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Dear Sir/Madam,

DRAFT AFFORDABLE HOUSING SUPPLEMENTARY PLANNING DOCUMENT RESPONSE TO CONSULTATION

Please find set out below comments made on behalf of our client group comprising Kier Living, Waddeton Park Ltd, Greendale, and Devonshire Homes Ltd.

General Comments

The document is proposed as a 'Supplementary Planning Document' but the scope of the document goes beyond that which it is necessary to consider for the planning process. The document also sets out various 'housing allocation/management' policies/approaches that are not directly relevant to planning decisions. There's no reason to have this information within a planning document. It should be removed and published separately (as an Affordable Housing Management Document).

Similarly, there's unnecessary duplication of national policy that has no need to be re-stated in this SPD. The role of the document is to provide guidance pursuant to Local Plan policies – and the document should start there.

Those two changes would considerably reduce the size and thus improve the usefulness of the document.

Specific Comments

We do have concerns about some of the provisions proposed within the document. The key concerns that we have are set out below.

Not Fettering Schemes of 0-5 units

Government Policy is correctly recorded in the document (at paragraph 2.14) that:

> *"Affordable housing "should not be sought for residential developments that are not major developments" i.e. 10 dwellings or more, or a site area of 0.5 ha or more. In 'designated rural areas', policies may set out a lower threshold of 5 units or fewer. Affordable housing contributions should be reduced where vacant buildings are being reused or redeveloped."*

In accordance with this policy, if a financial contribution is sought on schemes within a designated rural area of 6-9 units then, to prevent a discrepancy with Government policy, financial contributions should only be sought from units 6-9 (not units 0-5).

Uncertainty / Risk / Overage

The Council need to recognise that viability assessment is a 'risk based guestimate' not a science. This means that it's not possible, upon submission of applications, to be specific about the amount of affordable housing to be provided. The likely values and likely costs of a development need to be considered 'in the round'. At the submission stage it's often not at all clear what costs are being sought (and what is the justification for these costs in accordance with CIL regulation 122). These costs may affect the level of affordable housing that a proposal can support.

The uncertainty inherent in viability appraisal is, on its own, a very good reason why overage payments are not appropriate. If the Council wish to seek such

payments they must accept that if the viability moves in the opposite direction (for example due to a fall in anticipated sales values and/or an increase in build costs) then that costs must be borne (in part) by the Council (in a similar proportion to the potential overage increase). The Council must accept that development is a risk based venture, and they must accept that risk, or not seek overage payments – it's certainly not a 'risk free one way escalator'.

The idea that overage clauses can be assessed through the re-assessment of viability post completion using actual costs and values is setting up a wholly unnecessary bureaucratic structure. It's simply not possible to assess this with accuracy since recorded sales prices (at land registry) do not show 'sales incentives' such as free carpets, cashback etc that serve to reduce the actual selling price to the developer.

Benchmark Land Value

The document confirms EDDC's intention to have regard to the approach taken by Homes England (in their assessment of funding bids) in assessing the price paid for land within viability appraisals. Homes England's approach being to include a 20% uplift to the existing use value (paragraph 3.11, page 19).

This approach to grant funding is not a relevant benchmark to use when assessing viability and assessing what is a reasonable/competitive return to a landowner. The planning system is based upon a concept of land availability. The document was assessed having regard to the Government Policy at the time, which was that a 'competitive return' (NPPF, March 2012, paragraph 173). Whilst Government policy in the current NPPF is less explicit (See NPPF, paragraph 34) Government policy remains that there has to be an acceptable return to a willing landowner. It is not Government policy that EUV plus 20% should be adopted as a benchmark. This 'standard' is at odds to the assessment made at the plan making stage where:

> *"For Coast and Sidmouth and Rural, it was accepted for the Affordable Housing Viability Study that a higher benchmark was required and the figure of £900,000 to £1,000,000 per hectare was used.*
>
> *For (large-scale) greenfield development we assume between 10 and 20 times agricultural value – using £20,000 per hectare as agricultural land value in Devon."* (East Devon CIL viability study, January 2013, paragraphs 5.1.5 and 5.1.6, pages 22 and 23).

Some simple maths demonstrates that there's a vast difference between a 20% uplift to an existing agricultural value (£22,000) and £900,000 to £1,000,000 (in Coast, Sidmouth and Rural areas) and £200,000 to £400,000 for large scale greenfield sites.

This is a fundamental change to the basis of the viability upon which the plan was assessed and found sound. Effectively it's a new policy approach that has not been examined. In our opinion it is a change of such magnitude that it is not a matter that can be lawfully pursued via an SPD.

The document is clearly a development management policy which is intended to guide the determination of applications for planning permission.

Relevant Regulations

Regulations 5 and 6 of The Town and Country Planning (Local Planning) (England) Regulations 2012 ("***the 2012 Regulations***") provide, insofar as relevant:

> *"(1) …the documents which are to be prepared as local development documents are -*
>
> *(i) the development and use of land which the local planning authority wish to encourage during any specified period;*
> *(ii) the allocation of sites for a particular type of development or use;*
> *(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the*

development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are -

(i) relates only to part of the area of the local planning authority;
(ii) identifies that area as an area of significant change or special conservation; and
(iii) contains the local planning authority's policies in relation to the area; and

6. *Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan."*

For ease of reading I have, in the quote above, coloured in red those kinds of document which Regulation 6 says must be prepared as a DPD.

The significance of a document having to be prepared as a DPD is, firstly, that it must follow the statutory process for the adoption of DPDs (including submission to the Planning Inspectorate for examination in public) and, secondly, that once adopted it forms part of the development plan for the purposes of s.38(6) of the Planning and Compulsory Purchase Act 2004.

Relevant Case Law

Regulations 5 and 6 of the 2012 Regulations have been the subject of recent consideration by the High Court in ***R (Skipton Properties Ltd) v. Craven DC*** [2017] JPL 825 and ***R (William Davis Ltd) v. Chanwood Borough Council*** [2017] EWHC 3006 (Admin). In each case, the Court found that the Council had acted unlawfully in adopting a document as something other than a DPD. These judgments, which consider the earlier case-law on the subject, represent the latest word on how the regulations are to be interpreted and applied.

Skipton Properties was a judicial review challenge to a local planning authority's adoption of a document which, in the absence of any adopted development plan policy relating to affordable housing, sought to require 40% affordable housing provision on sites of five or more dwellings. The Council argued that the document fell within Regulation 5(1)(a)(iii) and therefore did not need to be a DPD. Jay J. rejected that argument. At para. 75 he held:

> *"if the document at issue contains statements which fall within any of (i), (ii) or (iv) of regulation 5(1)(a), it is a DPD. This is so even if it contains statements which, taken individually, would constitute it an SPD or a residual LDD. This conclusion flows from the wording "one or more of the following", notwithstanding the conjunction "and" between (iii) and (iv)."*

Accordingly, as Jay J. reiterated at para. 90, the focus is not on whether the document has features which fall within the description set out in Regulation 5(1)(a)(iii), but whether it has features which fall within Regulation 5(1)(a)(i),(ii) or (iv) and/or 5(2)(a) or (b) – in which case it must be a DPD.

At para. 92 he held that the document in question fell within Regulation 5(1)(a)(i):

> *"The correct analysis is that the NAHC 2016 contains statements in the nature of policies which pertain to the development and use of land which the Defendant wishes to encourage, pending its adoption of a new local plan which will include an affordable housing policy. The development and use of land is either "residential development including affordable housing" or "affordable housing".* It is an interim policy in the nature of a DPD. It should have been consulted on; an SEA should have been carried out; it should have been submitted to the Secretary of State for independent examination.

At para. 93, he went on to consider whether it could also be considered to fall within Regulation 5(1)(a)(iv). Having held at para. 93(2) that the word *"and"* in *"site allocation and development management policies"* was disjunctive,

meaning that a document only needed to contain one or the other of these kind of policies in order to fall within (iv), he held at para. 95(5)-(6):

> *"(5) The real question which therefore arises is whether the NAHC 2016 contains development management policies which guide or regulate applications for planning permission. It may be seen that the issue here is not the same as it was in relation to regulation 5(1)(a)(i) because there is no need to find any encouragement; this provision is neutral.*
>
> *(6) I would hold that the NAHC 2016 clearly contains statements, in the form of development management policies, which regulate applications for planning permission."*

William Davis concerned a SPD which amongst other things contained a policy setting out the housing mix that the local planning authority expected to see in new developments, including local plan allocations. At para. 61 Gilbart J. expressed agreement with the analysis of the Regulations given by Jay J. in ***Skipton Properties,*** commenting that it:

> *"reflects the basic underlying policy of the legislation and of the code, namely that the development plan is the place in which to address policies regulating development. That is what this policy undoubtedly did, albeit that CBC describe it as a starting point. As Mr Lewis pointed out, the policy in HSPD 9 undoubtedly requires the applicant for permission to show that the mix set out in the policy is not the one to use."*

At paras. 62-64 Gilbart J. continued:

> *"62. Mr Stinchcombe's first argument – i.e. that the policy relates only to matters falling within sub-paragraph (iii) - is unsustainable. The mix of housing proposed in an application could lead to a refusal on the grounds that it is unacceptable, or on an outline application could lead to the imposition of a condition applying a particular mix. In either case, the way in which that land would be developed is affected. A housing mix policy is thus "a statement regarding…. the development of land" and falls within sub-paragraph (i). It also falls within the scope of development management and probably within the scope of site allocation. It will*

undoubtedly be used "in the determination of planning applications." It thus falls within sub-paragraph (iv) as well.

63. That being so, it is unnecessary to interpret (iii). There is nothing in the Regulations which require the interpretation of the sub-paragraphs in an exclusive manner. I agree with Jay J that the drafting of these Regulations is very poor, and can lead to confusion, or to lengthy arguments on interpretation with not much regard being had to the realities of development control. It is in that context that I refer to the concept of the Planning Code, and within it to the role of the development plan, and to the importance given by the code to proper examination of the development plan, and to the fair consideration by an independent person of objections and representations made. From the point of view of all types of participant in the planning process, the process of development plan approval and adoption is important. Individual planning applications, appeals and inquiries will, save in unusual cases, be focussed on the effect of developing the site in question. Development plan processes, including the independent examination, also look at issues relating the wider pattern of development, and at policies which apply across the Local Plan Area, as well as the site-specific issues relating to sites where there is objection to their inclusion or omission. The Code, including that in its current form, maintains that principle.

64. If the CBC arguments were to prevail, then arguments on the overall mix of housing across the LP area, and across differing sites, would have as their "starting point" or "preference" as Mr Stinchcombe put it, or a "presumption" as Mr Lewis put it, a particular mix of housing which the LPA would want to see achieved. Whatever the choice of noun, that is a policy which could, and if my interpretation of the Regulations is correct, should have been open for debate within the Local Plan context. Although the text of the CLPCS referred to a mix, it was, no doubt quite deliberately, omitted from the policy, CBC then accepting that it should not figure within it. While I accept that subsequent evidence has come forward from a strategic housing assessment, that cannot be a reason for using an SPD as the vehicle for making an alteration."

Legal Compliance Conclusions

Having regard to the intended nature and function of the (as illustrated in the passages set out in the foregoing section of this letter) it is plain that the document may only lawfully be adopted as a DPD. Applying the analysis of Jay J. in ***Skipton Properties*** and Gilbart J. in ***William Davis***, it is plain beyond sensible doubt that the document falls within Regulation 5(1)(a)(iv) on the basis that it will contain development management policies which are intended to regulate applications for planning permission.

Given the significance which the Council intends to place on the document in future development control decisions the mischief identified by Gilbart J. in ***William Davis*** is also applicable here, namely that the policies in the document need to be tested through the statutory process for preparing DPDs, including submission for examination by an independent Inspector.

Accordingly, if the Council continues on its' current course of adopting the document as SPD, rather than as a DPD, it will be acting unlawfully and the adoption of it is likely to suffer the same fate in an application for judicial review as the documents that were the subject of the High Court challenges in ***Skipton Properties*** and ***William Davis.***

In this case, since affordable housing is the residual element in a viability assessment (after other costs have been allowed for, such as educational provision) then the SPD proposed a significant change to the operation and meaning of Strategies 34 and 35.

The East Devon Plan has been made (and adopted) using a certain set of assumptions. It's important that where costs exceed those assumptions then an allowance is made (either by not seeking contributions over and above those assumed cost levels, or by reducing the level of affordable housing provision sought to balance increased costs over and above those assumed levels). It would therefore be helpful if those assumed costs were published in an easily

accessible format (not buried in a CIL viability assessment). The step away from those assumptions (via an increase), without a consequential reduction in affordable housing levels sought will serve to reduce the viability of development across the plan area and prejudice the rate of delivery of meeting identified needs – a plan failure. For clarity those assumptions were:

> *"For the main testing, the analysis indicates that, for instance, a s106 contribution of £8,000 per dwellings with a CIL of up to £40 per sq m is viable."* (East Devon CIL Viability Study, January 2013, paragraph 8.2.8, page 53).

It is important to understand that S106 benchmark relates to the benchmark land values quoted earlier in this letter, not to the EUV plus 20% level now suggested. In broad terms the basis upon which the plan was found sound was that affordable housing levels would be expected to fall if S106 costs exceed £8,000 per unit – not that the S106 'bill' can rise and the land value can fall to a new, and distinctly different and significantly lower benchmark level.

Conclusion

For the reasons set out above please treat this letter as an objection to the emerging SPD.

Kind regards,

David Seaton, BA (Hons) MRTPI
For PCL Planning Ltd