



Neutral Citation Number: [2015] EWHC 2222 (Admin)

Case No: CO/76/2015

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/07/2015

**Before:**

**MR JUSTICE HOLGATE**

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**Between:**

**WEST BERKSHIRE DISTRICT COUNCIL**  
**READING BOROUGH COUNCIL**

**Claimants**

**- and -**

**DEPARTMENT FOR COMMUNITIES AND**  
**LOCAL GOVERNMENT**

**Defendant**

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**DAVID FORSDICK QC and ALISTAIR MILLS**  
(instructed by **Legal Service at West Berkshire Council**) for the **Claimants**  
**RICHARD DRABBLE QC and DAVID BLUNDELL**  
(instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing dates: 29<sup>th</sup> and 30<sup>th</sup> April 2015

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**Approved Judgment**

**Mr. Justice Holgate:**

**Introduction**

1. The Claimants, West Berkshire District Council (“West Berkshire”) and Reading Borough Council (“Reading”) seek to challenge two decisions of the Secretary of State:-

- (i) The decision on 28 November 2014 to make alterations to national policy in respect of planning obligations for affordable housing and social infrastructure contributions by way of a \ in the House of Commons (HCWS50);
- (ii) The decision on 10 February 2015 to maintain those policy changes following the completion of an Equalities Impact Assessment (“EqIA”).

The policy changes in the Ministerial Statement were accompanied by amendments to the National Planning Practice Guidance (“NPPG”). No alterations were made to the National Planning Policy Framework (“NPPF”).

2. The Defendant has relied upon witness statements by Ms. Jane Everton, who is the Deputy Director: Planning – Economy and Society Division. Her team has lead responsibility for the NPPF. She is responsible for Government policy on the use of planning obligations under section 106 of the Town and Country Planning Act 1990 (“TCPA 1990”). In paragraphs 54 and 55 of her first witness statement, dated 10 March 2015, Ms. Everton explains that Ministers decided (with my emphasis added) that, proceeding by way of Written Ministerial Statement:-

- (i) Developments of 10 units or 1000 sq m or less (including annexes and extensions) would be *excluded* from affordable housing levies and tariff based contributions;
- (ii) A lower threshold would apply in designated rural areas, National Parks and Areas of Outstanding Natural Beauty (as defined in section 157 of the Housing Act 1985), with developments of 5 units or less to be *excluded* from affordable housing levies and tariff based contributions. Development of between 6 and 10 units would be subject to a commuted sum payable on or after completion;
- (iii) Where a vacant building is brought back into use or demolished for redevelopment, local authorities will provide a “credit”, equivalent to the floorspace of the vacant building, to be set against affordable housing contributions.

3. The Claimants are local planning authorities (“LPAs”) for their respective administrative areas.

4. On 19 February 2015 Patterson J ordered that the Claimants’ applications be considered at a rolled-up hearing which took place before me. I understand that a similar challenge has been brought by Islington London Borough Council, but an application for that to be heard together with the present proceedings was refused. I am therefore unaware of the arguments or evidence to be presented in the Islington case.

**The policy context for the challenge**

5. The NPPF published on 27 March 2012 “sets out the Government’s planning policies for England and how these are expected to be applied.... It provides a framework within which local people and their accountable councils can produce their own distinctive local and neighbourhood plans, which reflect the needs and priorities of their communities” (paragraph 1 and see also the foreword of the Rt. Hon. Greg Clark MP, the then Minister for Planning).
6. Section 19(2)(a) of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) requires that in the preparation of a development plan document, such as a local plan, the LPA must have regard to “national policies and advice contained in guidance issued by the Secretary of State”.
7. In St Albans City and District Council v Hunston Properties [2013] EWCA 1610, [2014] JPL 599 (paragraphs 6, 25 and 26) and Solihull Metropolitan Borough Council v Gallagher Estates [2014] EWCA Civ 1610, [2015] JPL 713 (paragraphs 9 – 10), the Court of Appeal held that, according to the NPPF, local plans must meet objectively assessed housing needs unless “any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole” or “specific policies in this Framework indicate development should be restricted”. The Court described the greater policy emphasis in the NPPF upon the provision of housing to meet objectively assessed needs as a “radical change” from the preceding national policy in PPS3 which had simply required local authorities to prepare strategies which *balanced* all material considerations, including need, demand and other policy matters.
8. Paragraph 17 of the NPPF sets out twelve core land-use planning principles which underpin plan-making and decision-taking. The first principle requires that planning should be “genuinely plan-led, empowering local people to shape their surroundings” by means of (inter alia) local plans which are kept up-to-date. The plan-led principle forms a fundamental part of the statutory scheme (section 70(2) of TCPA 1990 and section 38(6) of PCPA 2004). The third principle requires “every effort” to be made “objectively to identify and then meet the housing, business and other development needs of an area”.
9. Policies for the delivery of housing are contained in paragraphs 47 to 55 of the NPPF. A key objective is “to boost significantly the supply of housing” by using an evidence base to ensure that the local Plan “meets the full, objectively assessed needs for market and affordable housing...”, and by identifying and updating annually a supply of specific deliverable sites sufficient to provide 5 years worth of housing against their housing requirements (paragraph 47). In addition, each LPA has to produce a trajectory for the period covered by their local plan to show how both market and affordable housing will be delivered and the five year supply of land maintained on an ongoing basis (paragraph 47).
10. “Affordable housing” refers to accommodation for “households whose needs are not met by the market” (Glossary in Annex 2 to the NPPF). Such housing may take different forms, but a common feature is that the cost to the occupier is less than the market value of the dwelling.
11. Paragraphs 156 – 157 of the NPPF require each LPA to set out in their local plan strategic policies to deliver the homes and jobs needed for their area and to plan

positively to meet those needs, using the evidence base described in paragraphs 158 to 161.

12. Paragraph 50 also requires LPAs to set policies for meeting affordable housing needs on site, i.e. as a proportion of the total number of dwellings to be built on a site. The aim of this longstanding policy objective is to help create mixed and balanced communities. It is well established that this is a legitimate planning purpose, because land is a finite, or even scarce, resource and it is necessary to ensure that it is made available for housing eligible persons who cannot afford to compete in the general housing market. Indeed, land scarcity relative to the need for housing may well cause the market value of residential land to rise, thereby reinforcing the justification for ensuring that residential development sites make appropriate contributions to the supply of affordable housing. Viewed in this way, a requirement to provide affordable housing to meet needs for such accommodation is a proper application of land use planning powers and not an unauthorised form of taxation (see e.g. R v Tower Hamlets LBC ex parte Barratt Homes Ltd [2000] J.P.L 1050, 1055-7, 1060-1061).
13. On the other hand, the formulation of local plan policies to secure contributions to affordable housing from residential development sites is constrained by economic realism. The provision of affordable housing is only one of the costs incurred in the development of a site in order to satisfy planning requirements. These costs may reach a point where development becomes unviable and therefore the site is unable to contribute towards meeting objectively assessed housing needs, whether general market or affordable housing. This constraint on policy-making is recognised in paragraph 173 of the NPPF:-

“173. Pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking. Plans should be deliverable. Therefore, the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.”
14. Thus, local plan policies which require affordable housing to be provided are subject to viability testing before they are adopted, to avoid impeding the delivery of necessary development by imposing excessive policy burdens. This testing is usually carried out at a generic rather than site-specific level.
15. This approach to “deliverability” is applied in three further respects. First, an authority’s evidence base for the allocation of housing land in a local plan will include its Strategic Housing Land Availability Assessment (“SHLAA”). The SHLAA must make realistic assumptions about (inter alia) “the likely economic viability of land to meet the identified need for housing over the plan period” (paragraph 159).

16. Second, only those sites which can be developed viably may be counted as part of an authority's demonstration of a rolling 5 year supply of housing land (footnote 11 at paragraph 47 of the NPPF).
17. Third, flexibility must be built into requirements set by local plan policies so as to take into account changes in market conditions over time (paragraph 50). Furthermore, the need to ensure that policy requirements do not threaten viability and hence deliverability also applies to the determination of a planning application for an individual site (paragraph 173). This last provision enables a developer to put forward legitimate viability arguments to show that the overall cost of a local authority's planning requirements (including affordable housing) for a particular site needs to be reduced if the site is to be deliverable. Where that is so, then it will be possible for the LPA to consider the relative merits of removing or reducing one requirement rather than another. For example, the authority may consider that in order to help meet requirements for affordable housing whilst at the same time ensuring viability, it would be preferable to reduce some other requirement. That is a matter of planning judgment which a LPA is entitled to exercise.
18. The NPPF contains policy "sanctions" for authorities who fail to take viability properly into account. First, a draft local plan is subject to a statutory process of examination by an independent Inspector under section 20 of PCPA 2004 (see paragraphs 31 – 33 below). The fourth of the four tests in paragraph 182 of the NPPF, to which regard is had when determining the "soundness" of a local plan, is whether it enables "the *delivery* of sustainable development" in accordance with the policies of the NPPF. Thus, draft policies with affordable housing requirements which are found by an Inspector to fail viability testing are liable to be treated as "unsound", and therefore incapable of being adopted, unless amended so as to satisfy that test.
19. The second "sanction" relates to an authority's obligation to demonstrate an ongoing 5 year supply of housing land. If in a planning appeal the Inspector should find that the authority has wrongly included non-viable sites in its assessment of the amount of housing land available, so that the corrected figure falls below 5 years, paragraph 49 of the NPPF requires "policies for the supply of housing" (including development restraint policies affecting the supply of housing land – see South Northamptonshire Council v Secretary of State [2014] EWHC 573 (Admin) para 47) to be treated as out-of-date. The upshot is that the presumption in favour of granting planning permission for sustainable development, contained in paragraph 14 of the NPPF, is engaged and the prospects of obtaining planning permission on appeal may be materially improved.
20. The costs of carrying out a development are likely to be increased by other planning requirements in addition to affordable housing. They fall into two main categories. First, there may be site specific requirements, such as the removal of contamination in the ground or improvements to part of the highway network in the vicinity of the site to accommodate additional traffic generated by the development. Such requirements may be imposed by conditions attached to a planning permission (sections 70(1) and 72 of the TCPA 1990) or by planning obligations (section 106).
21. Second, there may be generic requirements. LPAs may include policies in their local plans which require contributions from separate development sites to provide funding for infrastructure shown to be necessary because of the collective effect of those

developments. Such policies may require contributions to be paid into a pool through individual section 106 obligations and are sometimes referred to as tariff contributions to social infrastructure (“tariff contributions” or “SI contributions”). It is common ground that this term does not include contributions to affordable housing imposed by a section 106 obligation, whether the requirement is to provide affordable housing on the development site itself or elsewhere, or to make a payment in lieu of such provision.

22. It is agreed that the effect of regulation 123(3) of the Community Infrastructure Levy Regulations 2010 (SI 2010 No 948 - “the CIL Regulations 2010”) as amended, is that after 1<sup>st</sup> April 2015 no further contributions can be collected by an authority for the funding or provision of an infrastructure project, or type of infrastructure, once 5 or more such contributions have been obtained by separate section 106 obligations made on or after 6 April 2010 and relating to planning permissions for development in that authority’s area. This restriction applies to infrastructure of a kind which could be the subject of a community infrastructure levy under the code introduced in Part 11 of the Planning Act 2008 (see the definition of “infrastructure” in Regulation 2(1) of CIL Regulations 2010 and section 216(2) of the 2008 Act). The object is to encourage LPAs to introduce charging through the CIL code, instead of imposing requirements for SI contributions through section 106 obligations.

### **The policies challenged in these proceedings**

23. The relevant parts of the Written Ministerial Statement announced that “the Government is making the following changes to national policy with regard to Section 106 planning obligations”:-

“Due to the disproportionate burden of developer contributions on small scale developers, for sites of 10-units or less, and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions.

· For designated rural areas under Section 157 of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty, authorities may choose to implement a lower threshold of 5-units or less, beneath which affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions. Within these designated areas, if the 5-unit threshold is implemented then payment of affordable housing and tariff style contributions on developments of between 6 to 10 units should also be sought as a cash payment only and be commuted until after completion of units within the development.

· These changes in national planning policy will not apply to Rural Exception Sites which, subject to the local area demonstrating sufficient need, remain available to support the delivery of affordable homes for local people. However,

affordable housing and tariff style contributions should not be sought in relation to residential annexes and extensions.

· A financial credit, equivalent to the existing gross floorspace of any vacant buildings brought back into any lawful use or demolished for re-development, should be deducted from the calculation of any affordable housing contributions sought from relevant development schemes. This will not however apply to vacant buildings which have been abandoned.

We will publish revised planning guidance to assist authorities in implementing these changes.”

24. Accordingly, the NPPG was amended on 28 November 2014. It was subsequently revised on 27 February and 26 March 2015. In its current form the relevant passages read as follows:-

**“Are there any circumstances where infrastructure contributions through planning obligations should not be sought from developers?”**

National planning policy defines specific circumstances where contributions for affordable housing and tariff style planning obligations should not be sought from small scale and self-build development, as set out in the Written Ministerial Statement on small-scale developers.

contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1000sqm (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.

Additionally local planning authorities should not seek section 106 affordable housing contributions, including any tariff-based contributions to general infrastructure pots, from developments of Starter Homes. Local planning authorities will still be able to seek other section 106 contributions to mitigate the impact of development to make it acceptable in planning terms, including addressing any necessary infrastructure.”

#### **“What are tariff-style contributions?”**

Some authorities seek planning obligations contributions to pooled funding ‘pots’ intended to provide common types of infrastructure for the wider area.

Planning obligations assist in mitigating the impact of development which benefits local communities and supports the provision of local infrastructure. Planning obligations may only constitute a reason for granting planning permission if they meet the three tests that are set out as statutory tests in the Community Infrastructure Levy Regulations 2010, and as policy tests in the National Planning Policy Framework. These are: that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. For sites where the threshold applies, planning obligations should not be sought to contribute to pooled funding ‘pots’ intended to fund the provision of general infrastructure in the wider area.”

#### **“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.”

### **The statutory framework for local plans**

25. Part 2 of PCPA 2004 sets out the responsibilities of each LPA to prepare local plans and other local planning policy documents.
26. Under the heading “Survey of area”, section 13 requires each LPA to “keep under review the matters which may be expected to affect the development of their area or the planning of its development”, which include the principal physical, economic, social and environmental characteristics of the area, the principal purposes for which land is used, the size, composition and distribution of the population and the effect of



changes on the planning of development in the area. These statutory surveys form an important part of the evidence base for the preparation of development plans.

27. Section 17(3) provides that a LPA's "local development documents must (taken as a whole) set out the authority's policies...relating to the development and use of land in their area". Section 17(6) requires an LPA to keep under review its local development documents having regard to the results of any review carried out under section 13. The effect of section 17(7) and regulations 5 and 6 of the Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012 No 767) is that an LPA's policies for (inter alia) encouraging the development and use of land, the allocation of sites for a particular type of development or use, and development management and site allocation policies intended to guide the determination of planning applications, must be contained in a "local plan". A local plan is treated as being a "development plan document" (Regulation 2(1)).
28. Section 15(1) and (2) requires an LPA to prepare and maintain a "local development scheme" which must (inter alia) specify which of the authority's local development documents are to be development plan documents, the subject matters and areas which they cover, and the timetable for the preparation and revision of such documents. The Secretary of State may direct an LPA to make such amendments to its scheme as he thinks appropriate for ensuring effective coverage of the authority's area by development plan documents (section 17(4)).
29. In preparing a local plan the LPA must have regard not only to national policies but also "the resources likely to be available for implementing the proposals" in the plan (section 19(2)). "Resources" include resources in the private sector. Thus, the viability and deliverability of the proposals are considerations to which the authority should have regard when preparing its policies. The LPA must also carry out an appraisal of the sustainability of its proposals (section 17(5)).
30. A local plan must comply with the requirements for Strategic Environmental Assessment as laid down by the SEA Directive (Directive 2001/42/EC) and the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633).
31. A local plan must be subjected to scrutiny through the process of "examination" by an independent Inspector under section 20. One of the purposes of the examination is to determine whether the draft plan is "sound" (section 20(5)(b)). If the Inspector concludes that the document is "unsound", then it cannot be adopted at all unless the Inspector is asked by the LPA to make "main modifications" to the draft which would render the plan "sound" (section 20(7A) to (7C) and section 23(2A), (3) and (4)) of the PCPA 2004). As a consequence a local plan cannot be adopted and become part of the statutory development plan if it is judged to contain unsound policies.
32. The concept of "soundness" is not defined in the PCPA 2004. However, paragraph 182 of the NPPF supplies four tests for soundness to which regard should be had. The first is that a plan should be "positively prepared", meaning that it "should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements ...". The second test is that the plan should be "justified", that is it "should be the most appropriate strategy, when considered against reasonable alternatives, based on proportionate evidence". Thirdly, a plan should be "effective"

in the sense that it “should be deliverable over its period ...”. The fourth test has been dealt with in paragraph 18 above.

33. The first test for soundness, whether the plan’s strategy seeks to meet objectively assessed development requirements, is consistent with the requirement in paragraph 47 of the NPPF that LPAs “should use their evidence base to ensure that their local plan meets the full, objectively assessed needs for market and affordable housing” (see paragraph 9 above). The first step in preparing local plan policies is for housing needs to be objectively assessed. Then, secondly, other policies, including environmental considerations, may qualify how far the local plan should go in meeting those needs. But the guidance in the NPPF on “soundness” is policy not law. The judgments reached by an examining Inspector and the LPA on “soundness” are only amenable to challenge on public law grounds (Grand Union Investments Ltd v Dacorum Borough Council [2014] EWHC 1894 (Admin)).
34. In addition, the Secretary of State has a broad power to intervene if he considers a local plan, or a policy in a local plan, to be “unsatisfactory”. He may direct the LPA to modify the plan and the authority must comply with any such direction unless they withdraw the plan (sections 21 and 22). Any such modification will then generally be considered in the examination process (section 21(5)).
35. By section 26(1) an LPA may prepare a revision of its local plan at any time. Section 26(2) empowers the Secretary of State to direct the authority to prepare a revision of its plan in accordance with a timetable set by him.
36. Section 27 gives the Secretary of State a very wide default power if he considers that an LPA is failing to do anything necessary in connection with the preparation or adoption of a local plan. Subject to holding an independent examination under section 20, the Secretary of State may prepare or revise a local plan and then finally adopt a local plan.
37. Section 38 of PCPA 2004 identifies the documents which are to be treated as forming the statutory development plan for any area. Section 70(2) of TCPA 1990 provides that in determining a planning application, regard must be had to any relevant provisions of the development plan. Indeed, the decision-maker is mandated by the legislation to take into account adopted local plan policies relevant to the determination of a planning application, whether drawn to his attention or not (In re Findlay [1985] AC 318, 333-4; Bolton MBC v Secretary of State for the Environment (1991) 61 P & CR 343, 351-3; R (St James Homes Ltd) v Secretary of State for the Environment Transport and the Regions [2001] PLCR 27 per Ouseley J at paragraphs 37-40 and 48-50).
38. Section 38(6) of PCPA 2004 requires that determination to “be made in accordance with the plan unless material considerations indicate otherwise”. This provision creates a statutory presumption in favour of the policies contained in an adopted local plan (see Sullivan LJ in R (Cala Homes (South) v Secretary of State for Communities and Local Government [2011] EWCA Civ 639, [2011] JPL 1458 paragraph 6).

### **Affordable housing policies in local plans**

39. The policies in the statutory development plans of the Claimants illustrate how the requirements of the NPPF for the provision of affordable housing have been translated into local policies across the country.
40. Policy CS16 of Reading Borough Council's Core Strategy adopted in January 2008 required that 50% of the housing on developments of 15 or more dwellings should be provided as affordable housing. In the Council's "Sites and Detailed Policies Document" adopted in October 2010, Policy DM6 required that (i) on sites of 10 to 14 dwellings 30% should be affordable housing, (ii) on sites for 5 to 9 dwellings 20%, and (iii) on sites for 1 to 4 dwellings a financial contribution to enable the equivalent of 10% of the scheme to be provided as affordable housing elsewhere in the Borough. The policy expressly allowed developers to justify non-compliance with these requirements on viability grounds.
41. In August 2014 Reading submitted to the Secretary of State for independent examination its alterations to local plan policies dealing with the provision of affordable housing. The document contained amended versions of policies CS16 and DM6. In the light of further viability testing, the revised CS16 reduced the affordable housing requirement on sites for 15 or more dwellings from 50% to 30%. For smaller sites policy DM6 contained the same levels of contribution to affordable housing as set out above.
42. On 17 December 2014, subsequent to the Written Ministerial Statement of 28 November, the Inspector produced a report on his examination of the revised policies. He concluded that they were sound and should be adopted. Indeed, they were adopted on 27 January 2015. The Inspector considered the viability testing undertaken by the LPA and concluded that the targets contained in the policies were viable. In paragraphs 17 to 21 of his report he considered whether the policies were sufficiently flexible. He accepted that in a borough such as Reading, where most development will be on brownfield land, the viability of individual sites will vary widely according to matters such as ground conditions, demolition costs, remediation costs and existing use values, and consequently the targets would not be achievable in some cases. He also accepted that the policies expressly provided for the flexibility needed to deal with such situations, by enabling legitimate viability constraints to be advanced and taken into account. He concluded that the policies were sound because they allowed "wide scope for negotiation" and lower levels of affordable housing (paragraph 21). In reaching that view the Inspector plainly had regard to the requirements of the NPPF. He found that "the Plan complies with national policy" and that the Sustainability Appraisal was satisfactory.
43. West Berkshire District Council adopted its Core Strategy in July 2012. On sites for 15 or more dwellings, policy CS6 seeks "by negotiation" 30% affordable housing provision on previously developed land and 40% on greenfield sites. The distinction reflects the generally higher development costs affecting brownfield sites as compared with greenfield sites. For smaller sites the policy seeks 30% affordable housing provision on sites for 10 to 14 dwellings and 20% on sites for 5 to 9 dwellings. Once again the policy explicitly allows reliance upon viability assessment in individual cases to justify lower levels of affordable housing provision. The policy itself was based upon an "Economic Viability Assessment" (see paragraph 5.30 of the Core

Strategy). In line with national policy, paragraph 5.33 requires affordable housing to be provided as part of the proposed development scheme in order to help create “mixed inclusive communities”. But the policy is flexible by allowing for off-site contributions “where site specific issues inhibit the provision of on-site affordable housing”.

44. In his first witness statement Mr. Arthur Lyttle, the Planning and Transport Policy Manager for West Berkshire District Council, has explained how the affordable housing policies in the Core Strategy were successfully tested by economic viability, sustainability appraisal and equality impact assessments. In paragraph 27 he explains that the object of the economic viability testing was “to maintain the supply of housing sites whilst securing an optimal contribution to affordable housing need provided through market led housing developments”.
45. West Berkshire’s Core Strategy underwent independent examination. The Inspector’s report issued on 3 July 2012 concluded that there was a well-justified need for a substantial scale of affordable housing and the policy was “justified to seek to maximise the provision of affordable housing, subject to not adversely affecting the viability of development and the achievement of other planning objectives” (paragraph 124).
46. When the Secretary of State consulted in the spring of 2014 on his proposed changes to national policy, many LPAs provided information about their own local plan policies on affordable housing requirements. Only 57 out of the 157 local authorities responding indicated that their policies used any thresholds and only 23 used thresholds of 10 or more dwellings (paragraph 10 of Ms. Everton’s first witness statement). The consultation responses give further examples of flexibility in local plan policies to deal with site-specific issues such as viability. That is not surprising. A draft policy which did not allow such flexibility would be unlikely to survive the process of independent examination, because it would fail to comply with the NPPF and satisfy the “soundness” test (see paragraph 18 above). Moreover, if necessary the Secretary of State has had the power to intervene so as to require inappropriately worded local plan policies to be amended.

### **The evolution of the Secretary of State’s policy**

47. The evolution of Government Policy on affordable housing is helpfully summarised in the first witness statement of Ms. Everton.
48. In Planning Policy Guidance Note 3 (PPG3), issued in 1992, set out the general principles. It was supplemented by Circular 06/98 which gave guidance on identifying sites suitable for affordable housing. Ms. Everton goes too far, however, when she suggests (paragraph 5) that the Circular introduced national thresholds. It did not. Instead paragraph 10 stated that “in preparing plan policies for affordable housing and in assessing the suitability of sites to be identified in the plan and any sites that may come forward not allocated in the plan the *following criteria should be taken into account...*” (Emphasis added). Under the heading “site size, suitability and the economics of provision” the Circular advised that because it would be inappropriate to seek affordable housing on some sites, “in practice” the policy should only be applied to sites for 25 or more dwellings or at least 1 ha in size (or in inner London 15 or more dwellings or 0.5 ha in size). The Circular added that it could be

appropriate for LPAs which were subject to exceptional local constraints to justify through the local plan process, and then adopt, a lower threshold than the upper criterion. But the Secretary of State considered that it would be inappropriate to adopt thresholds below the lower criterion, save for small settlements in rural areas.

49. Thus, Circular 06/98 envisaged that the thresholds would be set at a local level through properly justified policies in the development plan. The Circular merely gave criteria to be taken into account by LPAs when setting thresholds in their policies. The circular did not use thresholds to create exemptions from requirements to provide affordable housing or purport to override thresholds in local plan policies.
50. Ms. Everton states that this national policy remained in place until November 2006, at which point Planning Policy Statement 3 (PPS3) was introduced. Paragraph 29 required LPAs to set an overall plan-wide target for affordable housing in their local development documents, taking into account the likely effect upon economic viability for land in their area. Paragraph 29 also gave an “indicative” minimum site size threshold of 15 dwellings but continued by stating that LPAs could set lower minimum thresholds “where viable and practicable”. The policy stated that LPAs would need to undertake an informed assessment of the economic viability of any thresholds proposed, including their likely impact upon overall levels of housing delivery. Thus the approach taken to thresholds in PPS3 was similar to Circular 06/98. The national policy gave guidance by way of an “indicative threshold” as a starting point, but left it to LPAs to justify and set local thresholds.
51. The indicative threshold in PPS3 remained the Government’s policy until March 2012, when the NPPF replaced PPS3. From then on national policy did not identify any thresholds for affordable housing until the Written Ministerial Statement made on 28 November 2014.
52. The Government’s key concern leading to the Ministerial Statement was the decline in the small scale house building industry (see Everton WS 1 paragraphs 14 to 17). It is said that even before the recession which began in 2008, overall construction levels for new housing had fallen significantly below housing need. Historically, a significant proportion of housing needs had been met by small scale house builders. But whereas other parts of the house building industry had recovered from the recession, the small scale sector had not. Instead, it continued to decline and showed no sign of recovery.
53. Under the heading “Developer Contributions Stalling Sites” Ms. Everton has identified materials upon which the proposed national policy was based (paragraphs 18 – 22 of first witness statement). It now appears that the Government was influenced by papers produced by house builders (e.g. “Tackling the Housing Crisis”: Federation of Master Builders – November 2011) which suggested that development costs are greater for small as compared with large house builders and that the Government should review the cumulative costs borne by development, not just from affordable housing requirements, but also CIL and sustainability design standards for new homes.
54. It appears that the Secretary of State also relied upon the Federation of Master Builders 2013 House Builder Survey. Paragraph 18 of Ms. Everton’s first witness statement states that 32% of respondents reported that there were sites in which they would

otherwise be interested, but which were believed to be unviable because of the “likely required developer contributions”. In fact, the document referred to “section 106, CIL or other obligations” and so the concern there expressed was related to planning requirements *overall* rather than just affordable housing requirements.

55. At paragraph 1.226 of the Government’s Autumn Statement (December 2013) it was announced that the Government would “take steps to address delays at every stage of the planning process, incentivise improved performance and reduce costs for developers”. The steps included “consulting on a new 10-unit threshold for section 106 affordable housing contributions”.
56. Ms. Everton summarises the internal processes within the Department and the consultation exercise carried out on policy options (paragraphs 28 to 55 of her first witness statement).
57. Following discussions on “self-build” development (i.e. a single development for own occupation), Ministers had given a “strong steer” that self-build should be *exempt* from affordable housing requirements. In addition, because of representations from the industry that such obligations also impacted on project viability for smaller builders, in April 2013 Ministers requested advice “on how an exemption is best achieved” (Everton WS 1 paragraph 29).
58. In May 2013 officials advised Ministers to use the forthcoming NPPG to establish ground rules for limiting affordable housing contributions from small scale development, particularly through guidance on viability. Officials also recommended that further work be carried out to estimate the impact of an exemption for *all* small developments on affordable housing delivery and then to review the effects of the policy after 12 months and assess whether it needed to be continued (Everton WS 1 para 32).
59. In September 2013 officials advised Ministers that if they wished to go further any changes would need to be made by “new planning policy or primary legislation” (Everton WS 1 paragraph 33). Although central to issues in this case, that particular advice has not been disclosed or even summarised in the Department’s evidence. At that stage officials presented options which included exempting housing below a stated threshold or exempting certain types of development. They recommended that any threshold should be “tightly defined”, i.e. between two and five units.
60. In response to that advice, Minister stated that they wished to proceed with an exemption from affordable housing on sites with less than 10 units (Everton WS 1 Paragraph 34). As the Claimants submit (paragraph 129e of skeleton), the evidence or reasoning upon which a threshold of 10 was selected by Ministers has not been disclosed or explained. Moreover, it appears that Ministers did not accept earlier advice that a relaxation of requirements be linked to additional guidance on viability considerations. Instead, Ministers were opting for an exemption based upon a standard threshold.
61. In November 2013 officials provided advice to Ministers on a consultation exercise based on a threshold of 10 units. The advice included some preliminary information on potential impacts for affordable housing (Everton WS 1 paragraph 34 and exhibit). It was suggested that the exemption would improve viability so as to unlock stalled

sites (by making a non-viable scheme viable) or would improve land values so as to encourage sales of development sites by landowners. However, as the Claimants submit (paragraph 129g of skeleton), according to the evidence supplied for the Defendant, no consideration was given in the analysis to the point that local plan policies (i) had been tested generically for viability so as to deliver the supply of housing land identified to meet development needs and (ii) expressly allow viability issues to be raised in order to reduce or remove affordable housing requirements where appropriate.

62. Following a subsequent request by Ministers, advice was given on the introduction of what became the “vacant building credit”. On 10 December 2013 officials advised against an exemption from affordable housing obligations for the bringing back into use of vacant buildings. Ministers decided, against that advice, to pursue the vacant building credit as part of the consultation (Everton WS 1 paragraph 36). As the Claimants submit (skeleton paragraph 129h) there is no evidence that Ministers or the Department had any information to justify either the need for the credit or its impact. On 24 January 2014 officials highlighted to Ministers “the need to consider further the potential impact on local affordable housing contributions of the vacant building measure” (Everton WS 1 paragraph 37). In this context it is significant that the vacant building credit *applies* to sites larger than the national thresholds (see also paragraph 91 below).
63. In January 2014 Ministers proposed for the first time a further exemption for inclusion in the forthcoming consultation, which would apply the thresholds-based exemption for affordable housing to all section 106 tariff-changes for social infrastructure (Everton WS 1 paras 39). There is no evidence that Ministers or the Department had any information to justify the need for this additional exemption.
64. The Department’s paper “Planning Performance and Planning Contributions” invited responses to the proposals during a consultation period running from 23 March to 4 May 2014. On affordable housing contributions, question 5 proposed a 10-unit and 1000 sq m gross floorspace threshold. It was said that this would help to address “the disproportionate burden being placed on small scale developers... and which prevents the delivery of much needed, small scale housing sites” (paragraph 24). The paper explained that “authorities will have to have regard to national policy that such charges create a disproportionate burden for development falling below a combined 10-unit and maximum of 1000 square metre gross floorspace threshold” (paragraph 25). It is plain from Ms. Everton’s witness statement that this concept of a “disproportionate burden” on small sites formed an intrinsic, if not the central, part of the Defendant’s policy and its rationale, both as proposed and as finally adopted. However, the consultation paper did not explain this “disproportionality” or the material upon which it was based, especially for sites which are viable even if affordable housing requirements are met. Indeed, the proposed policy required “disproportionality” to be assumed when planning applications on small sites are considered. It is also to be noted that the paper proposed thresholds which would confer the same exemptions across all parts of England.
65. Question 6 in the consultation paper proposed to extend the affordable housing “exemption” to tariff-style section 106 contributions in order to achieve consistency with the CIL regime (paragraph 78 of the paper and paragraphs 42 to 43 of Everton WS 1). The context identified in the paper for this proposal was the exemption

recently inserted into the CIL regime for self-build schemes, extensions and annexes (and not small-scale house building generally).

66. Question 7 in the consultation paper proposed a vacant building credit against affordable housing contributions so as to promote consistency with an exemption in the CIL Regulations for the amount of floorspace in an existing building which is brought back into use. The policy was intended to incentivise brownfield development and to reflect the view that the bringing back of an existing building into use would be likely to have less impact on local infrastructure (paragraphs 29 to 31 of the paper and paragraphs 44 to 45 of Everton WS 1).
67. After the consultation ended, officials gave advice to Ministers on 9 June 2014. The advice included a summary of the evidence on local impacts, but has not been disclosed. Instead, paragraphs 48 to 50 of Ms. Everton's first witness statement outline the advice provided as part of the Defendant's response on this aspect of the claim for judicial review. In particular, officials recommended Ministers either to proceed with their preferred option or "in view of the weight of evidence submitted as to impacts on local affordable housing contributions, particularly in rural areas – adopt an option for a lower national threshold (a minimum of 3 units or 300m<sup>2</sup>) combined with deferred payment [of a cash contribution in lieu of the provision of affordable housing on site] for other development below 10 units".
68. In the following months Ministers asked for and received advice comparing the effects across the country if thresholds were to be set at 3, 5 or 10 dwellings. On 30 July 2014 Ministers were informed about the *financial value* of affordable housing contributions which would be "exempted" and given a summary of the pros and cons of the policy options (Everton WS 1 para 52). As to the 10 unit threshold, officials advised that "evidence suggests a significant impact on affordable housing numbers – particularly in rural areas". In favour of a 3 dwelling threshold officials advised that data from the RICS "confirms that developments of 3 units or less have higher build costs" and this option "would deliver a national threshold which would still have a significant impact for the individual self-builder/small scale developer, while reducing the impact on affordable housing contributions and allowing for local variation (but only upwards) through viability assessment".
69. Ultimately on 10 September 2014 Ministers decided that the standard threshold should exclude developments of 10 units or 1000 sq metres or less from both affordable housing requirements and tariff-based contributions for social infrastructure (Everton WS 1 para 54).
70. In paragraph 61 of her first witness statement Ms. Everton refers to the evidence in these proceedings from a range of local authorities dealing with local development viability issues, the testing of LPA viability evidence in the examination of both local plans and CIL charges, and the likely loss of affordable housing locally through the new national thresholds. The response at paragraph 62 is very telling. The Department states that it has no basis upon which to challenge the accuracy of any of the data produced, "but it does not take matters any further". The reason given is that "the driver for the changes introduced to national planning policy by way of the 28 November 2014 decision was *not* that all small scale development was insufficiently viable to provide any contribution to affordable housing." Rather it was:



- a. that the small scale housing industry makes an important national contribution to the provision of new housing;
- b. that the industry has steadily declined (from providing nearly two thirds of new homes registered in 1989 to just over one third in 2010)
- c. that disproportionate, and generally up-front, charges imposed on this sector have contributed significantly to this decline;
- d. that small scale sites with planning permission are stalled because of this; and
- e. that national measures are required to reverse this decline, free up stalled sites and increase land availability to ensure this important sector then contributes effectively to meeting national housing need.”

71. Mr. Drabble QC accepted that points a, b and d set out the Government’s concerns, whereas point c represents the cause of those concerns which the new policy is intended to address. Once again it is important to note that the central focus of this new policy is the same unexplained “disproportionate charges” or “burdens” which lay at the heart of the consultation exercise.
72. The Department published “Planning Contributions (Section 106 Planning Obligations): Government Response to Consultation” (“the Response”) in November 2014. Paragraph 3 referred to the proposal to introduce a national 10-unit threshold for affordable housing contributions in order “to reduce planning costs to developers”. “The Government considers that such charges *can* place a disproportionate burden on small scale developers...and prevent the delivery of much needed, small scale housing sites” (emphasis added).
73. Paragraph 11 of the Response summarised the view of developers and others supporting the new national thresholds. It was said that requirements for substantial affordable housing contributions had caused the stalling of some sites, delays to delivery, or non-viability in some cases.
74. Paragraph 12 of the Response summarised the views of local authorities which represented 48% of the 325 parties responding to the consultation and were generally opposed to both the principle and size of the proposed national thresholds. Some authorities, not restricted to rural areas, argued that a 10 unit threshold would impact disproportionately on their areas as it would apply to a higher proportion of new development proposals and would hamper their ability to provide adequate levels of affordable housing:
- “Many local authorities referred to the differences between land values and development costs both nationally and from site to site; arguing that these considerations should remain part of the locally led approach to plan-making and, where necessary, on a site-by-site basis.”
75. Section 4 of the document gave the “Government response”. Paragraphs 23 and 24 simply announced the changes to national policy as set out in the Ministerial

Statement and the intention to publish revisions to the NPPG. Paragraph 21 explained the introduction of a lower threshold for defined rural areas. Paragraph 22 explained a refinement of the vacant building credit.

76. Paragraph 20 gave the Government's sole response on the principle of introducing a national exemption and the setting of a threshold of 10 units:-

“The Government has carefully considered the wide range of views and evidence submitted in response to the consultation. The Government intends to strike an effective balance between providing the support and incentives which will drive up self-build, small scale and brownfield development *without adversely impacting on local contributions to affordable homes and infrastructure.*” (emphasis added)

77. The text I have emphasised is unexplained and surprising. The evidence before the Court produced by the Defendant is that in June and July 2014 Ministers were advised (i) that in view of the “weight of evidence” submitted, a 10-unit *national* exemption would have a significant impact on affordable housing numbers (21% of affordable housing contributions would become exempt), without allowing for the additional effect of the vacant building credit; and (ii) a national threshold of 3 units (allowing for local variations *upwards* through viability testing) would still have a significant beneficial impact for small-scale developers, whilst reducing the adverse impact on the provision of affordable housing.
78. In the face of that evidence it is impossible to see how Ministers could have reached the conclusion in paragraph 20 of the Response that it would be possible to introduce the 10-unit exemption “without adversely impacting on local contributions to affordable homes and infrastructure”. For example, no evidence has been produced to indicate that the estimates produced by officials were incorrect or replaced by substantially lower figures. Indeed, the explanation in paragraphs 48 to 54 of Ms. Everton's first witness statement leaves no room for doubt in this respect.
79. Moreover, the failure to have identified the basis for and scale of the so-called “disproportionate burden” on small development sites is consistent with the absence of any explanation, either in the Government's Response, or in Ms. Everton's witness statement, as to why a national threshold of 10 units was considered to be justified in order to incentivise small-scale development, given that, according to officials in the Department, the alternative threshold of 3 units would still have provided significant economic advantages for that sector.

### **Concerns about the effects of the national policies challenged in this case**

80. The Court was told that the policy changes introduced on 28 November 2014 have profound consequences for LPAs up and down the country in discharging their responsibilities under the planning system for the provision of affordable housing. Under the land use planning system that responsibility is directed to the *supply of land* for the development of housing, to meet both general market and affordable housing needs.

81. First, the Secretary of State accepts the Claimants' contention that the exemption conferred by the new thresholds will relieve some smaller sites from any obligation to provide affordable housing, although that obligation would not render development of those sites non-viable, resulting in a windfall for landowners or developers (or perhaps both).
82. Second, the effect of the new policy thresholds will be to reduce the amount of affordable housing provided across the country. This can be seen from internal briefing material provided to Ministers. In November 2013 it was estimated that for 2013/14 35% of all affordable housing units would be secured through section 106 obligations related to development sites. In July 2014 Ministers were informed that if a threshold of "10 and below" units were to be introduced, 21% of affordable housing contributions would be exempted (contributions equating to an annual value of £693m based upon figures for 2011-12). If the threshold were to be set at "5 and below", then 15.4% of affordable housing contributions would become exempted.
83. However, those numbers give only a broad picture for England as a whole. The characteristics of the area of each LPA vary quite substantially from one authority to another. In the case of some authorities, like Reading for example, where the urban area is tightly bounded by development constraint policies, little greenfield land is available and most development has to take place on brownfield sites. The area is economically buoyant and land values are high, reflecting the competition between land uses for sites (Roughan witness statement 1, paragraph 1). Around 25% of housing completions each year take place on sites providing 10 or fewer dwellings and the Defendant's new policy would result in the loss of 25 to 30 much-needed affordable homes a year out of the 167 per annum otherwise estimated to be provided, at least 15% of expected affordable housing completions (*ibid* paragraph 22 and see also letter from Reading to the Department dated 26 May 2014).
84. West Berkshire is a more rural area. It is estimated that because of the new national thresholds 23.5% of affordable housing units will be lost when sites for 10 or less dwellings are granted planning permission (Lyttle WS3 paragraph 22).
85. In some areas the proportion of housing provided on smaller sites is very much higher. In its response to the Department's consultation exercise in Spring 2014, Shropshire stated that over 80% of its annual housing delivery takes place on sites of *5 units or less*. Moreover, previous national planning policy has recognised that affordable housing thresholds might need to be lower in inner urban areas, implicitly acknowledging the higher proportion of house completions on smaller sites in those areas.
86. Mr. Forsdick QC, who appeared on behalf of the Claimants, therefore submitted that the third concern is that the new national policy has imposed uniform thresholds which completely disregard the wide variations in the characteristics of different LPA areas, in contrast to the dedicated policies in each authority's local plan which have been justified by an evidence base specific to that area. This concern was raised in the consultation responses of, for example, Shropshire Council and Cornwall Council. The evidence before the Court indicates that a uniform threshold of, for example 10 units, will result in a disproportionately greater reduction in the supply of land for affordable housing in an area which depends very largely on small sites.

87. The policy changes introduced in November 2014 do not address this problem. In rural areas designated under section 157 of the Housing Act 1985, the new national policy allows an LPA to require affordable housing on schemes of 5 units or less. However, by definition, that relaxation of the new national threshold does not apply, for example, to an urban area such as Reading or an inner urban area in a large city. Moreover, the object of section 157 of the 1985 Act is to impose restrictions in certain rural areas on subsequent disposals of a dwelling where the statutory “right to buy” is exercised. No explanation has been presented as to why the definition of rural areas for that purpose was considered to be relevant in the present context, or is appropriate to address the concerns of those LPAs (whether primarily rural or urban in character) which are dependent upon smaller sites for the provision of land for affordable housing.
88. Fourth, there is no dispute on the material before the Court that one particular consequence of the new national thresholds will be a reduction in *the supply of land* hitherto identified by LPAs in order to meet affordable housing needs. Plainly, the new policy could not alter the nature or scale of those needs. Those needs will remain and each LPA will therefore have to consider how the shortfall in the provision of affordable housing in its area should be made up in order to comply with the NPPF (see paragraphs 7 to 11 above). LPAs will face arguments that their local plan policies are out of date because they fail to deliver sufficient land to meet objectively assessed needs for affordable housing and so more land needs to be released. In this way the presumption in paragraph 14 of the NPPF in favour of granting permission may become applicable to unallocated sites, including sites in areas protected against development.
89. Fifth, LPAs are faced with limited options for dealing with shortfalls in the supply of land for affordable housing. It is likely that they would need to revise their local plan policies, even ones which, as in the case of Reading, have only recently been scrutinised by an independent Inspector and adopted. They might try to increase the proportion of affordable housing required to be provided on larger sites, but that is likely to be impractical in an area largely dependant upon small sites for the supply of housing land and, moreover, any such increase would be subject to viability testing. There may also be objections in any statutory examination of a revised policy increasing the proportion of affordable housing on larger sites to what would amount, in effect, to a transfer of affordable housing requirements from smaller to larger sites, albeit that the viability of smaller sites had not been undermined by the previous affordable housing policy (the “windfall” point).
90. The Secretary of State has not disputed the Claimants’ contention in these proceedings that the likely consequence is that LPAs will have to release more housing land on a continuing basis in order to meet an annual shortfall in land for affordable housing. To some extent it may be possible to meet some of the shortfall on brownfield sites. But for those authorities who cannot rely upon that resource to any significant extent, or where brownfield sites are affected by viability constraints, it is likely that more greenfield land will need to be released in various parts of the country (see e.g. paragraphs 20 to 23 of Mr. Lyttle’s WS 3 dealing with the situation in West Berkshire). That in turn will depend upon environmental constraints and further sustainability appraisal.

91. The sixth concern relates to the final part of the changes to national policy (paragraph 23 above), the “vacant building credit”. Where a vacant building is brought back into lawful use or demolished for redevelopment the existing gross floorspace is to be deducted from “relevant development schemes”. It was unclear during oral argument how the vacant building credit interacts with the thresholds for affordable housing. I have concluded that, as a matter of construction, the credit is to be applied *after* the threshold provisions have been applied. The credit only applies to the calculation of affordable housing contributions from “relevant development schemes”. A site in an urban area for less than 11 dwellings is exempted by the national policy from having to provide *any* affordable housing contribution; there is no contribution from which to deduct the vacant building credit. Thus, exempt schemes are not “relevant development schemes”. I also note that the vacant building credit operates as a deduction from gross floorspace. By contrast, the threshold for excluding small sites is defined in two alternative ways, not solely by reference to gross floorspace but also the number of units.
92. The vacant building credit will itself cause additional shortfalls in the supply of housing land for affordable housing. An urban authority such as Reading is largely dependant upon previously developed land for nearly all its new development. Its local plan policies have been adopted on the basis that affordable housing will be provided on land in general, including previously developed land, subject to any viability considerations raised. The credit will reduce the amount of affordable housing which Reading will be able to secure from sites not excluded under the smaller sites exemption (paragraph 40 of Roughan WS 1).
93. The seventh concern relates to the Community Infrastructure Levy (“CIL”). This is one of the costs generally borne by development sites in the increasing number of authorities which have adopted a charging schedule for their area. As Mr. Roughan explained (paragraph 28 of his first witness statement dated 27 January 2015), the setting of the charges in the LPA’s charging schedule which forms the basis of the levy in that authority’s area depends upon the viability of different types of development. The charges are set upon the assumption that residential development bears the cost of providing a level of affordable housing compliant with the policies in the LPA’s local plans (see e.g. paragraph 11 of the Inspector’s Report dated 17 December 2014 on the examination of the CIL charging schedule for Reading). Likewise the viability analysis for CIL charges for housing development has been carried out on the same assumption. The upshot is that CIL charges for smaller housing sites have been set at lower rates than would have been the case if the national exemptions from affordable housing requirements had been taken into account. Accordingly, compliance with the new national thresholds is likely to result in LPAs revising their CIL charges upwards to take account of this reduction in development costs. Cornwall Council made essentially the same points in its response to the Government’s consultation exercise in spring 2014 and Mr. Lyttle (for West Berkshire) does likewise in paragraph 39 of his third witness statement.
94. These points have not been disputed by the Defendant. The CIL legislation does not contain an exemption from CIL charges for smaller housing schemes, other than self-build, and so the intended benefit for smaller developers may well be greatly reduced or even marginal. So far as LPAs are concerned the effect is likely to be a redirection of contributions currently used for affordable housing towards community

infrastructure without any opportunity to consider whether that is a sensible prioritisation of the way in which development contributions are applied. Points of this nature were made in the consultation response of Cornwall Council.

95. The eighth concern is closely linked to the previous one. It is said that the exemption solely in respect of affordable housing and social infrastructure costs is arbitrary, because they represent only some of the costs of complying with planning requirements which development sites are expected to bear. Other costs include access, landscaping and design requirements. Even where viability is in issue, an exemption in relation to just two items of expenditure (affordable housing and social infrastructure), precludes a planning authority from considering the *relative merits* of *all* of the requirements it seeks to impose, so that costs are only reduced once the local authority has had an opportunity to *prioritise* those requirements.
96. The ninth concern is that the new national thresholds were introduced on 28 November 2014 with immediate effect. No transitional provisions were included so as to allow LPAs a period within which to revise their local plan policies in so far as that might be appropriate. That is to be contrasted with, for example, the transitional arrangements allowed by paragraphs 211 to 215 of the NPPF which gave LPAs a one year period within which to revise their policies in the light of the new national framework.
97. The tenth concern follows on from the previous one and is even more fundamental. Both the Ministerial Statement and the consequential amendments to the NPPG are silent as to the effect of the new national policy on existing affordable housing policies in local plans and the responsibility of LPAs to formulate such policies in the future. It is most surprising that, in a plan led system, the Secretary of State's new policy failed to deal with these matters, especially in view of the continuing responsibility placed by the NPPF upon LPAs to promote local plan policies which meet objectively assessed needs for affordable housing.

**Statement on behalf of the Secretary of State during the hearing**

98. As I have explained above, it is apparent from the papers before the Court that the intention of Ministers was to create a blanket exception or exclusion for small sites in respect of affordable housing and social infrastructure requirements. In addition, Mr. Forsdick QC submitted that, as a matter of construction, the new national policy effectively negates or “trumps” local plan policies which do not accord with these new national policies. That submission underlies several of the grounds of challenge.
99. On the second day of the hearing Mr. Drabble QC, on instructions, made a statement on behalf of the Secretary of State seeking to explain the effect of the new national policy. This was not foreshadowed in any material previously emanating from the Department, including the witness statements served on behalf of the Secretary of State. It came very late in the day indeed. I should add that any such explanation must be subject in any event to the proper construction of that policy as a prior question. Mr. Drabble QC stated that:-
  - (i) As a matter of law the new national policy is only one of the matters which has to be considered under section 70(2) of TCPA 1990 and section 38(6) of PCPA 2004 when determining planning applications or formulating local plan

policies (section 19(2) of PCPA 2004), albeit it is a matter to which the Secretary of State considers “very considerable weight should be attached”;

- (ii) Ministers did not pursue the option of using primary legislation to create the exemptions (See Ms. Everton Witness Statement 1, paragraph 33). Instead the changes were introduced as policy, not binding law;
- (iii) In the determination of planning applications the effect of the new national policy is that although it would *normally* be inappropriate to require any affordable housing or social infrastructure contributions on sites below the thresholds stated, local circumstances may justify lower (or no) thresholds as an exception to the national policy. It would then be a matter for the decision-maker to decide how much weight to give to lower thresholds justified by local circumstances as compared with the new national policy;
- (iv) Likewise if in future an LPA submits for examination local plan policies with thresholds below those in the national policy, the Inspector will consider whether the LPA’s evidence base and local circumstances justify the LPA’s proposed thresholds. If he concludes that they do and the local plan policy is adopted, then more weight will be given to it than to the new national policy in subsequent decisions on planning applications.

100. There are three matters concerning the statement on behalf of the Secretary of State which are quite striking. The first and essential matter for the Court to consider is the proper construction of the policy as promulgated, which for the purposes of this case did not differ substantially from the policy consulted upon. The Department’s consultation paper in spring 2014, the Government’s response document and the final policy all make it plain that the new national policy purports to create exemptions from the requirements of local plan policies inconsistent therewith. The Department’s evidence as to the exchanges between officials and Ministers and the nature of the policies which the latter wished to introduce is consistent with the construction I place upon the promulgated policy. The policy simply refers to a blanket threshold of 10 units or 1,000 sq m gross floor area for the whole of the country, subject only to an explicit relaxation for rural areas falling within a certain definition. It is not expressed to be subject to adopted development plan policies. The policy does not contain any language to indicate that it operates in the manner suggested much later in the Secretary of State’s statement through Leading Counsel in response to the legal challenge, indeed at the hearing itself.

101. Second, if, as has been stated by the Defendant, an LPA is able to adopt a *new* local plan policy which departs from the national guidance and attracts greater weight than that guidance, there is no logical reason for treating an *existing* local plan policy any differently where the *justification* for that policy remains sufficiently up to date and is entitled to greater weight than the new national threshold. However, even the statement made in Court on behalf of the Secretary of State treats the provisions of the new national policy as *the norm* in every case rather than adopted policies of an existing local development plan (see paragraph 99(iii) above), notwithstanding the legal presumption created by section 38(6). This situation results from a national policy which has been devised so as to confer immediate and general exemptions from affordable housing requirements under adopted development plan policies, as

contrasted with a national policy which gives indicative thresholds as guidance for the formulation of local policies.

102. Third, the balancing or weighing exercise envisaged by the Defendant's statement depends upon LPAs being given access to the evidence upon which the Secretary of State has reached the conclusion embedded in the Written Ministerial Statement, namely that the contributions required by local plan policies involve "disproportionate burdens" for small scale developers. That is an important aspect of the challenge under ground 3.
103. According to evidence before the Court, the understanding that the new national policy confers on small sites general exemptions from affordable housing and social infrastructure contributions is shared by some Inspectors issuing appeal decisions. For example in a decision letter dated 5 January 2015 (on a site in Buckles Way, Banstead, Surrey) the Inspector acknowledged that the LPA needed to *increase* the supply of affordable housing in its area and that its Core Strategy had only recently been adopted. But he took the view that the *local* affordable housing policy was no longer consistent with *national* policy as set out in the NPPG, and that primacy should be given to the latter because of the Government's introduction of a threshold of 11 dwellings or more, in order to bring forward small scale developments "by reducing a financial burden upon them". The Inspector added that given the content of the NPPG, "there is no longer a policy imperative for an affordable housing contribution to be made" (paragraphs 14 to 16).
104. The effect of the new national policy in that case was bizarre, because the developer was willing to develop the site *with* a section 106 obligation compliant with the LPA's affordable housing policy. In other words, compliance with that up to date and properly justified requirement was not impeding the bringing forward of the site. The Claimants say that that is one of the consequences of the blanket exemption conferred on small sites.

### **Summary of the Grounds of Challenge**

105. The Claimants do not pursue Ground 4, which alleged a breach of Directive 2001/42/E2, the Strategic Environmental Assessment Directive.
106. I will consider first the challenges to the policy on affordable housing requirements before dealing with social infrastructure contributions and the vacant building credit.
107. In summary, the grounds now pursued in relation to the national thresholds for affordable housing contributions are as follows:-
  1. The Secretary of State failed to take into account material considerations;
  2. The national policy is inconsistent with the statutory scheme and its purposes;
  3. The consultation process carried out by the Secretary of State was unfair;
  4. In deciding to adopt the new national policy the Secretary of State failed to comply with the public sector equality duty in section 149 of the Equality Act 2010; and



5. The decision to introduce the new national exemptions from affordable housing requirements was irrational.

I will address the grounds in the following order: 2, 3, 1, 4 and 5. Some of the Claimant's submissions were wide-ranging, but I will only deal with points need to be addressed in order to determine whether any of the grounds of challenge are made out.

## **Ground 2 – Inconsistency with the Statutory Scheme**

108. Mr. Drabble QC rightly submits that the Secretary of State sits at the apex of the planning system in England and Wales and as such he is entitled to set *national* policy relevant to the determination of planning matters.
109. As Lord Slynn stated in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 (para 48) it is for Parliament and Ministers to determine the objectives of planning policy and to set out those objectives in legislation, ministerial directions and in planning policy guidelines. Decision-makers, whether local authorities, Inspectors or the Secretary of State, are all required to have regard to policy when taking particular planning decisions.
110. In summary, Lord Clyde held at paragraphs 139 and 140:-
  - (i) The planning functions of the Secretary of State are “administrative” in the sense that they are dealing with policy and expediency rather than with the regulation of rights;
  - (ii) Planning is a matter of formulation and application of policy. Policy is a matter for the Executive and not the courts. Decisions in the planning process are made by members of the administration, not the Courts;
  - (iii) Planning and the development of land are matters which concern the community as a whole, not simply the locality where a particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to central supervision. The central planning authority secures *some degree of coherence and consistency* in the development of land. National planning guidance is promulgated so as to “*influence* the local development plans and policies which the planning authorities will use in resolving their own local problems” (emphasis added);
  - (iv) “At the heart of that system are development plans. The guidance [i.e. national guidance] sets out the objectives and policies comprised in the framework within which the local authorities are required to draw up their development plans and in accordance with which their planning decisions should be made”;
  - (v) In accordance with the democratic principle, it follows that responsibility for a national planning policy under central supervision should lie with a minister answerable to Parliament;
  - (vi) The whole scheme of the planning legislation involves an allocation of various functions respectively between local authorities and the Secretary of State.

In Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 the Supreme Court held (paragraphs 19-20) that it is the function of the courts to interpret planning policy, but the exercise of judgment in the application of a policy is a matter for the decision-maker, the planning authority. That statement is, of course, entirely consistent with principle (ii) above.

111. In the light of the Alconbury decision, it is common ground that a challenge to the merits of a policy formulated by the Secretary of State is not a matter for judicial review.
112. Mr. Drabble QC submitted that in formulating and adopting a national policy, the Secretary of State exercises common law rather than statutory powers (referring to Lindblom J in Cala Homes (South) Ltd v Secretary of State for Communities and Local Government [2011] J.P.L 887 paragraph 50).
113. He then relied upon the distinction between a purely common law power and the exercise of a statutory discretion accepted by the Supreme Court in R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] 1 WLR 2697, in particular the judgment of Lord Sumption JSC at paragraph 83. However, the issue in that case was whether the rule against the adoption of a blanket policy fettering the exercise of a discretion (British Oxygen Co. Ltd v Board of Trade [1971] AC 610), applies also to a Minister's use of a purely common law power. The Supreme Court held that it does not (see paragraph 62), but went on to add that the exercise of a prerogative power would be reviewable by the Courts on the grounds of irrationality or breach of other judicial review principles (paragraph 65).
114. However, the Claimants' complaint in the present case does not depend upon the British Oxygen principle. The Claimants do not argue that the Secretary of State has adopted a blanket policy which simply fetters his own discretion. Instead, the challenge relates to the interaction between the Secretary of State's policy for exempting small sites from affordable housing contributions and the statutory code for the adoption of local planning policies and the determination of planning applications.
115. In this case, the prerogative power to make policy upon which the Secretary of State has relied is not a freestanding power. Instead, the Defendant has exercised a common law power to promulgate a policy within the statutory framework for the planning and control of the use of land. Indeed, a major purpose of the Secretary of State's policy is to lay down exclusions from affordable housing requirements for the determination of planning applications on smaller residential sites under the TCPA 1990 (see section 70(2)). Those applications may be determined by LPAs, planning Inspectors acting on behalf of the Secretary of State, or by the Secretary of State himself. Thus, the Secretary of State has adopted a policy for use not only by LPAs but also in the exercise of his own statutory powers to determine (i) an application which is called-in for his own decision under section 77 of the TCPA 1990 or (ii) an appeal from an LPA under section 78.
116. I agree with the Claimants that the decision of the Court of Appeal in Laker Airways Ltd v Department of Trade [1977] QB 643 is relevant, although not the passage cited at p 704 A-E. That part of the decision was concerned with the *vires* of a policy made under a *statutory* power. It was held that the guidance issued by the Secretary of State

in that case was *ultra vires* the relevant statutory provisions, whereas here the policy which the Claimants seek to impugn is not made under any statutory power.

117. But the second part of the decision is very much in point, where the Court of Appeal held that a prerogative power cannot be exercised incompatibly with, or so as to frustrate, the relevant statutory scheme (pp 704-7, 718-722, 726-728). In that case a licence had been granted by the Civil Aviation Authority to Laker to fly a transatlantic route. The Court held that prerogative powers to withdraw the designation of Laker as an air carrier under an international treaty could not be used so as to frustrate the purpose for which the statutory licence had been granted. The Court of Appeal relied in part upon the existence of provisions in the Civil Aviation Act 1971 which could have been used to achieve the outcome desired by the Government, but which had not been used. They included the revocation of the statutory licence, subject to procedural safeguards for the licensee Laker. It was held that the effect of the statutory scheme was to prevent the prerogative being used in a manner incompatible with that scheme (see also Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508, 526, 539-540, 554, 561, 575-6 cited by Roskill LJ at [1977] QB 719-721).
118. I also note that Lord Denning MR considered the scope of judicial review for controlling the use of prerogative or common law powers to be similar to that laid down in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997. In my judgment that consequence logically flows from the conclusion in Laker that a prerogative power has to be used compatibly with a comprehensive statutory framework.
119. At this point it is necessary to return to the Alconbury decision. Of course, the formulation and merits of policy is a matter for government and not the courts. But a key issue in the present case is whether the policy challenged is unlawful on grounds of inconsistency with the statutory scheme, which is a matter for judicial review in the courts. In Alconbury it was held that the legislation involves an allocation of functions, including policy-making functions, as between central and local government. In the present context, the relevant function of the Secretary of State is to act as a central authority bringing some degree of coherence and consistency in the development of land, by *influencing* “the local development plans and policies which the planning authorities will use in resolving their own local problems”. The local development plan of each LPA lies at the heart of the system. It is the LPA which formulates locally applicable policies in its development plan. A function of the Secretary of State is to provide “guidance” for the drawing up of local plans which reflect local circumstances and issues.
120. Before the start of the hearing I drew attention to other cases which have considered the relationship between national and local planning policies, such as ELS Wholesale (Wolverhampton) Ltd v Secretary of State for the Environment (1988) 56 P&CR 69, 75 - 77; Surrey Heath Borough Council (1987) 53 P&CR 428, 433 - 4; and Camden LBC v Secretary of State for the Environment (1990) 59 P&CR 117, 122. As the Divisional Court emphasised in the ELS case, national policy guidance has to be applied throughout the country in widely differing circumstances. It is not to be applied in a particular case as if it had the binding force of a statute or statutory instrument. National policies provide *guidance* to individual decision-makers “and give an indication of the principles upon which the Secretary of State or his Inspectors will act ...” when considering planning appeals. Local circumstances within a

particular area can lead to a decision that national policy be given less weight and not applied, whether the decision concerns the outcome of a planning application or the formulation of local planning policies.

121. Mr. Drabble QC relied upon two passages in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 in which it was acknowledged that a change in national policy giving guidance to LPAs may render policies in local plans outdated. Lord Hope stated at page 1450 C – D that:-

“No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But *some of its provisions may become outdated as national policies change*, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.” (emphasis added)

Similarly, Lord Clyde, having pointed out (at page 1458 B) that section 38(6) gives a “priority” to the development plan, added (at page 1458 E – F):-

“By virtue of section 18A [equivalent to section 38(6) of PCPA] if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where *a particular policy in the plan can be seen to be outdated and superseded by more recent guidance*. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.” (emphasis added)

122. Similar points were made by Lindblom J in Cala Homes (South) Ltd v Secretary of State for Communities and Local Government [2011] JPL 887 at paragraph 48. But it is important to note that these passages provide no support for the notion that a national policy can simply override an adopted local plan policy or create an exemption such that the local policy need not be applied. Instead they envisage the need to *weigh* the relative merits of national and local policy as they apply to the circumstances of an individual case. Of course, in some instances a local plan policy may become so outdated that little or no weight is attached to it, but that must always remain a matter for evaluation by the planning authority which determines a planning application (see also paragraph 124 below and Cala Homes in the Court of Appeal).

123. In order to resolve the issues under ground 2 the following features of the statutory scheme are particularly important:-
- (i) Local plan policies are based upon the evidence which an LPA is obliged to collect under section 13 of PCPA 2004. That evidence will capture (inter alia) information on characteristics and needs specific to that LPA's area and which differ from those of other LPA areas;
  - (ii) Section 17(3) provides that the local development documents (which will include the local plan) must set out the planning policies of the plan-making authority, *namely the LPA*, for the development and use of land in its area;
  - (iii) By section 19(2) when an LPA prepares its local plan policies it must have regard to a number of considerations, including national policies and advice contained in guidance issued by the Secretary of State. The legislation does not require the local plan policies of an LPA to be in "conformity", or even "general conformity", with the Secretary of State's national policies. It is common ground that an LPA is entitled to put forward, justify and adopt local plan policies which depart from national policies. This position is to be contrasted with the requirement in section 24(1) that local development documents in London be in general conformity with the spatial development strategy for London and, formerly, outside London, with the relevant regional spatial strategy;
  - (iv) Although the responsibility for formulating and adopting "its policies" for its area through a local plan, is placed upon the LPA, those policies are subject to independent scrutiny by an Inspector so as to test (inter alia) the justification for policies which are contentious. The process of statutory examination laid down by Parliament is important for the checks and balances and for the transparency it provides. Draft policies must be supported by a sufficient evidence base. Those policies are then publicised across the LPA's area and consulted upon. There has to be a published report on that process. The process is designed to take into account (inter alia) local circumstances and the views of local interests. The draft policies are subject to scrutiny by an independent Inspector and tested for (inter alia) soundness and compliance with various legal requirements including sustainability appraisal. The Inspector's report has to be published. The LPA's ability to adopt its local plan is broadly dependent upon the Inspector's recommendations. The legislation allows for legal flaws in the policies or process to be pursued in the courts.
  - (v) The Secretary of State has power to intervene if he considers the content of a draft local plan to be unsatisfactory, by directing modifications to the plan or by preparing revisions himself. But in either case the revised policies are subject to statutory examination. Furthermore, those policies become part of the local plan itself. The legislation does not give the Secretary of State a power to make policies *outside* the statutory local plan process which simply override a local plan. Instead, his powers to intervene are embedded within that process;

- (vi) Once adopted, there is a legal presumption that planning applications will be determined in accordance with relevant policies of the development plan, including the local plan, unless material considerations indicate otherwise (section 38(6) of the PCPA 2004). The legislation requires decision-making on planning proposals to be led by the development plan.
124. In my judgment it is plain from the above analysis that the Secretary of State's common law powers to promulgate planning policies cannot be used incompatibly with the statutory code. By way of example, when the Cala Homes case reached the Court of Appeal ([2011] J.P.L 1458), Sullivan LJ stated that if, in anticipation of legislation to abolish all regional strategies, a policy issued by the Department had advised LPAs to ignore the policies in the regional strategies, or to treat them as no longer forming part of the development plan, or to determine planning applications otherwise than in accordance with those strategies (because of their proposed abolition), or if it had told decision-makers what weight they should give to the Government's proposal, then that statement would have been unlawful (see paragraph 26 applying Laker). The legal analysis cannot be any different if a new policy from the Secretary of State is directed at local plans or at policies within local plans dealing with a particular topic.
125. I accept the submissions of Mr. Forsdick QC that the substance of the national policy published in November 2014 is materially different from the national policies in force between 1998 (Circular 06/98) and March 2012 (PPS3 issued in 2006). The earlier national policies simply gave "criteria" or "indicative thresholds" which LPAs were to take into account when formulating local plan policies. These policies were consistent with the statutory framework set out above and the analysis in Alconbury. They sought to give guidance to and "influence" individual LPAs when drawing up policies in their local plans for affordable housing requirements appropriate to their respective areas. The setting of thresholds was left to be dealt with at the local level by each LPA drawing up and adopting policies appropriate for their area, but having regard to the national policy on indicative thresholds. Thus, the earlier national policies properly discharged the Secretary of State's function as a central authority bringing "*some degree* of coherence and consistency" to the development of land, whilst respecting the statutory role of LPAs to devise local policies appropriate to their local circumstances, subject to scrutiny by independent examination in public. The policies provided a framework within which LPAs could adopt the same thresholds or justify alternative approaches based upon local circumstances.
126. The new national policy does not purport to give guidance to LPAs which should be considered alongside local plan policies. Rather it gives thresholds below which affordable housing (and tariff style contributions) should not be sought when any planning application for housing development in England is determined. Those thresholds are to be applied directly, and with immediate effect, in the determination of planning applications, notwithstanding any local plan policy inconsistent therewith. To that extent the policy has been drawn up so as to displace adopted local plan policies on affordable housing requirements.
127. Mr. Forsdick QC also contrasted the approach taken in the Written Ministerial Statement made on 28 November 2014 with the NPPF itself. Paragraph 2 of the NPPF expressly states that the Framework should be "taken into account in the preparation of local and neighbourhood plans" (reflecting section 19(2) of the PCPA 2004) and "is a material consideration in planning decisions" (respecting both section

70(2) of TCPA 1990 and section 38(6) of PCPA 2004). Thus, in the determination of planning applications the NPPF is meant to be taken into account in addition to, or alongside, local plan policies. Moreover, it is expressly recognised that LPAs are able to formulate local plan policies which depart from the NPPF and to justify any such departure in the statutory examination of their plan. That is the clear effect of the explicit language used in paragraph 1 of the NPPF (see paragraph 5 above).

128. Furthermore, because it made a number of important changes to national policy, the NPPF did go on to address interaction with existing local plan policies (see paragraphs 209 to 215 of the NPPF). By paragraph 208 the policies in the NPPF came into force on the date of publication. Paragraph 209 stated that the NPPF “aims to strengthen local decision-making and reinforce the importance of up-to-date plans.” Having referred to section 38(6) of PCPA 2004, paragraph 211 explicitly stated that in determining planning applications, policies in local plans should not be considered out-of-date simply because they were adopted prior to the publication of the NPPF. Instead, the policies in the NPPF were to be treated as “material considerations” (paragraph 212) and local plans might need to be revised to take into account the NPPF (paragraph 213). Where that was the case, the NPPF stated that that should be done as quickly as possible, whether by a partial review of the plan or the preparation of a new plan. Paragraph 214 then allowed a period of 12 months from the publication of the NPPF within which decision-makers would continue to be able to give “full weight” to relevant development plan policies adopted under the PCPA 2004, notwithstanding a limited degree of conflict with the NPPF. Thus, the introduction of the NPPF allowed a period during which conflicts or tensions between the new national policy and existing local plan policies could be addressed by the revision of local plans in so far as that was considered to be appropriate.
129. By contrast the Written Ministerial Statement purported, with immediate effect, to create exemptions from affordable housing requirements contained in adopted local plans. It purported to do so for all small housing developments in England, without distinguishing between existing or future local plan policies. Unlike the NPPF, the Written Ministerial Statement (and the revisions to the NPPG) was not devised so as to be taken into account alongside local plan policies in development control decisions or as guidance when new local plan policies come to be formulated. The purported effect of the exemptions in the Written Ministerial Statement does not envisage that LPAs may prepare, justify and adopt local policies departing therefrom. Furthermore, the policy did not allow any transitional period within which adopted local plan policies would continue to be given full weight or primacy, or for LPAs to consider *whether* their local plan policies should be revised in the light of new national guidance.
130. Changes in national policy may impact upon local plan policies in different ways and may sometimes result in local policies being treated as outdated or as having reduced weight. For example, a new national policy may give guidance on how to approach applications for a relatively new form of development, or a new problem in the operation of the development management system, which has not been covered in the existing policies of local plans. LPAs can revise their local plan policies having regard to the new national policy and in the meantime may generally apply that policy. Similar considerations apply where a new national policy deals with a type of development of national or regional importance which has not been addressed in

existing local plan policies. A local plan which had not previously addressed such matters might (depending on the circumstances) be described as “not up to date” for the purposes of weighing competing considerations.

131. In other situations a new national policy may deal with a subject already covered by a local plan. For example, national policy may indicate that a new objective or factor should be taken into account, or that a consideration previously referred to in national policy should be weighed differently. Such guidance will generally fall to be applied alongside existing local plan policies covering the same issue. Whether a local plan policy will be judged to be out-of date may depend upon an assessment of whether more weight should be given to the new national policy and the material upon which it has been based, or to the existing local plan policies and the local circumstances and evidence upon which the latter have been based. The outcome of that kind of process will be sensitive to the circumstances, including such matters as the relative importance of the national policy as compared with local factors and the cogency of any supporting local evidence. It is impossible to be prescriptive about such a process of evaluation. This category of case would include the indicative thresholds for affordable housing requirements set by the former PPS 3 (see paragraph 50 above).
132. It is plain from the evidence put before the Court that the Defendant’s policy was aimed at local affordable housing requirements, whether contained in local plans or other statutory development plans. The process by which Ministers considered policy options, obtained advice, consulted on draft policies and determined the content of the new national policy, was all on the basis that defined small-scale developments would be generally excluded or exempted from such affordable housing requirements (see paragraphs 2 and 57 to 69 above). It is also plain from Ms. Everton’s first witness statement (e.g. paragraphs 54 – 55), that Ministers’ final decision to adopt changes to national policy was made on the same basis, notwithstanding local plan policies to the contrary. Neither the Defendant’s decision nor the Written Ministerial Statement was expressed so that the new national thresholds would be subject to policies contained in adopted local plans, or even considered alongside those policies. The use by Ministers and officials of the terms “exclude” and “exemption” makes no sense unless that referred to exclusions or exemptions from requirements in local plan policies that would otherwise apply.
133. The changes to national policy in the present case are therefore different from the examples in paragraphs 130 to 131 above, for a combination of reasons which I summarise as follows:-
  - (i) The new national policy purported to create exemptions or exclusions from affordable housing requirements in statutory local plans for all small developments (as defined) and with immediate effect. It was not formulated so as to be subject to those local plan policies, or even to be considered and weighed alongside those policies. No transitional period was provided to enable local plan policies to be reviewed in the light of the new national policy;
  - (ii) The new national policy created exemptions for affordable housing requirements without distinguishing between existing and future local plan policies. It purported to create exemptions which would apply in either case. It did not seek merely to give guidance (e.g. by way of indicative thresholds)



to which LPAs would have regard under section 19(2) of PCPA 2004 when formulating and adopting local plan policies in the future;

- (iii) The local plan policies have been devised in order to fulfil the obligations imposed upon LPAs to identify the objectively assessed needs for general market and affordable housing and then to meet those needs (see paragraphs 7 and 9 above). The new national policy does alter those obligations. It is common ground that local affordable housing requirements were proper matters to have been included in local plans. The new national policy did not deal with a lacuna in local plans or a subject which was unsuitable to be considered at that local level (that is accepted in the statement by Leading Counsel on behalf of the Secretary of State – see paragraph 99 (iv) above);
- (iv) Local plan affordable housing policies have been adopted after having satisfied all the legal requirements and/or procedures for a supporting evidence base, publicity and consultation, testing by independent examination and modification, and legal challenge in the Courts (paragraphs 26 to 33 above). The Secretary of State has not exercised his statutory powers of intervention to modify those policies (subject to independent examination) prior to adoption (paragraphs 34 to 36 above).
- (v) Future local plan policies would be subject to the same legal requirements and procedures as in (iv) above;
- (vi) Affordable housing requirements in adopted local plans are a consideration which decision-makers are mandated by section 70(2) of TCPA 1990 and section 38(6) of PCPA 2004 to take into account and there is a statutory presumption in favour of compliance with those requirements (paragraphs 37 to 38 above). National policy is not the subject of a presumption of the kind contained in section 38(6) of PCPA 2004;
- (vii) The new national policy purported to confer exemptions which apply notwithstanding local policies inconsistent therewith. There is no material difference between what the national policy purported to do in this case and an express direction to decision-makers that they should disregard adopted local plan policies to require affordable housing contributions on small developments when determining planning applications (see paragraph 124 above and Cala Homes).

134. From the analysis above it can be seen that the national policy changes introduced on 28 November 2014 are inconsistent with certain core principles of the statutory scheme, in summary because:-

- (i) Section 38(6) of PCPA 2004 gives “priority” to the policies in adopted development plans. These policies have been formulated by reference to a local evidence base (section 13 of PCPA 2004) and have satisfied the requirements of the statutory process leading to adoption. The legislation does not give a general priority to, or a presumption in favour of, national policy as against statutory local policy. National policy is not subject to the kind of procedures by which local plan policies are statutorily required to be tested prior to adoption. When planning applications are determined, national policy

is to be taken into account as an “other material consideration” (section 70(2) of TCPA 1990). The new national policy is inconsistent with the statutory scheme because its aim, and the language chosen, purports to confer exemptions *in each and every case* where affordable housing requirements in an adopted local plan policy are inconsistent with the national thresholds. A policy formulated in that way is improper because, in effect, it purports to override relevant policies in the statutory development plan in so far as they are inconsistent with the national policy. To that extent the national policy ignores or circumvents the presumption in favour of the development plan policies in section 38(6) (see paragraph 124 above and Cala Homes) and the need to carry out the weighing process envisaged by the decisions in Alconbury and in City of Edinburgh (see paragraphs 110 and 119 - 122 above);

- (ii) The new national policy does not distinguish between existing and future local plan policies. It is common ground that the national policy deals with a subject which is appropriate to be dealt with in the local plan of each LPA, namely requirements for the provision of land (or contributions in lieu) for affordable housing in order to meet local needs. Accordingly, the obligation in section 17(3) of PCPA 2004 was engaged and each LPA was and is obliged to set out *its* policies on that subject for its area in its local development documents. In carrying out that function the LPA must have regard to national policies and advice contained in guidance issued by the Secretary of State (section 19(2)(a)), but there is no statutory requirement that the LPA’s policies must be in “conformity”, or even “general conformity”, with national policy (contrast section 24(1) of PCPA 2004). It is the objective of the statutory code that LPAs should prepare and adopt local plan policies for their area which reflect local circumstances and requirements. Such policies may be at variance with national guidance where that is justified. Because the new national policy purports to override local plan policies inconsistent therewith, it is inconsistent with the statutory scheme for the formulation and adoption of such policies. The policy does not simply give indicative thresholds or guidance which should be taken into account by LPAs when they come to prepare and adopt local policies
- (iii) In so far as the local plan policies of a particular LPA are thought by the Secretary of State to be unsatisfactory, he has appropriate default powers under PCPA 2004 to achieve alterations to local plans, subject to independent scrutiny through public examination, but those powers have not been used.

- 135. In these circumstances, it is not surprising that officials advised Ministers on the possible need for primary legislation in order to create the exemptions they wished to achieve (see paragraph 59 above).
- 136. For the reasons set out above, I have reached the firm conclusion that the purported effect of the new national policy on exemptions from affordable housing contributions is incompatible with the statutory framework of the TCPA 1990 and PCPA 2004 and therefore unlawful applying Laker Airways and Cala Homes.
- 137. Secondly and in the alternative, the issues raised by the Claimants should be considered by the application of the Padfield principle, as the Court of Appeal accepted in the

Cala Homes case (paragraphs 15 to 17). The Court reaffirmed the elucidation of that principle by Laws LJ in R v Braintree D.C. ex parte Halls (2000) 32 HLR 770, 779. Thus, the principle is not confined to cases where the exercise of the power is “incapable of promoting the policy of the legislation”. The real question is “what was the decision-maker’s purpose in the instant case and was it calculated to promote the policy of the Act?”

138. Even if the new national policy were not to be *construed* as overriding local plan policies inconsistent therewith, nonetheless it is clear that the *purpose* of Ministers in consulting upon and adopting that policy was to create exemptions having that effect. Their intention was plainly to create exemptions from affordable housing requirements on smaller-scale developments, thus freeing developers and landowners from the requirements set by the planning policies of LPAs (see paragraphs 57 to 69 above). For the reasons previously given, that purpose was inconsistent with the statutory framework described in paragraphs 25 to 38, 109 to 110 and 119 to 123 above; alternatively, it was not “calculated to promote the policy of the Act” (see Padfield and R v Braintree DC ex parte Halls (2000) 32 HLR 770, 779).
139. The legislation *presumes* that planning applications will be determined in accordance with adopted local plan policies. These are policies which have been formulated by the local authority on the basis of local circumstances, having regard to (but not subject to) national policies, and have then been tested through statutory processes which include Strategic Environmental Assessment and sustainability appraisal, consultation and public participation and independent examination, and which upon adoption have “priority” in the determination of planning applications. The purpose of Ministers in their new national policy was to create exemptions from affordable house requirements by introducing blanket thresholds, irrespective of (a) whether those thresholds conflict with adopted local plan policies and (b) the weight to be attached to a specific local plan policy. To put it at its lowest, that purpose was not “calculated to promote the policy of the legislation”. Ground 2 should also be upheld on this alternative basis.
140. Thirdly, ground 2 may also be considered in another way. A policy may be held to be unlawful if it gives rise to an unacceptable risk of unlawful decision-making (see e.g. R (on the application of Suppiah) v Home Secretary [2011] EWHC 2 (Admin) paragraphs 137 – 140). The new national policy was intended to confer exemptions from affordable housing requirements in local plans, notwithstanding the statutory framework to which I have referred. It has been understood in that way, for example by Inspectors in the determination of planning appeals (see paragraphs 103 - 104 above). By contrast, no evidence has been provided to indicate that the policy has been understood by decision-makers working in the field to operate in the manner suggested by the Defendant for the first time during the hearing (see paragraph 99 above). Given the language used in the Written Ministerial Statement and the amendments to the NPPG, as well as the genesis of the new policy, I consider that there is an unacceptable risk of unlawful decision-making, in particular in the determination of planning applications, through treating the new exemptions as having primacy over local plan policies inconsistent therewith. However, because the authorities in this area were not addressed during the hearing, my decision under ground 2 does not rest on this third approach.

141. I return to the Secretary of State's statement made through Mr. Drabble QC as to what is now said to be the effect of the new national policy (see paragraph 99 above). I do not consider that that statement overcomes the legal flaws which I have accepted under ground 2, nor should it lead the Court to exercise its discretion to withhold an appropriate remedy. I take that view for a combination of reasons, namely:-
- (i) As I have already held, the policy has been drafted so as to confer exemptions which are not subject to local planning policies or local circumstances. The policy does not contain any language to indicate the very substantial modifications which the Secretary of State would now accept to the operation of his policy when faced with a legal challenge. The policy would need to be substantially rewritten;
  - (ii) The unqualified terms of the policy, and the basis upon which the consultation exercise was carried out has led landowners and developers to understand that they will benefit from the new exemptions without them having to be weighed against local evidence and policies produced by LPAs;
  - (iii) Even if the exemptions never gave rise to a legitimate expectation upon which landowners and developers would have been able to rely, because of incompatibility with the statutory scheme (see e.g. R v Secretary of State for Education ex parte Begbie [2000] 1 WLR 1115), the effect of the national policy as explained in the Statement through Leading Counsel would be so very different from its published and purported effect, as to undermine the very coherence and consistency which national policy is supposed to bring to decision-making (Alconbury). Landowners and developers would face a series of disagreements with LPAs as to whether local or national policy should take precedence which, if unresolved, would result in more planning appeals;
  - (iv) The Statement through Leading Counsel would also produce very considerable uncertainty for LPAs. In cases where contributions are disputed and an appeal is brought, LPAs would have to justify their existing local plan policies against the national thresholds in each appeal and, moreover, without knowing the basis (including evidence) for the Defendant's view that local plan affordable housing requirements involve "disproportionate burdens" for small-scale developments. As Ms. Everton has indicated, it was the (unexplained) concept of "disproportionate burden", rather than development viability issues, which served as the driver for the new national policy (see paragraphs 70 to 71 above). Furthermore, the Statement in Court by the Secretary of State insists that "very considerable weight" should be attached to the exemptions contained in the national policy. There would be much uncertainty for LPAs as to the circumstances in which their adopted policies would prevail over the basis for the Defendant's policy. Indeed, Inspectors would be likely to face a difficult task in weighing the merits of national against local policy and there is a real risk of different decisions being reached on appeals which would be difficult to reconcile;
  - (v) In any event, the Secretary of State accepted at the hearing that LPAs will still be entitled to submit for examination local plan policies which set thresholds below those given in the new national policy. However, for substantially the

same reasons as in (iv) above, LPAs will face uncertainty as to whether their draft policies will withstand the process of examination. But if, following that process, their policies are adopted, the Secretary of State now says that more weight will be given to them than the new national policy (see paragraph 99 (iv) above). Although, that outcome would be in line with the approach taken in national policy between 1998 and 2012, it is radically different from the 2014 national policy, the language of which confers unqualified exemptions from affordable housing requirements below the stated thresholds;

- (vi) The Statement made through Leading Counsel describes a policy which, self-evidently, would operate in a radically different way from the draft policy conferring unqualified exemptions upon which the public consultation exercise was carried out in 2014. It is highly arguable, although the point does not appear to have been considered, that the Secretary of State's new approach to thresholds, suggested for the first time at the hearing of this claim, would need to be the subject of a fresh consultation exercise because of the differing ways in which it would affect stakeholders across the country (see e.g. R (on the application of Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin) paragraphs 39 - 45);
- (vii) The evidence before the Court shows that Ministers intended throughout to introduce clear-cut exemptions. There is nothing to suggest that they intended that the imposition of affordable housing requirements would be decided by the kind of weighing exercise which the recent Statement in court would require. There is little or no reason to assume that Ministers would have been willing to adopt a policy which would operate in that manner. For the reasons set out above, it would produce much uncertainty and could lead to more planning appeals and, ironically, additional costs for small developers. That would be wholly contrary to the rationale for the policy changes adopted by Ministers in the first place, namely to encourage development by smaller developers.

142. I should emphasise, however, that the legal conclusions reached in this judgment are solely concerned with the circumstances which I have sought to summarise in paragraph 133 above. They do not affect, for example, the ability of Ministers to make policies affecting local plans, and the weight to be given to such plans, of the kind set out in Circular 06/98 and PPS 3 (see paragraphs 48 – 50 above). Moreover, different considerations may well need to be addressed in other cases, for example, subjects which are primarily a matter for national policy, such as developments of national or regional importance.

143. For the above reasons I conclude that ground 2 must be upheld.

### **Ground 3 – Whether the consultation process was unfair**

144. The Claimants submit that the consultation process did not comply with the second and fourth requirements of the “Sedley criteria” endorsed by the Supreme Court in R (Moseley) v Haringey LBC [2014] 1 WLR 3947 (Lord Wilson JSC at para 24). In other words, it is said that the Defendant failed to give sufficient reasons for his proposal so as to allow intelligent consideration and responses to be given and also failed to take the product of consultation conscientiously into account.

145. The Supreme Court also endorsed a passage from the judgment of Lord Woolf MR (as he then was) in R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 in which he stated (at paragraph 112) that because consultation is not akin to litigation, the consulting authority does not have to publish every submission it receives or (absent some statutory obligation) disclose all the advice it obtains. “Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response.”
146. Mr. Drabble QC relied upon paragraph 26 of the speech of Lord Wilson JSC in Moseley in which he stated that the degree of specificity required may be influenced by the identity of those being consulted. Thus LPAs and developers familiar with the workings of the planning system *may* be able to respond satisfactorily to a less detailed consultation document than consultees dealing with unfamiliar material or who are disadvantaged in some way. That, however, must depend upon the subject matter of the proposals.
147. But the Supreme Court also held that the demands of fairness are likely to be greater when the consulting party is contemplating withdrawing an existing benefit or advantage as compared with consultees who merely contemplate obtaining a future benefit ([2014] 1 WLR 3958 C–D). The same can be said for a proposal the effect of which is to impose disadvantage or burdens upon a party or parties. In the present case, the Department accepted that Ministers’ proposals would have a “significant impact on affordable housing numbers” and “local affordable housing contributions” (see paragraphs 67 - 68 above). The Department has not disputed the Claimants’ evidence that the shortfalls in affordable housing resulting from the new national policy will oblige LPAs to revise their adopted local plan policies, and take steps to release additional sites for housing development. This may prove to be onerous for LPAs in areas subject to environmental constraints. In my judgment, the effect of the new policy upon the ability of LPAs to fulfil their obligation to identify sufficient housing land was a factor which enhanced the requirement for sufficient information to be provided to enable consultees to make meaningful responses.
148. In R (London Criminal Courts Solicitors Association) v Lord Chancellor [2015] 1 Costs LR 7; [2014] EWHC 3020 (Admin) a challenge was brought to a decision on revisions to the number of Duty Provider Work contracts that would be made available under the criminal legal aid scheme. The complaint related to the consultation process and the failure of the Lord Chancellor to disclose for comment two independent expert reports, which had been used to provide assumptions for the financial modelling which had influenced the decision being challenged.
149. Burnett J (as he then was) set out a number of principles of which the following are relevant in the present case:-
- (i) Complaints about a non-statutory consultation process depend on the requirements of procedural fairness, which are fact and context sensitive (paragraph 34);
  - (ii) The test is whether the process has been so unfair as to be unlawful. It is not necessary to show that “something has gone clearly and radically wrong”

(paragraph 36 and R (Baird) v Environment Agency [2011] EWHC 939 (Admin) explaining R (Greenpeace) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin), [2007] Env LR 29 at paragraph 63, upon which paragraph 64 of the Defendant's skeleton had sought to rely);

- (iii) Sufficient information to enable an intelligent response requires the consultee to know in sufficient detail not only what the proposal is, but also the factors likely to be of substantial importance to the decision, or the basis upon which the decision is likely to be taken (paragraph 34);
  - (iv) The impact of a decision is a material factor in deciding what fairness requires in any particular case (paragraph 35). Thus, a proposed ban on oral snuff which would have led to the closure of a factory which the claimant had recently been encouraged by Government to set up, meant that a high degree of fairness was required and so the evidence to support the ban should have been disclosed (R v Health Secretary ex parte US Tobacco International plc [1992] 1 QB 353);
  - (v) The question of whether there has been procedural unfairness is one for the Court to determine (paragraph 36).
150. On the facts of that case Burnett J decided that the Lord Chancellor's failure to disclose in the consultation process the two expert reports had amounted to procedural unfairness. The consultation paper had not identified the assumptions, or even their nature, which would lead to a decision on the number of contracts available. Broad indications of the considerations which would determine the outcome were held to be insufficient to enable consultees to respond meaningfully (paragraph 50 of the judgment).
151. From paragraph 64 above and the consultation responses shown to the Court, I find that the following points are established:-
- (i) The Department's Consultation paper proposed thresholds for affordable housing contributions to address "the disproportionate burden" placed on small-scale developers, which prevents the delivery of much needed small-scale housing sites (paragraph 64 above);
  - (ii) The Department's paper did not explain what that disproportionality related to or identify the material upon which the concern was based (paragraph 64 above);
  - (iii) Consequently, in consultation responses from LPAs and others it was assumed that the Government was concerned about policy requirements which render development schemes *non-viable*. The responses explained how their own policies had been tested for viability, allowed for viability issues to be raised on individual sites, and that the economic factors affecting smaller sites did not mean that those sites are unable to afford to provide any affordable housing at all (see e.g. the responses from Reading, Cornwall Council and the North Yorkshire Strategic Housing Partnership);

- (iv) The consultation response from Three Dragons also demonstrates that the Government's suggestion that small-scale developers were facing a "disproportionate burden" was, perfectly reasonable given the lack of explanation, understood to refer to viability issues. They also pointed out that no evidence had been produced in the Consultation Paper to justify the proposed thresholds.
152. Paragraph 12 of the Government's Response to Consultation published in November 2014 suggests that the Defendant did have in mind the responses from local authorities on viability issues. But that does not assist the Defendant to meet the challenge because paragraph 23 of the same document maintained that the new policy was justified by the "disproportionate burden" on small-scale developers and sites. Moreover, in paragraphs 61 and 62 of Ms. Everton's first witness statement, as well as in oral submissions, it was made plain to the Court that the decision to adopt the new national policy was *not* driven by the view that "all small scale development was insufficiently viable to provide any contribution to affordable housing". Thus, the Defendant accepts that some smaller sites can afford to make affordable housing contributions. Rather, the rationale for the policy is said to have been that disproportionate, and generally up front, charges have contributed significantly to the decline of the small scale housing industry. But I note that the new policy for rural areas adopted by the Secretary of State demonstrates that concerns about "up front" requirements can be met by allowing an affordable housing contribution to be made as a cash payment which is deferred until the development is completed (paragraph 23 above and see also consultation responses from Three Dragons and others). It follows, and indeed was accepted in oral submissions for the Secretary of State, that the real driver for the change in national policy was the view that affordable housing requirements impose a "disproportionate burden" on small sites.
153. In the absence of any proper explanation in the Consultation Paper as to the basis for the "disproportionate burden" concern, the focus of the responses by many LPAs on this aspect was, understandably, directed to the viability testing and flexibility towards viability issues upon which local policies are based, as Ms. Everton accepted (paragraph 61 of her first witness statement). But it now turns out from the Government's response and the evidence it has filed in these proceedings that the notion of a "disproportionate burden" related to something else. There is nothing in the Department's consultation paper to explain what that disproportionate burden was thought to be nor the basis for that view, including any supporting evidence. Consequently, LPAs in particular did not have an opportunity to give a meaningful, intelligent response on this key justification for the proposed policy. The rationale for the policy was not properly defined.
154. Paragraphs 18 to 22 of Ms. Everton's witness statement give a limited explanation as to why the Government considered that affordable housing contributions might be inhibiting or stalling development. But the material she referred to was exiguous and some of it did not even exist at the time of the consultation. The short point remains that not even the material then in existence was disclosed as part of the consultation exercise so that consultees, in particular LPAs, could respond thereto. It is plain from the evidence filed by the Claimants in these proceedings that they would have had substantial criticisms to make of some of the material which ought to have been considered by Ministers. Furthermore, it would have been possible for LPAs to put



the material relied upon by the Department into context, for example by pointing to other factors which, according to those sources, were causing development to be stalled (such as the availability of finance and funding) some of which were just as significant as the costs of planning requirements, if not more so. Finally, if LPAs had had access to the material upon which the Defendant's concerns had been based, it would have been possible for them to consider putting forward other alternatives.

155. LPAs did not have the opportunity to make representations on material which was known to the Defendant and central to the formulation and adoption of his new national policy, where that policy was going to have a substantial effect on the discharge of LPA's planning functions. The process followed by the Defendant was plainly unfair.
156. For the above reasons, I consider that there was a breach of the second "Sedley criterion" and consequently ground 3 must be upheld.
157. Furthermore, I have reached the conclusion that ground 3 also succeeds because in two respects the Defendant breached the fourth Sedley criterion, namely the requirement for the decision-maker to take the product of consultation conscientiously into account.
158. First, in paragraph 20 of the Response in November 2014 the Government stated that the policy they had decided upon would support self build, small scale and brownfield development "without adversely impacting on local contributions to affordable homes and infrastructure". That statement was flatly contrary to the evidence that the policy would have a substantial impact upon affordable housing provision, as had been stated in consultation responses and confirmed in advice from officials. Nothing has been put forward on behalf of the Defendant to identify any other evidence upon which that part of the Government's Response in November 2014 could have been based. The express statement in paragraph 20 of the Response is inconsistent with Ministers having fulfilled their obligation to take into account "conscientiously" a matter of crucial importance to their final assessment of the merits of their proposed policy.
159. Alternatively, even if the view were to be taken that the last part of paragraph 20 was simply a poorly drafted description of how Ministers had attempted to strike a balance between support for small-scale and brownfield development and the degree of impact upon local contributions to affordable housing and social infrastructure, there is no evidence of any consideration being given to the difference in support for the development industry which could be achieved in any event by adopting a general threshold of 3 units as compared with 10 units. Evidence had been provided by the Defendant to show that Ministers were informed in July 2014 (a) about the estimated impact upon affordable housing contributions (in monetary terms) by adopting a 10 unit threshold as compared with a 3 unit threshold and (b) that a 3 unit threshold would still achieve a significant benefit for small-scale development (see paragraphs 67 - 68 above). But there is no evidence to suggest that any attempt was made to estimate any difference in *benefits* for the development industry between the two alternative thresholds, so as to enable a proper judgment to be reached on whether the threshold should be set at a level which would have a substantially worse effect upon the provision of land for affordable housing. If and in so far as any balance was struck between benefits and disbenefits, it was therefore substantially incomplete.

The Defendant did not grapple with an issue which, in the context of the proposed policy and the consultation exercise, was an “obviously material”, if not fundamental, consideration which he was legally obliged to take into account (Re Findlay [1985] AC 318, 334 and see paragraph 166 below).

160. Second, the Defendant failed to grapple with other points made by consultees (see e.g. representation by Cornwall Council and paragraphs 93 – 95 above) which were of central importance, namely that:
- (i) CIL charging rates for housing developments had been set in the light of viability testing which assumed that developers would incur costs in compliance with affordable housing requirements set by local plan policies (i.e. an assumption which would depress the levels at which CIL rates could be set); and
  - (ii) LPAs who apply the exemptions from affordable housing in the new national policy rather than more onerous local plan policies, may well seek to increase CIL rates, so as to claw back cost savings enjoyed by developers because of those exemptions (i.e. additional “headroom” in the viability analysis). However, although an increase in CIL rates would produce more funding for CIL-funded projects, those projects would not include affordable housing schemes;
  - (iii) The diversion of section 106 contributions to CIL charges favours the provision of community infrastructure over affordable housing and therefore denies the LPA the opportunity to prioritise as between the two, or indeed more generally as between the various planning requirements imposed upon the grant of a planning permission.
161. Grounds 3 also succeeds for these additional freestanding reasons, applying the fourth of the Sedley criteria on consultation (paragraphs 158 and 160 above) and/or the failure to take into account an “obviously material” consideration, (paragraph 159).

#### **Ground 1- Failure to take into account “obviously material” considerations**

162. The Claimants submit that in adopting his new policy the Secretary of State failed to take into account a number of material considerations.
163. Mr. Drabble QC submits that when formulating changes to national policy on affordable housing there was no obligation upon the Secretary of State to have regard to any particular considerations. This was not a case where the Defendant was exercising a statutory discretion which mandated the consideration of certain factors. Because the Secretary of State was exercising a common law power to formulate policy, he was not bound to have regard to any particular matters. To the extent that the formulation of policy is justiciable at all, “the ultimate control is the principle of rationality” (paragraph 60 of the skeleton).
164. With respect I consider that Mr. Drabble’s analysis was too narrow. Although the Secretary of State was exercising a common law power rather than one conferred by statute, nevertheless that power was relied upon in order to promulgate a policy within a statutory context and for the purposes of the relevant legislation (see paragraphs 112

to 118 above). More particularly, the Secretary of State intended that his policy be used in the determination of planning applications and in the formulation of local plan policy. Accordingly, in exercising power to make policy the Secretary of State could only have regard to land use planning considerations.

165. Can it truly be said that the Secretary of State was under no obligation to have regard to any particular considerations simply because there was no statutory provision explicitly requiring him to do so when exercising his common law power to formulate policy? In my judgment the answer is no. At the very least, given that the prerogative power could only be exercised compatibly with the statutory framework (paragraphs 117 and 124 above), the Secretary of State was obliged in this instance to have regard to relevant statutory provisions relating, for example, to the formulation of local plan policy and the determination of planning applications and the implications of these provisions for the use of the policy-making power.
166. Indeed, in paragraph 61 of the Skeleton for the Defendant it was accepted that the principles laid down in Re Findlay ([1985] AC 318, 333-4) are applicable, at least where a common law power is relied upon in order to formulate a policy for application in a statutory context. Thus, the principle is that the party formulating a policy (the “decision-maker”) is obliged to have regard to those considerations which the legislation expressly or impliedly identifies as relevant. A consideration is “impliedly relevant” in this context if it is “so obviously material” that a failure by the decision-maker not to take it into account would not accord with the intentions of the legislation (see also R (Luton Borough Council) v Central Bedfordshire Council [2015] EWCA Civ 537 at paragraph 71). During submissions it became apparent that Mr. Forsdick QC accepted that this is the correct test to apply under ground 1 (see e.g. paragraph 33 of Claimant’s skeleton).
167. In my judgment, the Defendant failed to take into account certain considerations which were “obviously material”, in addition to those matters which I have already identified under ground 3 (see paragraphs 158 to 160 above). In so far as they relate to the affordable housing issue, these additional matters arise from paragraphs 88 to 90 above. In summary, there is no dispute in these proceedings that one effect of the new national policy will be to reduce the amount of land available to meet affordable housing needs, with the consequence that LPAs affected will face arguments that their local plans are out of date, the presumption in paragraph 14 of the NPPF applies and more land needs to be released in their areas, including greenfield sites.
168. In my judgment, the main benefits and disbenefits of the proposed exemptions from affordable housing requirements were “obviously material” to the Secretary of State’s decision to adopt the new policy. That policy could not have been adopted on a whim. That would have been arbitrary. Consequently the decision to adopt the policy had to have regard to the perceived advantages of the proposed policy. Such advantages could not properly be taken into account without also addressing any adverse consequences which were “obviously material”.
169. The question of what harmful consequences were “obviously material” needs to be considered in context. The Secretary of State was making changes in national policy which were intended to affect land use decisions across the country. In the submission made to Ministers in July 2014 the reduction in affordable housing contributions for the country as a whole was expressed in *monetary terms* in order to

indicate the relative effects of setting national thresholds at 3, 5 or 10 units. But nothing has been put before the Court indicating that the scale of the reduction in the *supply of land* for affordable housing across the country was considered and, in particular, the implications of the action that LPAs would need to take in order to redress shortfalls, not even in broad terms.

170. The *beneficial* purpose which Ministers intended their policy to serve was to overcome the “stalling” of development on small sites, an issue relating to land supply. In my judgment *adverse* effects on land supply were equally and obviously relevant to a proper weighing of the benefits (or rather the net benefits) of the proposed policy. There is no evidence to suggest that that exercise was carried out before the adoption of the policy in November 2014.
171. According to the Statement made on behalf of the Secretary of State in this hearing (see paragraph 99 above), it is now suggested that LPAs can decide to promote and adopt local plan policies at variance from the new national thresholds (despite the plain evidence that the intention of Ministers was to create exemptions from local policy requirements). The approach in the Statement made in Court would have been similar to that taken in Circular 06/98 and PPS3 (see paragraphs 48 to 50 above). But there is no suggestion whatsoever that that alternative approach was considered by Ministers instead of the *exemptions* which they intended that the November 2014 policy should create. Nor is it suggested that any consideration was given to a transitional period during which LPAs could address a new national policy by revisions to their local plan policies. In the circumstances of this case, these too were “obviously material” considerations which the Defendant ought to have taken into account before adopting this policy.
172. On the material now before the Court, I am unable to go so far as to suggest that the Secretary of State was necessarily obliged to consider the adverse consequences of his proposed policy on land supply in *quantitative* terms. I have insufficient evidence on the practicality of obtaining numerical data. But, at the very least, the adverse consequences upon land supply for affordable housing had to be reflected in the final decision, even if only in a *qualitative* manner. For example, the creation with immediate effect of national exemptions from local plan requirements had the potential to create sudden, or even immediate, shortfalls in land supply without allowing LPAs an opportunity to address that problem beforehand through the development plan process. If instead national indicative thresholds had been set so as to influence the formulation of local plan policies, perhaps within a defined timescale, LPAs would have been able not only to set local thresholds, but also to address any consequential land supply issues, as part of a revision to a local plan. Thus, the considerations in paragraphs 170 and 171 above are interrelated.

173. To the extent set out above, I conclude that ground 1 must be upheld.

#### **Ground 4 – The Public Sector Equality Duty**

174. In this case it is common ground that the public sector equality duty (“PSED”) in section 149 of the Equality Act 2010 had to be satisfied when the Defendant adopted the policies under challenge in these proceedings.

175. Ms. Everton explains that Islington Borough Council complained about the Defendant's failure to comply with the PSED in a pre-action protocol letter dated 2 January 2015 (paragraph 57 of her first witness statement). The Claimants first raised the issue of whether the PSED had been breached in their Amended Statement of Facts and Grounds dated 23 January 2015 (and filed an application to amend on 2 February 2015).
176. A letter from the Treasury Solicitor dated 3 February 2015 indicated that the decision taken on 28 November 2014 was being reviewed in order to address the PSED.
177. Paragraphs 58 and 59 of Ms. Everton's first witness statement make it plain that it had not been thought necessary to consider the PSED at the time of the 28 November 2014 decision. But, in view of Islington's proposed challenge, officials were instructed to undertake an Equality Impact Assessment (EqIA) in respect of the changes to national policy in January. The findings and results were then recorded in a formal Equality Statement dated 5 February 2015, which was produced to the Court. Officials provided to Ministers detailed written advice (which has not been disclosed) and the Equality Statement as an Annex. It is said by Ms. Everton that having considered "the findings of the Equality Impact Assessment" and the matters required by section 149 of the 2010 Act to be taken into account, the Secretary of State was satisfied that the policy changes of 28 November 2014 were compatible with those requirements and on 10 February 2015 he decided to maintain those changes. Thus, the Secretary of State's defence to ground 4 is critically dependant upon the Equality Statement dated 5 February 2015 in order to explain the equality impact assessment carried out after national planning policy had already been altered in November 2014. Neither the Government's Response in November 2014 nor any of the material referred to in the witness statements of Ms. Everton suggest that the considerations forming part of the PSED were taken into account and applied before the policy was altered.
178. Section 149 of the 2010 Act provides as follows:-

**"149 Public sector equality duty**

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;  
disability;  
gender reassignment;  
pregnancy and maternity;  
race;  
religion or belief;  
sex;  
sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) ………”

179. Mr. Drabble QC submits that, “whilst equality duties must be complied with at the time that decisions which they affect are taken, the fact that a later, lawful assessment is carried out *may* mean that there is no basis for relief – beyond a declaration that the relevant duty was not complied with at the time of the decision in question” (paragraph 83 of skeleton with emphasis added). He relies upon a decision of Stanley Burnton J (as he was) in R (BAPIO Action Ltd) v Home Secretary [2007] EWHC 199 (Admin) at paragraphs 64-70 and the decision of Singh J in R (Cushnie) v Secretary of State for Health [2014] EWHC 3626 (Admin), [2015] PTSR 384 at paragraphs 95 to 117.
180. In the BAPIO case Stanley Burnton J accepted that before certain changes to the Immigration Rules had been made, there had been a failure to comply with Section 71 of the Race Relations Act 1976, which imposed a very similar obligation to the PSED. But the Court simply granted a declaration that the Secretary of State had failed to comply with the duty before deciding to alter the Rules and refused to quash those changes, for the sole reason that subsequent to that decision, an Equality Impact Assessment had been carried out the sufficiency of which had not been challenged (see paragraph 70).
181. The Judge had previously referred to Secretary of State for Defence v Elias [2006] EWCA Civ 1293, [2006] 1 WLR 3213 in which Arden LJ had stated that the clear purpose of section 71 is to require public bodies to whom that provision applies “to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them”. She went on to describe the provision as “an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation”. In the circumstances, it is reasonable to infer that there was no suggestion in BAPIO that the failure to comply with the statutory duty at the proper time could have affected the decision to make the policy change or the nature of that change. That is not the case here. Both the effect of non-compliance with the PSED prior to the decision to alter national planning policy upon the content of those changes and the legal adequacy of the EqIA in February 2015 are very much in issue in the present case.
182. When BAPIO reached the Court of Appeal ([2007] EWCA Civ 1139) Sedley LJ, having noted that there was no challenge by the Appellant to either the ex post facto EqIA or the judge’s decision to grant only declaratory relief, treated the decision at first instance as an exercise of the discretion to withhold relief (paragraph 2) and then added (paragraph 3):-

“Such a finding does not in any way diminish the importance of compliance with [s.71](#), not as rearguard action following a concluded decision but as an essential preliminary to any such decision. Inattention to it is both unlawful and bad government. It is the Home Office's good fortune that the eventual assessment did not force it to go back to the drawing board.”

The same points were adopted by Moses LJ in R (on the application of Kaur and Shah) v Ealing LBC [2008] EWHC 2062 (Admin) at paragraphs 23 – 24.

183. In Cushnie the challenge was to regulations which entitled former asylum claimants to free NHS treatment but only if they had previously been receiving accommodation and support from the Home Office under certain statutory provisions. However, as a disabled person the Claimant's support had been provided by a local authority instead of the Home Office and so he did not qualify for free medical treatment. Singh J held that the equality impact analysis carried out before the making of the regulations breached the PSED because it had not addressed the protected characteristic of disability (paragraph 111) and that the consideration given to this aspect after the regulations had been made had been too late to satisfy section 149 (paragraphs 112 to 116).
184. I entirely agree with the Judge's conclusion (paragraph 113) that the PSED is an obligation imposed on the relevant decision-maker and therefore a failure to comply cannot be excused because consultees or other third parties did not raise issues concerning a relevant protected characteristic in their representations. In other words the matters to which a decision-maker must have "due regard" under section 149 are matters which he or she is mandated to assess and then take into account (In Re Findlay [1985] AC 318, 333-334).
185. At the conclusion of his judgment Singh J invited submissions as to the form of relief which should be granted in respect of the breach of the PSED (paragraph 117). I have been shown the formal order in which the Judge granted declaratory relief but not a quashing order. But I have not been provided with a copy of the submissions made to the Judge on this aspect or the reasons he gave for his decision and so I cannot treat Cushnie as an authority to support the Defendant's submission. However, I note that during 2013 and 2014 amendments to the regulations were under consideration and the Department had indicated that the issue of whether the provision under challenge should be widened in scope, and thus potentially meet the Claimant's concern, would be considered (paragraphs 107 - 108). Therefore, it is quite possible that that indication, which may have been reinforced in the submissions which followed the judgment, explains why only declaratory relief was granted in that particular case.
186. On 10 July 2015 the Treasury Solicitor sent to the Court a copy of the decision of the Divisional Court in R (on the application of Hottak and AL) v Secretaries of State for Foreign and Commonwealth Affairs and for Defence [2015] EWHC 1953 (Admin) handed down on 8 July. My attention was drawn in particular to paragraphs 61 and 62 dealing with the exercise of the Court's discretion where a breach of the PSED had occurred, but no specific submissions were made as to how the decision might assist in the resolution of the issues in the present case.
187. The challenge in Hottak and AL was to the Government's "Afghan Scheme" for the provision of protection and benefits to certain Afghan nationals who had worked for the Government. The Scheme comprised an Intimidation Policy and a Redundancy Policy. It was mainly challenged on discrimination grounds by reference to nationality, on the basis that the similar "Iraq scheme" had been more generous (paragraph 1). The Redundancy Policy under the Afghan Scheme contained financial options (which included training or education plus support) and, for certain persons who had engaged in the most dangerous tasks, the possibility of relocation to the UK



(paragraph 12). The Court found that the financial benefits were in fact more generous under the Afghan Scheme than the Iraq scheme (paragraph 18). In the main part of its judgment the Court decided that the territorial reach of the discrimination provisions relied upon did not cover the claimants' circumstances (paragraphs 26 – 49). The Court then rejected a common law discrimination argument which related to the less advantageous relocation policy under the Afghan scheme, holding that the differences between the two schemes did not involve either direct or indirect discrimination on grounds of nationality, but had been justified because of material differences in the levels of risk and the circumstances of employees in the two countries (paragraphs 50 – 56).

188. The PSED was very much a residual ground of challenge in Hottak and AL. The Court held that the duty did not touch on the Intimidation Policy at all. Because of the Court's earlier conclusions, the discrimination provisions in section 149(1)(a) were not engaged, and in relation to the requirements of section 149(1)(b) and (c), only the relocation aspect of the Redundancy Policy was in issue. In that respect the Court concluded that the equality analysis carried out after the challenge had been brought would have satisfied the PSED if it had been carried out at the time when the policy was developed (paragraph 61). Although there had been a failure to comply with the PSED at the time of developing and promulgating the Afghan Scheme, the Court decided that it would be inappropriate to quash the Scheme because of the adverse impact upon those who would wish to take advantage of the Intimidation Policy or the training package with financial support. Moreover, given the Court's conclusions on the equality analysis subsequently carried out, a quashing order was unnecessary and no practical purpose would be served by requiring a fresh analysis to be carried out limited to those aspects which should have been covered at the outset. It was for those reasons that the Court decided to grant only declaratory relief (paragraph 62). Thus, the Court's decision on relief was highly sensitive to the facts of that case, not least the limited scope of the PSED assessment which had needed to be dealt with. In the present case it is common ground that the PSED was engaged in relation to the whole of the policy changes introduced in November 2014. For the purposes of resolving the issues in the present case, the decision in Hottak and AL adds little if anything to BAPIO and Cushnie.
189. Mr. Forsdick QC relied upon R (C (a minor)) v Secretary of State for Justice [2009] QB 657 which dealt with a challenge to rules made by delegated legislation as to the circumstances in which physical restraint of trainees in a secure training centre could be used. The Court of Appeal held that the Divisional Court had been wrong in refusing to quash rules which it had found to be unlawful for failure to comply with a duty similar to the PSED, notwithstanding a subsequent undertaking to carry out an EqIA following its judgment (paragraphs 48 – 49). The Court of Appeal did not doubt the good faith of officials who had carried out the subsequent assessment, but held that it was wrong in principle that an assessment which ought to have been carried out in order to inform the minds of government before taking a decision to alter the rules should only be produced subsequently in an attempt to validate a decision that had already been taken. The Court of Appeal then went on to decide that although the assessment had been produced before the appeal was heard, it should quash the rules. The Court described the breach of the duty as a procedural defect of "very great substantial, and not merely technical, importance" such that it should be marked by an appropriate order.

190. The Court of Appeal treated BAPIO as a case where the mistake had been realised and corrected before the matter came to court (paragraph 54). In BAPIO it does not appear that the assessment was carried out in response to a challenge raised by a potential claimant. The Home Office appears to have carried out the subsequent assessment of its own volition (see paragraphs 67 – 68). However, in the present case, the Defendant accepts that the assessment was carried out in response to the ground of challenge advanced by Islington LBC (see paragraphs 57 – 59 of Ms. Everton’s first witness statement). Furthermore, it should be recalled that in BAPIO there was no legal challenge to the EqIA subsequently carried out.
191. In my judgment the exercise of discretion in Hottak and AL, Cushnie, and BAPIO (at first instance) need to be seen in the context of the fundamental and well-established principle that there must be compliance with the PSED before the decision in question is taken because that process is meant to inform and influence the decision (see Elias; Kaur and Shah; BAPIO per Sedley LJ; and R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) per Aikens LJ at paragraph 91). This principle has been applied to the formulation of a proposed policy and to the assessment of its merits before final adoption. The principle is all the more important where the decision involves the adoption of a national policy or delegated legislation with widespread effects. Where a decision-maker purports to carry out an assessment applying the requirements of the PSED after having taken his decision, the Court may withhold a quashing order in the exercise of its discretion. Where a subsequent assessment is unchallenged, or any legal challenge to it is rejected by the Court, it may be possible for the Court to conclude that the prior decision would *inevitably*, and not merely probably, have been the same if the necessary assessment had been carried out at the correct time and so refuse a quashing order of that decision (R (Smith) v North Eastern Derbyshire PCT [2006] 1 WLR 3315 paragraph 10).
192. Mr. Drabble QC submitted that having carried out an EqIA in January 2015 the Secretary of State was entitled to decide whether or not to maintain the policy changes he had introduced in November 2014 in the light of that assessment. He suggested that the legitimacy of the Defendant’s decision depends upon what alternatives there would have been. To suggest that he should have withdrawn his policy and then, after having carried out an EqIA, could have promulgated the same policy again would be entirely artificial. Accordingly the true question is whether the assessment and decision to maintain the policy were carried out in good faith.
193. I am unable to accept that merely to exclude bad faith in the Defendant’s subsequent decision to maintain his earlier adoption of a new policy goes far enough. As Mr. Drabble QC acknowledged, that approach could often be relied upon where there has been a failure to comply with the PSED before taking a decision or promulgating a new policy. I agree with Mr. Forsdick QC that the result would be to subvert Parliament’s requirement that the PSED objectives should inform the making of the original decision. Such decision-making includes the formulation and adoption of policy. There is a substantial difference between the process of reaching a decision having started with a blank sheet of paper and the validation of a decision already taken. This is the very point emphasised by the Court of Appeal in R (on the application of C) v Secretary of Justice. Furthermore, compliance with the PSED requires the decision-maker to perform the assessment with rigour and with an open mind (see Bracking below). Satisfying those requirements will often be more difficult

where a decision-maker has carried out a consultation exercise and has already determined the final content of his policy after having received the responses of consultees and considered pros and cons.

194. There is some similarity between the present situation and one where a decision-maker who has failed to comply with a duty to give reasons for his decision subsequently seeks to supply additional reasons, typically when an omission has been raised by one of the parties. A greater degree of caution and possible also scrutiny is likely to be required in such cases (see by analogy R (on the application of Nash) v Chelsea College of Art and Design [2001] EWHC 538 (Admin) at paragraphs 34 – 35).
195. I now turn to the relevant principles for determining whether there has been compliance with the PSED. Both parties accepted the summary given by McCombe LJ in Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345, [2014] Eq LR 60 at paragraph 26:

“(1) As stated by Arden LJ in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26–27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a ‘rearguard action’, following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23–24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:

- i) The public authority decision maker must be aware of the duty to have ‘due regard’ to the relevant matters;
- ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
- iii) The duty must be ‘exercised in substance, with rigour, and with an open mind’. It is not a question of ‘ticking boxes’; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
- iv) The duty is non-delegable; and
- v) Is a continuing one.
- vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) ‘[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.’ (per Davis J (as he then was) in R (Meany) v Harlow DC [2009] EWHC 559 (Admin) at [84], approved in this court in R (Bailey) v Brent LBC [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be ‘rigorous in both enquiring and reporting to them’: R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

- (i) At paragraphs [77–78]

‘[77] Contrary to a submission advanced by Ms. Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of “due regard” requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms. Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.’

(ii) At paragraphs [89–90]

[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms. Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):

“... the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.”

[90] I respectfully agree .....”

196. The main points in the Equality Statement of 5 February 2015 (which I note was signed off by Ms. Everton) may be summarised as follows:-

- (i) The Statement alluded to an earlier PSED assessment undertaken for those parts of the Growth and Infrastructure Act 2013 which dealt with section 106 obligations. However, although that assessment was included in the voluminous documentation before the Court (much of which was not referred to and wholly unnecessary), it was not relied upon by the Defendant in any written or oral submissions in order to show that the PSED had been satisfied in relation to the policy changes announced on 28 November 2014;
- (ii) The Statement acknowledged that affordable housing policies can impact upon protected groups. It explained that although data has been recorded for the *overall* provision of on-site affordable housing through section 106 contributions, data was not available to distinguish between sizes of

development. The paper proceeded on the basis that over the period between 2011/12 and 2013/14 between 25% and 35% of all affordable homes had been delivered with section 106 contributions;

- (iii) The Statement did not deal separately with the effect of the vacant building credit. That measure was only referred to as part of the new thresholds for affordable housing (see e.g. page 2590 of the bundle);
- (iv) The thresholds for section 106 contributions to community infrastructure may lead to some reductions in such contributions, but LPAs are able to introduce CIL charging schedules where they have not already done so, “which should counteract any local reductions in tariff style contributions” and “in view of this we do not consider that this aspect of the policy would impact on the characteristics of protected groups” or the three objectives in section 149(1);
- (v) Data from the English Housing Survey for 2012-13 shows that higher proportions of persons with protected characteristics, namely disabled people, long-term sick persons and ethnic minorities, occupy social housing (a sub-category of affordable housing) than housing of all types;
- (vi) The Government’s programme is on track to deliver 170,000 new affordable homes between 2011 and 2015, and a further £38 billion of public and private investment is planned to provide 275,000 new affordable homes between 2015 and 2020. The introduction of the new policy has no impact upon the 2011-2015 programme because it would have been necessary to obtain planning permission a considerable time before March 2015;
- (vii) The target for the delivery of affordable housing post-2015 contains “a small amount” of affordable housing delivered through section 106 obligations. The new affordable housing policies, including the vacant building credit, “may result in some local reductions in affordable housing” but the Department’s assessment “shows that this is a minor element”. Moreover, over the next Parliament more affordable housing will be built than during any equivalent period in the last 20 years;
- (viii) A lower threshold have been introduced for rural areas “where local authorities rely more on smaller sites for housing delivery” and the impact of the new policy would otherwise have been “disproportionately felt”;
- (ix) People with disabilities who need to move home on medical or welfare grounds must be given a statutory “reasonable preference” for *social* housing under local authority allocation schemes, which “should *mitigate* any impact of a reduction of affordable housing on this protected group”. However, the Statement was silent on the position of disabled persons who rely upon affordable housing other than social housing, or who do not need to move for medical or welfare reasons. The Statement also acknowledged that social housing is not prioritised on the basis of race or ethnicity;
- (x) When paying “particular regard” to the three objectives in section 149(1), the Defendant’s Statement said that “facilitating housing delivery will benefit

local communities and the economy across the board, so we therefore do not consider that there will be a negative impact on any of these issues”.

- (xi) The Statement acknowledged two gaps in data: (a) data on occupation of affordable housing by certain protected groups and (b) the provision of affordable housing through section 106 obligations broken down by size of site.

197. In considering ground 4 it is necessary to keep in mind the principle that it is not for the Court to determine whether appropriate weight has been given to the PSED or the matters taken into account. However, in this case I have come to the conclusion that the exercise carried out in January 2015, as explained in the Equality Statement dated 5<sup>th</sup> February 2015 (which is the only evidence before the Court about the assessment) did not comply with the requirements of section 149 of the 2010 Act because:-

- (i) Ministers did not take adequate steps to obtain relevant information in order to comply with the PSED; and/or
- (ii) The duty was not fulfilled in substance and with rigour; and/or
- (iii) Ministers did not assess the extent and risk of certain adverse impacts upon persons with protected characteristics and falling within section 149(1);
- (iv) The exercise was not carried out with a sufficiently open mind.

198. I reach these conclusions for a number of reasons, both singly and in combination, which I summarise as follows:-

- (i) The vacant building credit applies to sites larger than the new national thresholds. When Ministers decided, against advice, to add this measure to the consultation exercise in spring 2014, officials highlighted that its impact upon local affordable housing contributions had to be considered further (see paragraph 62 above). The witness statement of Ms. Everton and the documents disclosed contain no suggestion that any further information was obtained on the effects of the vacant building credit. Indeed, nothing has been said as to whether any information was available on this measure at all and, if so what;
- (ii) In the Department’s consultation paper published in March 2014 no reference was made to the PSED or the matters which had to be taken into account, and no attempt was made to obtain information on these matters from consultees (see paragraph 89 of Hurley & Moore cited at paragraph 195 above), whether in relation to the vacant building credit or the other changes to national policy. I also note that it has not been suggested that any consultation took place with groups representing persons with protected characteristics. The Equality Statement simply swept up the vacant building credit together with the thresholds for affordable housing and did not address the impact of this measure, not even in overall terms, let alone according to the terms of the PSED;

- (iii) The Equality Statement now purports to downplay the effect of the new policies upon the supply of affordable housing as “minor” on the basis that only “a small amount” of affordable housing is delivered through section 106 obligations. That assessment is plainly inconsistent with the briefing supplied by officials to Ministers before the decision to promulgate the new policy was taken in November 2014 and it has not been suggested that the Equality Statement was based on new information which had not been available to Ministers before. On the contrary, the Equality Statement used the same figure of 35% for the proportion of the overall amount of affordable housing provided through section 106 contributions as Ministers had been given in November 2013 (page 2429 of the bundle). Yet in July 2014 officials advised that the “evidence suggests a *significant impact* on affordable housing numbers” if the 10 unit threshold were to be adopted. That view was based on the Department’s assessment that 21% of affordable housing contributions (by value) were derived from sites of 10 units or below (pages 2561-2 of bundle). This unexplained, if not inexplicable, shift in position on the Defendant’s part underlines the potential legal pitfalls of an *ex post facto* assessment. On the materials before the Court, I conclude that this inconsistency on such a fundamental point indicates that the exercise was carried out in order to support the policy stance already taken in November 2014 and was not undertaken with a sufficiently open mind;
- (iv) Ministers did not carry out the assessment under the PSED with the rigour necessary to assess the extent and risk of adverse impacts to members of protected groups. The exercise was coloured by the overarching view that the overall impact on affordable housing supply would be “minor”. The Statement did accept that the policy changes would impact on persons with protected characteristics who occupy *social* housing to a greater extent than general market housing, notably people with disabilities (or with long term illness) and people in certain racial or ethnic groups. The percentage of such persons in *social* housing was described as “high”. The Statement therefore recognised that a reduction could impact on such groups to a greater extent. But the Statement contains no information about the effect of the policy changes upon the ability of these groups to obtain *affordable* housing, which is a broader category of housing than social housing. Instead, the Statement contented itself with an incomplete analysis, limited to social housing and further restricted within that sector to disabled persons in particular situations (not all disabled persons), “homeless persons” and those living in overcrowded conditions (which are not protected characteristics for the purposes of the PSED). The effect upon, for example, persons with racial or ethnic characteristics was not addressed. This criticism is reinforced by the underlying land supply issues identified in paragraphs 167 to 172 above.
- (v) Nothing has been said in the Statement as to whether any steps had been taken *at all* to obtain information to fill in the gaps described above, whether by approaching representative bodies or the commissioning of research. This is hardly surprising because (a) PSED issues were not raised in the consultation paper issued in March 2014, (b) they were not addressed by the Defendant until after they were raised by Islington Borough Council in January 2015 as a potential legal challenge and (c) the purported assessment was then completed



within about a month, no doubt having regard to the timescale for the commencement of judicial review proceedings. The Statement gives the plain impression that Ministers only relied upon information which was to hand;

- (vi) Rather than deal with the issues raised in (iv) above, the Equality Statement relied upon a very broad brush point, namely that £38bn of public and private investment (the majority being national funding) will be made in affordable housing over the period 2015 to 2020. But that confirms the failure of Ministers to tackle conscientiously and rigorously the issues raised by the PSED, including matters which had been raised in the 2014 consultation and in legal challenges. The figure of £38bn is an investment figure. By contrast the concerns raised in the consultation on the new national policy related to the effect of excluding small sites from *the supply of land* for affordable housing. The issue was to do with the adequacy of the amount of land to be released for housing and not simply the funding for housing development;
- (vii) In any event the £38bn is an overall investment figure across the country as a whole. The Statement referred to the dependency of LPAs upon small sites to provide affordable housing but only as regards *rural* areas. No consideration was given to that issue for *urban* areas such as Reading. The evidence before the Court shows the difficulty that some LPAs had in identifying sufficient land to meet objectively assessed needs for affordable housing even before the introduction of the new national policy. The reliance upon a single, overall figure for investment across the whole of the country failed to give any consideration whatsoever to considerable variations in the challenges facing different LPAs to provide sufficient affordable housing to meet needs and, in that context, the implications of the new national policy for persons with protected characteristics;
- (viii) In these circumstances the information and analysis were insufficient to enable the Defendant to have specific and conscientious regard to the matters set out in section 149(1).

199. Mr. Drabble QC sought to meet these points firstly, by arguing that the purpose of the Government's policy is to increase the supply of affordable housing overall and secondly, the weight to be attached to the reduction in affordable housing should be viewed in the context of a national programme for a high level of provision. There are at least three flaws with that line of argument.

- (i) No matter how impressive the scale of the national programme and £38bn of investment might appear to be at first sight, it is not suggested by the Defendant that that will be sufficient to meet all objectively assessed needs for affordable housing, whether taking the country as a whole or looking at the areas of individual LPAs. The Equality Statement did not address that point, or the extent of any shortfall between the scale of the intended supply by 2020 and the need for affordable housing;
- (ii) It is not suggested (unsurprisingly) that the national programme would result in more affordable housing than is needed. Nor is it suggested that at the time the programme was drawn up (as represented by the total investment figure of £38bn), the Department had factored in reductions in the supply of land for

affordable housing attributable to the policy changes eventually adopted in November 2014. It was stated by officials in their advice to Ministers that those policy changes would have a significant impact upon the numbers of affordable homes. It has not been suggested that that advice was given without being aware of the national programme for £38bn worth of investment. The only reasonable inference to draw is that the investment of £38bn would be required in any event to meet affordable housing needs even if the November 2014 policy changes had not been made.

- (iii) In any event, “high level” points of this nature are no substitute for a proper discharge of the PSED, which required a rigorous assessment of the specific effects of the policy changes on persons with protected characteristics.

200. For the reasons set out above, the Equality Statement of 5 February 2015 cannot be treated as satisfying the PSED and ground 4 must be upheld. The appropriate remedy is a quashing order rather than the mere grant of declaratory relief.

### **Ground 5 –Irrationality**

201. At this stage in my analysis of the challenge, I do not consider that the arguments pursued under the heading of irrationality added anything of substance to the grounds which I have already accepted in relation to the new affordable housing thresholds.

### **Social Infrastructure contributions or Tariff-based contributions**

202. The national policy introduced on 28 November 2014 applies the same thresholds to social infrastructure contributions (otherwise referred to as tariff-based contributions) as for affordable housing contributions. This exemption from local plan requirements was first proposed by Ministers after 24 January 2014 as a reaction to a draft consultation document prepared by officials in which it had not featured at all (see paragraphs 37 - 39 of Ms. Everton’s first witness statement). As I have noted in paragraph 63 above, there is no evidence that either Ministers or the Department obtained any information to justify the need for this additional exemption.

203. Paragraph 28 of the Consultation Paper published in March 2014 reveals the flawed basis upon which this further exemption was conceived. First, it was pointed out that the CIL Regulations had been amended so as to exempt self-build development, extensions and annexes and that it would be inconsistent if the same approach were not to be taken in areas which had yet to adopt CIL charging. That reasoning reinforces the point already made in relation to the new affordable housing policy, that Ministers were intending to create exemptions from local plan requirements. That is also supported by the language of Question 6, namely “Should the proposed exemption apply beyond affordable housing to other tariff style contributions based on standard formulae?”

204. Paragraph 28 then continued as follows:-

“Moreover, the fact that the Community Infrastructure Levy is not levied on self-build provides a strong argument for not levying any tariff-style contributions via Section 106

mechanisms either, given the desire of the Government to reduce burdens on self-builders.”

I agree with Mr. Forsdick QC that that sentence continued to focus on the position of self-builders. It did not give any proper indication that the Government was considering an exemption from social infrastructure contributions on all small sites as defined by the thresholds proposed for affordable housing. The Defendant’s submissions relied upon the language of Question 6, but that simply asked whether the proposed exemption should extend beyond affordable housing to other tariff style contributions. That formulation was consistent with the focus of paragraph 28, namely to achieve consistency with the exemption from CIL charges in respect of self-build, extensions and annexes, without going any further. Indeed, an exemption from social infrastructure contributions on sites for 10 units or less, would have been inconsistent with the approach taken in the CIL legislation which does not contain any such exemption. It follows that I do not accept the explanation given in paragraphs 42 to 43 of Ms. Everton’s first witness statement as to the scope of this part of the consultation. In my judgment, the Secretary of State failed to publicise properly the full extent of the exemption which he was considering and so the consultation process was unfair in this additional respect.

205. In any event, the Equality Statement produced on 5 February 2015 reveals an internal inconsistency in the stance taken by the Defendant. When dealing with the exemption from tariff-based contributions, the Statement concluded that there should not be an impact on persons with protected characteristics because LPAs would be able to substitute CIL charges for tariff-based contributions to social infrastructure. That was correct but only because small developments other than self-builds, extensions and annexes are *not* exempted by the legislation from CIL charges. In other words, the effect of the Defendant’s assessment in February 2015 of this change was that it produces no benefit for much, if not most, small-scale development; the effect is self-cancelling. Neither the Consultation document in March 2014 nor the Government’s Response in November 2014 showed any appreciation of this outcome, which was an “obviously material” consideration. Paragraphs 42 and 43 of Ms. Everton’s first witness statement also show that this point was not understood by Ministers or within the Department because they suggest that the exemption from tariff-style contributions was introduced in order to reduce “the burden of charges for *small scale development*” and not just self-build development, extensions and annexes. The failure in November 2014 to take into account the nugatory effect of this part of the national policy is a further ground upon which the challenge succeeds.
206. In addition, the challenge to the policy exemption from local tariff-based contributions succeeds for the reasons given under grounds 2 and 3 above.

### **Vacant Building Credit**

207. This measure was suggested by Ministers, against the advice of officials, in about December 2013, just before the exemption from tariff-style contributions was suggested (see paragraph 62 above). For the reasons already given under ground 4 above, the challenge in respect of this part of the policy must succeed. I should reiterate that before the decision to adopt the vacant building measure was made, no consideration was given to the lack of information on the impact of this policy

change, notwithstanding the advice given by officials that this was necessary. In addition, the challenge must succeed for the reasons given under grounds 1, 2 and 3.

### **Conclusions**

208. For all the reasons set out above, both separately and cumulatively, the challenge to the national policy changes introduced in November 2014 in respect of affordable housing and social infrastructure contributions and the vacant building credit succeeds. Accordingly, I grant permission to apply for judicial review in respect of these matters.
209. There remains the question of what relief should be granted. I have already indicated in relation to the failure to comply with the PSED, ground 4, that the Claimant's are entitled in principle to a quashing order, rather than merely declaratory relief. The same remedy is also justified in relation to grounds 1, 2 and 3, subject to one point.
210. The policy the subject of this challenge was promulgated by a Written Ministerial Statement, which was repeated and elaborated in alterations to the NPPG. In a *dictum* in the Cala Homes case Sullivan LJ, relying upon paragraphs 30-50 of the judgment of Stanley Burnton J (as he then was) in the Office of Government Commerce v Information Commissioner [2010] QB 98, said that a quashing order in respect of the Secretary of State's statement to Parliament "would have been out of the question" ([2011] EWCA Civ 639, [2011] JPL 1458 paragraph 29). That referred to a statement announcing that the Government's intention to abolish regional strategies in the Localism Bill should be treated as a material consideration in planning decisions.
211. The *dictum* by Sullivan LJ stems from Article 9 of the Bill of Rights 1689, as interpreted in decisions such as Prebble v Television New Zealand Ltd [1995] 1 AC 321, 332 and 337; Hamilton v Al Fayed [2011] 1 AC 395; R (Bradley) v Secretary of State for Work and Pensions [2009] QB 114 and R (Federation of Tour Operators) v HM Treasury [2008] STC 547. I note that this point has not been raised by the parties in the present proceedings. In any event, it would not appear, subject to submissions, that Parliamentary privilege would prevent the making of a quashing order in respect of (i) relevant parts of the NPPG, (ii) the Defendant's *decision* to adopt the new policy by way of Written Ministerial Statement and (iii) the Defendant's decision on 10 February 2015 to maintain his decision in (ii). Nor would it prevent the grant of a declaration by the Court that the policies in the Written Ministerial 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.
212. As to article 9, the main issue is whether an order to quash the Written Ministerial Statement would involve any questioning of "proceedings in Parliament". But the law of Parliamentary privilege is based upon two broad principles, first, the need to avoid any risk of interference with free speech in Parliament and second, the separation of functions between the legislature, the executive and the courts (see e.g. paragraph 46 of the OGC case). Challenges have been made by judicial review to Written Ministerial Statements announcing policies, apparently without any objection based on Parliamentary privilege being raised (see e.g. Re Findlay [1985] AC 318; R v Home Secretary ex parte Pierson [1998] AC 539; R v Home Secretary ex parte Venables [1998] AC 407; R v Home Secretary ex parte Hindley [2001] 1 AC 410; R v

Home Secretary ex parte Brind [1991] 1 AC 696). It has also been said that Parliamentary privilege is not intended to “ring fence” policy statements from judicial review (see e.g. paragraphs 46 to 59 of the First Report of the Joint Committee on Parliamentary Privilege - April 1999).

213. Accordingly, on 23 July 2015 the judgment was made available to the parties in draft form in the usual way and I invited them to agree the terms of the order to be made by the Court or, in the event of disagreement, to make submissions on what should be done.
214. In written submissions sent on 28 July the Claimants asked that the policy in the Written Ministerial Statement be quashed. The Defendant, however, submitted for the first time that a quashing order of the Written Ministerial Statement would be inappropriate because it would infringe Article 9 of the Bill of Rights, simply because the statement had been made in Parliament. The Defendant merely cross-referred to the case law to which I had drawn attention in paragraphs 210 to 211 above, but without any analysis or submissions to support his stance. It was not clear whether the reference I had given to the Joint Select Committee has been followed up, in order to see whether that expresses the view taken by Parliament.
215. I asked the parties for submissions on how the issue should be dealt with. On 29 July the Defendant suggested that the proposed quashing order of the Written Ministerial Statement raised serious issues of constitutional significance, now requiring input from lawyers in the Cabinet Office (who might wish to instruct separate Counsel to make submissions). It was also said that the Office of the Speaker of the House of Commons should be informed, in case he would wish to make submissions through Counsel. Consequently it was suggested that that aspect of the relief to be granted would need to be held over until late September at the earliest, although all other relief could be granted forthwith. In an email dated 29 September the Defendant also said that until the draft judgment was sent out it had not been “clear ... that there would be any issue about the quashing the Written Ministerial Statement”. Given that it was plain in the original claim form that that was indeed the relief being sought by the Claimants, the email must have been accepting that the Defendant had not previously considered or appreciated that the relief sought gave rise to any constitutional problem. If so, that would appear to accord with a widely-held view. Plainly, if issues were to be raised about the constitutional propriety of quashing a statement of this kind, then the relevant submissions ought to have been made during the substantive hearing of the claim, and any other parties wishing to intervene ought to have been given an opportunity to do so then. It is most unfortunate that an unsubstantiated objection to the grant of this relief should have been raised in this way in response to the draft judgment. The Claimants faced the prospect of incurring more costs in dealing with the matter by way of written submissions and at a further hearing.
216. Fortunately, the parties have confirmed that they agree that the Court can properly grant the relief summarised in paragraph 211 above without giving rise to any issues under Article 9 of the Bill of Rights or needing to involve other parties at this late stage. The Claimants have also stated that, upon reflection, the declaration I propose to grant provides them with sufficient relief in relation to the unlawfulness of the policy promulgated by means of the Written Ministerial Statement and that they do not need to ask the Court to consider quashing the Statement itself. Therefore, the interesting

issues posed by the recent objection from the Defendant will have to await another case.