of the policy. It would set a dangerous (and unlawful) precedent if SCC adopts the approach of subjecting the application of VBC to viability analysis in every case, which is the logical outcome of the approach it is adopting here.

SCC says it has significant affordable housing need amounting to over 700 units per year. The implication is that this position justifies Core Strategy Policy CS40 being given greater weight than VBC in this case. However:

- (a) policy CS40 was adopted in 2009, pre-dating both the NPPF and PPG. It therefore contains no reference to VBC;
- (b) SCC's Community Infrastructure Levy and Planning Obligations Supplementary Planning Document (SPD) was adopted in December 2015, after the High Court's decision in *West Berkshire* but before that decision

was overturned by the CA. The SPD is now inconsistent with national planning policy insofar as it does not address VBC and the other elements of the PPG which were reinstated in May 2016.

- (c) in fact, the SPD was preceded by the SCC's *"Affordable Housing: Interim Planning Guidance 2014 Update"*. As this predated the High Court decision in *West Berkshire* this document **did** take account of VBC, stating at Guideline 1 (G1) that *"For **any** vacant buildings brought back into any lawful use 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 vacant buildings which have been abandoned."* This shows that SCC was applying VBC prior to the High Court decision in *West Berkshire*. It is also not surprising that this was not qualified by reference to viability given the absence of reference to viability testing in the VBC policy.
- (d) SCC's position now is based upon its 2013 Strategic Housing Market Assessment which is also out of date and does not accord with paragraph 158 of the NPPF;
- (e) in any event Sheffield has twelve affordable housing market areas and the site falls within the Rural Upper Don Valley Affordable Housing Market Area. To the extent that it can be relied upon at all, the 2013 SHMA confirms that this Housing Market Area has one of the lowest annual shortfalls in affordable housing (just two units).

6. Conclusion

SCC is using the timing of the submission of the Applications to avoid applying an incentive which the Government says should be applied to this type of development. VBC is a national planning policy which should be afforded significant weight in the determination of the Applications.

The timing of submission of the Applications is not relevant in this regard but the date of determination is. VBC is not stated to be subject to viability testing and it is a misinterpretation of the policy to state otherwise. Indeed it would be an extremely limited incentive if its only effect were to make unviable developments viable. I have not seen any up to date evidential basis for SCC's claim that affordable housing need in the Rural Upper Don Valley Housing Market Area justifies not applying VBC in this instance.

On that basis VBC should be applied in this particular case and the proposal should benefit from a credit equivalent to the floorspace of the vacant buildings being demolished, to be offset against affordable housing obligations. This means that there will be no residual requirement for an affordable housing contribution, as stated in NLP's letter of 6th June 2016.

Please do not hesitate to contact me if I can assist further.

Yours sincerely



James R Cook

cc Suzanne Phillipson, NLP (by email only)