TRAFFORD COUNCIL

Report to:	**Planning and Development Management Committee**
Date:	**14 July 2016**
Report for:	**Information**
Report of:	**Head of Planning and Development**

Report Title

Affordable Housing Provision: Case Law Update

Summary

This report is to inform the Planning and Development Management Committee of recent case law in respect of affordable housing contributions and the implications for planning decisions and the Council.

Recommendation

That Planning and Development Management Committee note the contents of this report.

Contact person for access to background papers and further information:

Name: Rebecca Coley
Extension: 4788

1.0 Introduction and Background

1.1 On 28 November 2014, Brandon Lewis, the Minister of State for Communities and Local Government announced changes to government policy in respect of planning obligations (S106 agreements or unilateral undertakings) via a Written Ministerial Statement (WMS). This resulted in an amendment to the National Planning Practice Guidance (NPPG) as follows:-

- Contributions for affordable housing and tariff style planning obligations should not be sought from development of **ten units or less** and which have a **maximum combined gross floorspace of no more than 1000sqm**.
- Tariff style contributions are defined as planning obligations contributing to pooled funding pots intended to provide common types of infrastructure.
- Authorities can still seek obligations for site specific infrastructure – such as (for example) improving road access and the provision of adequate street lighting – where this is appropriate, to make a site acceptable in planning terms.

1.2 Two local authorities, Reading Borough Council and West Berkshire District Council, jointly challenged the WMS and the amendments to the NPPG on a number of grounds. The High Court upheld the challenge in July 2015, quashing the amendments to the NPPG and ruling that the WMS must not be treated as a material planning consideration. The government deleted the relevant paragraphs in the NPPG as a result of the judgment.

1.3 The Secretary of State then appealed against the High Court judgment on all grounds. This was heard by the Court of Appeal in March 2016 and in May 2016 the judgment was handed down, quashing the previous decision of the High Court. As a result the WMS was reinstated and the government republished the advice in the NPPG on 19 May 2016. As a result the WMS was reinstated and the NPPG amended to reflect the original changes and they are both once more material considerations in the determination of planning applications.

1.4 This change to government policy was effective from the date of the Court of Appeal judgment. The Council's Core Strategy and associated Supplementary Planning Guidance (SPD), which together comprise the Council's adopted local development plan in this respect, does not comply with the policy and the government have made clear that where a Council's development plan is out of date (i.e. predates the adoption of the National Planning Policy Framework) and does not comply with national policy, then national policy should take precedence. This approach has been supported by Planning Inspectors at appeal.

2.0 Community Infrastructure Levy and Planning Obligations in Trafford

2.1 The Council operates a Community Infrastructure Levy (CIL) in order to secure the necessary infrastructure contributions from new development. In conjunction with this, the Council's SPD1, 'Planning Obligations' sets out the Council's approach to securing S106 contributions from development where it is not possible to use CIL. SPD1 provides clarity for when the use of S106 legal agreements will be appropriate to mitigate the negative impacts of development, as there should be no circumstances where a developer is paying CIL and S106 for the same infrastructure in relation to the same development.

2.2 All previous 'tariff style' planning obligations operated by the Council, for example, financial contributions to the provision of recreational open space are now secured by CIL. The WMS and NPPG amendments do not affect CIL and there is therefore no need to alter the Council's approach to the collection of CIL.

2.3 With the exception of affordable housing, all planning obligations identified in SPD1 are for 'site specific infrastructure' and the WMS and NPPG are clear that these can continue to be secured on all relevant schemes with no lower threshold. The Council's approach to securing these contributions is therefore unaltered.

3.0 Affordable Housing

3.1 The reinstatement of the WMS and NPPG as a material consideration affects the Council's approach to securing affordable housing contributions, specifically in 'hot' and 'moderate' market areas.

3.2 Affordable housing falls outside the scope of CIL and is secured by way of a S106 agreement. The approach to securing affordable housing in Trafford is set out in

SPD1. In 'hot' and 'moderate' market areas affordable housing contributions are required from schemes of 5 dwellings or more. In 'cold' market areas the threshold is schemes of 15 dwellings or more. The change to government policy therefore only affects 'hot' and 'moderate' market areas.

3.3 Paragraph 215 of the National Planning Policy Framework (NPPF) states that:-

'due weight should be given to relevant policies in existing plans [i.e. the Core Strategy in Trafford's case] *according to the degree of consistency with this framework (the closer the policies in the plan to this policies in this Framework, the greater the weight that may be given'.*

It was made clear that the government announcement of 28 November 2014 was the introduction of government policy and it is also clear, given the successful appeal lodged against the original judgment to quash the policy, the government believe that the policy has significant merit and should be applied. The policy has been placed in the NPPG which accompanies the NPPF. It is therefore the government's intention that this policy can and should be given the same weight as the NPPF when making planning decisions. As such, where the Core Strategy is not in accordance with the NPPF it can be given very limited, if any weight and government policy takes precedence.

3.4 It is the role of the Planning Inspectorate to independently apply relevant policy to planning decisions where appeals are made against the decisions of a Council. The Council has already received an appeal decision from the Planning Inspectorate in respect of a six dwelling scheme, where although this matter was not central to the appeal, the Inspector determined that, despite the appellants agreeing a sum of £90,000 for affordable housing contributions, that following the reinstatement of the WMS and related NPPG as a material consideration that *'there is no requirement for the appellant to provide affordable housing (either on site or by way of a financial contribution)'*. [N.B. The Council's request for affordable housing contributions pre-dated the Court of Appeal judgment]. It is clear from recent appeal decisions in this Borough and elsewhere that this is not an isolated case; where local policy is not in accordance with the NPPF then the NPPF is taking precedence as an important material consideration.

3.5 As a result it is proposed that with immediate effect the Council will no longer be seeking affordable housing contributions from schemes of ten dwellings or fewer, which have a combined floorspace of 1000sqm or less. Therefore, there will no longer be a requirement to enter into a S106 for such applications.

3.6 Additionally, those applications with a delegated or committee resolution of 'minded to grant subject to S106' but that have not yet been determined will no longer be required to make affordable housing contributions and if no other S106 contributions are required can be granted planning permission immediately without the need for the developer to enter into a legal agreement. Developers will be advised of the position and given the choice to proceed with the S106 or where the initial resolution to grant planning permission was made by the Committee, bring the application back before Members with a recommendation that their resolution be amended.

3.7 In practice, now and going forward, the change will only affect a small number of applications. Affected applications are those between five and ten dwellings, in the 'hot' and 'moderate' sub-market areas which cover Altrincham, the Rural

Countryside, Sale, Stretford and Urmston. In the majority of these cases developers submit a 'viability appraisal' which seeks to demonstrate that with affordable housing or other contributions, the scheme would not generate sufficient return or value from a development for it to be 'viable' i.e. it would not go ahead with such contributions being paid. This is demonstrated by the fact there are just three live planning applications with a resolution to grant planning permission subject to a s.106 agreement to secure affordable housing contributions which are affected by the change.

3.8 It is accepted that should there be a further upturn in the economy, making development more viable, and leading to more small schemes being viable enough to provide affordable housing contributions that the Council would lose a potential source of income from implementing this change to government policy. It is not possible to establish the precise financial implications, as it is not possible with any certainty to predict either how many schemes would come forward or which of these would be viable, however it could be reasonably substantive. There are also a number of schemes which were granted planning permission subject to affordable housing contributions but which have not yet been implemented during the period when the WMS was quashed by the High Court where the developer could potentially reapply for planning permission to avoid making affordable housing contributions. Again, the precise financial implications of this are impossible to predict with any certainty.

3.9 This impact needs to be offset however against the following risks of continuing to implement the Council's Core Strategy policy in respect of affordable housing contributions:-

- It is clear that this change to government policy outweighs the existing policy in the Core Strategy;
- It is established that where there is a clear steer that government policy outweighs local policy that Planning Inspectors are upholding planning appeals, with awards of costs where Councils are deemed to have acted unreasonably;
- Developers are aware of this change to government policy (some have already contacted the Planning and Development Service seeking an immediate grant of planning permission) and would appeal against non-determination of a planning application if the resolution was to grant subject to a S106 agreement or against a refusal of planning permission if applications were to be refused on the grounds of a lack of contribution to affordable housing;
- At appeal, the Council would be at significant risk of costs awards against it from these decisions as they are clearly contrary to government policy;
- Developers will be unlikely to agree to an extension of time for the determination of a planning application for the completion of a S106 agreement where they do not consider this agreement to be necessary; leading to an adverse impact on the Planning and Development Service's performance and the likely refund of fee income from those applications if not dealt with within the statutory period.

3.10 It is therefore considered that this government policy will need to be implemented with immediate effect if the Council is not to put itself at risk of significant reputational and costs awards against it at appeal or the potential that planning fees would need to be refunded.

4.0 Recommendation

4.1 That the Planning and Development Management Committee note the contents of this report.