

Public Document Pack



Rory Ringer – Democratic Services Manager
General Enquiries: Telephone No. 01362 656870
DX743950 Dereham 2

To The Chairman and Members of the Overview
& Scrutiny Commission

Contact: Teresa Smith

Direct Dial: 01362 656295

All other Members of the Council – for
information

E-mail: teresa.smith@breckland.gov.uk

Date 29 January 2019

AGENDA SUPPLEMENT

Dear Sir/Madam,

OVERVIEW AND SCRUTINY COMMISSION - THURSDAY 31 JANUARY 2019

I refer to the agenda for the above-mentioned meeting and enclose the following item:

Item No	Report Title	Page Nos
12.	<u>Amendments to the Breckland Housing Allocations policy</u> Report of the Executive Member for Growth, Councillor Gordon Bambridge.	106 - 115

Yours faithfully

Teresa Smith

Democratic Services Team Leader

BRECKLAND DISTRICT COUNCIL

Report of: Executive Member for Growth – Councillor Gordon Bambridge

To: Overview and Scrutiny Commission, January 31st 2019

Author: Matthew Hogan, Executive Manager for Growth

Subject: A report concerning proposed amendments to the council's Housing Allocations Policy

Purpose: To consider a proposed policy direction and associated amendments for the council's Housing Allocations Policy in respect of housing allocations on sites planned for through the neighbourhood planning process. To consider updated and refreshed legal advice in respect of the proposed amendment, commissioned in response to questions raised by the committee at a previous meeting on November 8th 2018.

Recommendation(s):

- 1) That Overview and Scrutiny Commission give consideration to the content of the report and the proposed amendments to the council's Housing Allocations Policy, ahead of the amendment being made available for a period of public consultation during February 2019.
- 2) That Overview and Scrutiny Commission give consideration to the legal advice note (appended to the main report) which seeks to answer a number of questions raised by the committee's previous meeting on November 8th 2018 (see Para 1.17).

1.0 BACKGROUND

- 1.1 The Housing Act 1996 requires every local housing authority in England to have a scheme for determining priorities and the procedure to be followed in allocating housing accommodation. In Breckland, this policy is captured within the Breckland Housing Allocations Policy.
- 1.2 Breckland Council's current housing allocations policy was last reviewed and adopted by the authority in 2016. The council's policy sets out who is eligible to apply for housing, and then sets out an approach to the prioritisation of eligible households.
- 1.3 The council's policy has been created in such a way to ensure compliance with the legislation that governs housing allocations, specifically in relation to the requirement to provide 'reasonable preference' to households with a certain level of housing need
- 1.4 Broadly speaking, the council's current allocations policy is structured in the following way;
 - **Local Connection.** Under the council's existing policy, an applicant is required to have a local connection to the district of Breckland as a whole in order to be considered to be eligible to apply for housing. Local connection is determined through one or more of the following; residency, employment within the district and/or family connection. Note that there are other factors that the council considers when looking at eligibility, including household income and previous tenancy conduct.
 - **Priority.** Once an applicant has been determined as being eligible, applicants are then prioritised in accordance with a banding scheme. The Breckland prioritisation scheme

has been structured to award greatest priority to those who fall into the 'reasonable preference' categories. There are two key reasons why the council's policy is structured in this way; firstly, in order to ensure compliance with the legal requirement to provide 'reasonable preference' to certain households, and secondly to ensure that the authority can discharge its duties to homeless households in the most timely manner possible.

1.5 Consequently, the council's current policy position can be summarised by saying that affordable housing within the Breckland is ring-fenced for households with a local connection to the district as a whole, and that priority for housing is awarded to local households in the highest housing need. The only exception to this is for homes developed on 'exception sites', whereby homes are developed on small sites in response to the identification of a locally arising need for additional affordable housing. In this scenario, homes built on exception sites are typically prioritised for households with a connection to the parish where the homes have been built, over and above those who do not have a connection with the parish.

1.6 Affordable Housing Allocations and Neighbourhood Planning

1.7 Separately to the processes relating to the housing allocations, a number of local communities across Breckland are developing Neighbourhood Plans. As members will be aware, the neighbourhood planning process has been developed by government as a means of providing local communities with the opportunity to shape development in their areas. It is common place for neighbourhood plans to include policies on matters relating to design, amenity space and the location of development within settlements.

1.8 An increasingly common policy area featured within neighbourhood plans relates to affordable housing. This includes policy to guide the development of exception sites, and policies concerning preferences for housing mix.

1.9 Linked to this, a common 'ask' by local communities developing neighbourhood plans is for a proportion of affordable housing delivered on sites allocated by the district council (through the local plan process) to be prioritised for households with a local connection to that specific settlement.

1.10 Whereas this 'ask' from those developing neighbourhood plans is entirely comprehensible, given the desire for many local communities to see new housing growth deliver tangible benefits to local people, there are a number of legal impediments that make it difficult for the district council (as the local housing authority) to support this approach. These legal impediments mainly relate to the legal requirement for local authorities to gear the allocation of affordable housing to those in the highest need. There are also risks of legal challenge under equalities and housing legislation where these requirements are deviated from without strong evidence to justify an alternative approach.

1.11 Acknowledging these legal constraints, the authority has been seeking to explore a means through which it can balance a) the desire of local communities to see affordable housing developed on site within their areas allocated to local people, with b) the need for the local housing and planning authority to have policies that seek to meet the housing needs of the district as a whole, and c) the need to ensure that affordable housing is prioritised in accordance with relevant housing and equalities legislation.

1.12 A potential option concerning policy direction

1.13 Consequently, and in response to requests from a number of local communities developing neighbourhood plans, the authority has been exploring how amendments to its housing allocations policy could facilitate an outcome whereby, in circumstances where a local

community uses a neighbourhood plan to proactively plan for additional housing growth over and above the growth planned through the council's Local Plan, an element of any additional affordable housing delivered as a result of this growth could be 'ring-fenced' to meet locally arising housing need.

- 1.14 Having obtained legal advice on the matter, officers have prepared some draft policy wording which, if adopted by the authority as an amendment to its existing Housing Allocations Policy, would enable that outcome to be delivered. The draft policy wording is included in Appendix 1.
- 1.15 In order to deliver a change to the council's allocations policy, there is a statutory requirement for the authority to consult with housing associations that operate within the district. Furthermore, whereas there is no strict legal requirement to consult with the public on changes to a housing allocations policy, the authority has received legal advice which confirms that the chances of a successful challenge against this or other parts of the Housing Allocations Policy will be lessened should the authority be able to demonstrate that it has conducted a full and fair public consultation of any proposed changes.
- 1.16 It is worth noting that, alongside introducing this proposed policy change, it is also proposed that as part of the review process, the references to now-extant legislation within the council's current allocations policy (e.g. the Housing Act 1996) are amended to reference current and prevailing legislation (i.e. the Homelessness Reduction Act 2016). This amendments will not change the council's policy, but will ensure that it reflects the latest legislation.
- 1.17 Meeting of Overview and Scrutiny Committee, November 8th 2018**
- 1.18 The proposed amendment to the council's Housing Allocations Policy was considered previously by the committee on November 8th 2018.
- 1.19 Following a detailed discussion on the proposed amendment, members of the committee requested that officers return to a future meeting as a means of providing clarity on a number of points and raised by the committee at the November 2018 meeting.
- 1.20 The two key points raised by the committee during the previous meeting were as follows;
- That further consideration be given as to whether the policy amendment should be amended in order to enable the parish local connection requirement to apply to lettings 'in perpetuity' (as opposed to simply applying on 'first let').
 - A question from the committee in respect as to whether it would be possible to apply a parish local connection requirement to all sites in all parishes in the district, regardless of whether a neighbourhood plan is in place.
- 1.21 In respect of the matter of whether the policy should apply on 'first let' or 'in perpetuity', having given further consideration to the operation of the policy, it is proposed that the policy proceeds to public consultation on the basis of the policy applying on 'first let' as opposed to 'in perpetuity'. This is with a view to keep the effectiveness of the policy under close review if or when it comes to be implemented in the future, and for the matter of the policy applying 'in perpetuity' being considered as part of the next full review of the council's Housing Allocations Policy.
- 1.22 In respect of the matter as to whether such a policy could or should apply to all parishes in the district regardless of whether a neighbourhood plan is in place, officers have sought fresh external legal advice on this as an alternative policy option. This legal advice, which is set out in Appendix Two, sets out the following view;

- That any amendment to the council's allocations policy, be it on this or other matters, carries with it a degree of risk of successful challenge.
- That the likelihood of a challenge being successful is dependent largely upon the amount to which any discrimination which may occur as a result of any policy can be justified as serving a 'legitimate aim', whilst also being 'proportionate'
- That as the proposed policy amendment would only apply in limited circumstances, as a means of supporting the delivery of evidence-backed policies within a neighbourhood plan (i.e. the delivery of affordable housing to meet locally identified need), the proposed policy amendment carries with it a lower risk of successful challenge from any individual naturally disadvantaged by the policy.
- That if the policy applied all parishes in the district regardless of whether a neighbourhood plan is in place, it is more likely to be considered by the courts as not being 'proportionate', and would therefore give rise to a higher risk of challenge from any individual disadvantaged by such a policy..
- That should the authority wish to develop a policy approach which is wider and far reaching than the policy approach proposed through the amendment set out within this report, that counsel's advice be sought as a means of understanding the level and type of evidence needed to justify such a policy.

1.23 Consequently, on the basis of this advice, it is proposed that the policy amendment set out within this report proceeds to public consultation on the basis that it will apply only in circumstances where a neighbourhood plan is in existence. This is with a view for any more far-reaching policy amendments, including those discussed at the November 2018 meeting of OSC, be considered as part of the next full review of the council's Housing Allocations Policy.

1.24 It should be noted that, should the authority adopt the proposed amendment to the Housing Allocations Policy, a parish council within Breckland has already indicated an desire to utilize the policy as a means of meeting affordable housing need within their parish.

2.0 OPTIONS

2.1 **That Overview and Scrutiny give consideration to the content of the report and the associated legal advice, with a view to provide comment and input on the proposed amendments to the council's Housing Allocations Policy ahead of a period of public consultation in February 2019 (recommended).**

2.2 **Do nothing.** Under this option, the members of the committee would not give consideration to the proposed policy changes (not recommended).

3.0 REASONS FOR RECOMMENDATION(S)

3.1 The reason for officers proposing a potential new policy direction in this area stems from discussions that have taken place between the authority and communities that are developing neighbourhood plans across the district, and the common 'ask' from communities to have greater influence over the allocation of affordable homes developed within their areas.

3.2 Consequently, officers have sought to consider what may be possible within a legal context to support these 'asks'. If members are minded to support this policy direction, in response to requests from many local communities developing neighbourhood plans, then members are recommended to support the proposed amendments to the council's allocations policy.

4.1 EXPECTED BENEFITS

4.1 If members are minded to support the report recommendation, it will enable local communities that accept additional housing growth through the neighbourhood planning process to seek for the allocation of any additional affordable homes delivered through this growth to be prioritised for households with a connection to that settlement.

5.0 IMPLICATIONS

5.2 Constitution & Legal

5.2.1 Officers have sought external and specialist legal advice on both a) the nature of the proposed policy direction, and b) the proposed policy wording set out within Appendix 1. This legal advice has returned a view that the proposed policy approach is likely to be a legally sound and defensible approach to achieving an outcome whereby the allocation of housing on sites promoted through neighbourhood plans is prioritised for households with a connection to that settlement.

5.3 Corporate Priorities

5.3.1 The authority's support for local communities developing neighbourhood plans is rooted in the alignment between neighbourhood planning and the council's corporate objectives linked to 'enabling stronger and more independent communities' alongside 'supporting Breckland to develop and thrive'.

5.4 Equality and Diversity

5.5.1 The matter of the impact of the proposed policy direction upon equalities and diversity has been considered at great length as part of the process of developing the approach contained within this report. Officers are satisfied that the proposed policy approach is legally robust when considered against the requirements set within the Equalities Act 2010.

5.12 Consultation / Timescales

5.12.1 As set out within this report, it is proposed that any proposed amendments to the council's Housing Allocations Policy are made subject to a period of public consultation (with 28 days being the proposed period). The authority will also need to complete statutory consultation with housing associations with housing stock within the district.

6.0 WARDS/COMMUNITIES AFFECTED

6.1 This report does not directly relate to any specific Ward within the District.

Background papers:- [See The Committee Report Guide for guidance on how to complete this section](#)

Lead Contact Officer

Name and Post: Matthew Hogan (Executive Manager for Growth)
Telephone Number: 01775 764524
Email: matthew.hogan@breckland-sholland.gov.uk

Key Decision: No

Exempt Decision: No

This report refers to a Mandatory Service

Appendices attached to this report:

Appendix A Proposed Policy Wording

Appendix B Legal Advice

Appendix One - Draft Housing Allocations Policy

6. Special Circumstances

Allocations on specified sites in neighbourhood areas

Across Breckland a number of local communities have proactively sought to develop 'neighbourhood plans'. These plans enable local communities to set a vision for the future of their local areas. Breckland Council is keen to support communities that adopt neighbourhood plans that set a positive vision for their local area.

Matters relating to housing provision are often key considerations in the minds of local communities. This is especially the case in relation to affordable housing. In order to meet local housing needs, a number of communities are developing neighbourhood plans that seek to support additional sustainable housing growth, above and beyond that planned for by the local planning authority.

Where a community adopts a neighbourhood plan that facilitates additional housing supply by allocating sites within their neighbourhood plan for housing over and above those sites already allocated by the local authority to meet the district wide need, Breckland Council may, in relation to a percentage of the affordable housing secured on those additional named and allocated sites, give preference to applicants with a local connection to the Parish, subject to the requirement to give reasonable preference as detailed in this policy.

This approach will apply solely to properties on first let and will only be applied where it is supported by corresponding policies within an adopted neighbourhood plan. The percentage of housing and the types will be agreed in conjunction with the landlord and the local authority, taking into account matters relating to local and district-wide housing need, development viability, deliverability and prevailing local and national policy.

Matters of eligibility and priority will be determined in accordance with the full provisions of this allocations policy.



Legal Advice Note Housing Allocations Policy and Local Connections

I have been asked to advise on the risks to the Council of adopting a local connection requirement across the District that would give priority for housing to those already living or connected to the Parish within which the housing is located.

Legal Background

s166A of the Housing Act 1996 (“the 1996 Act”) requires every local housing authority in England (“LHA”) to have a scheme for determining priorities and the procedure to be followed in allocating housing.

Under S166A(3) of the 1996 Act “reasonable preference” must be given to certain classes of persons. This means that “positive favour should be shown to applications which satisfy any of the relevant criteria. To use colloquial language, they should be given a reasonable head start” (R v Wolverhampton MBC Ex p. Watters (1997) 29 H.L.R. 931).

S169 of the 1996 Act provides that regard must be had to guidance issued by the Secretary of State, currently “allocation of accommodation: guidance for local housing authorities in England”. When considering a “local connection” for the purposes of the 1996 Act and the above guidance this is framed in the context of a District. The prospect of a Parish connection is not specifically dealt with albeit provision is made for policies to be created at a more local level known as “local letting policies”. Again these must be evidence based.

In R (on the application of Ahmad) v Newham LBC 2009 UKHL 2009 Lord Neuberger stated “as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies”. Since that time the Equality Act 2010 has come into force and amendments have been made by the Localism Act 2011 giving rise to further challenges to housing allocation policies related mainly to the “reasonable preference” requirements.

The Equality Act 2010 (“2010 Act”) prohibits discrimination (direct and indirect) against persons with protected characteristics. Indirect discrimination occurs if a person or organisation adopts a provision, criterion or practice which is neutral but which nonetheless puts a person with a protected characteristic at a particular disadvantage (s19 2010 Act).

A level of indirect discrimination may be permissible if “it is a proportionate means of achieving a legitimate aim for the purpose of section 19(2)(d)” (R. (on the application of C) v Secretary of State for Work and Pensions 2017).

For example, In R (on the application of XC) v Southward LBC 2017 EWHC 736 (Admin) the Court considered that whilst a local authority’s housing allocation scheme which gave a

preference to working households indirectly discriminated against disabled persons and women the scheme had a legitimate aim, being the creation of sustainable and balanced communities and encouragement of residents to make a contribution to the local community, and was the least intrusive measure which could be used to achieve that aim.

A recent challenge to an allocation policy was in relation to its local connection criteria in R (TW and others) v London Borough of Hillingdon 2018 EWHC 1791. Here the Court held that a ten year residency requirement indirectly discriminated against persons with the protected characteristic of race under the Equality Act 2010. The Council had failed to consider whether it had struck the correct balance between disadvantage to Irish travellers and the aims of the residence requirement.

A local housing authority is free to put in place any policy it considers appropriate to “meet local needs and local priorities” subject to the overarching duties to act fairly and reasonably and to comply with the requirements of the 1996 and any other statutory requirements. When preparing, adopting and amending an allocations policy the Council must therefore have regard to the need to give “reasonable preference” under S166A(3) of the 1996 Act, to take into account government guidance, act fairly and ensure that where indirect discrimination occurs it is proportionate and serves a legitimate aim.

The Policy Amendment

Officers have put forward a proposed amendment to the current Housing Allocations Policy to support the neighbourhood plan proposals of Parish Council’s supporting housing growth. This includes Parishes such as Swanton Morley, who have indicated a desire to utilise such a policy approach if amendments to the council’s housing allocations policy are agreed by the district council.

The proposed amendment is to enable additional preference to be given to applicants with a local connection to the Parish, rather than just the District, in relation to sites being allocated over and above those already allocated in the District Council’s local plan. This proposal would not override the need to give “reasonable preference” under the 1996 Act.

Previous advice given in relation to this proposal was that any amendment which could be considered unjustified due to a lack of need or because it is indirectly discriminatory is open to challenge. The risks of challenge are reduced by limiting the impact of the amendment (for example by reducing the circumstances it would apply so that it does not impact upon the Council’s wider housing needs), ensuring that any indirect discrimination resulting from the policy amendment can be shown to be “proportionate” when weighed against the legitimate aim of supporting neighbourhood plan policy and ensuring that there is evidence of need, such as the evidence base and examination process related to the neighbourhood plan policy itself.

In this case the aim of the amendment is to support the policies of a neighbourhood plan. Such a plan is supported by its own evidence base and is subject to independent examination. In addition, the amended policy only applies to sites not already identified as needed to meet the housing need of the District thereby reducing the likelihood of challenge.

The Members Proposal

I am advised that members have enquired as to whether it is possible to apply a Parish Local Connection requirement to all sites in all Parishes in the District regardless of whether a Neighbourhood Plan is in place. My advice would be that the risk of challenge to such a policy is much higher for the following reasons:

- As highlighted in the Hillingdon case above local connection requirements have recently been subject to challenge. Such a policy may be considered unlawful if it results in indirect discrimination, is not proportionate and does not serve a legitimate aim. I am not aware of any evidence base to support a blanket policy and it would therefore be difficult to demonstrate a legitimate aim or consider whether it was proportionate or not.
- A blanket policy may affect the Council's ability to meet housing need within the District and be more likely to be challenged by local people seeking housing accommodation.

Recommendation

As previously advised a change to the Allocations Policy without any evidence of need to support it or where a policy is likely to be considered discriminatory without a legitimate aim would be subject to challenge. This applies regardless of what amendments are considered.

The current amendment being put forward by officers carries the least risk whilst enabling the Council to support Parish Council's seeking to adopt this type of policy in their neighbourhood plans. This is because it seeks to facilitate the legitimate aim of supporting neighbourhood plan policies whilst applying only in those limited circumstances so as to limit the impact on any persons indirectly discriminated against.

The members proposal is much wider and it more likely to be considered as not "proportionate" in these circumstances and would therefore give rise to a higher risk of challenge. If the Council wishes to pursue such a policy Counsel's advice is recommended in relation to the risks of challenge and the level and type of evidence needed to justify such a policy.

Prepared by Nikki Fonseca
Head of Planning
18th December 2018

Clapham & Collinge ^{LLP}
St Catherine's House
All Saints Green
Norwich
NR1 3GA

t 01603 693500
f 01603 693501
e info@clapham-collinge.co.uk
w www.clapham-collinge.co.uk
dx 5212 Norwich