

PRETTY VACANT – Using Vacant Building Credit



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Summary

1. Vacant Building Credit ('VBC') might be seen as something of a planning backwater, suitable only for dedicated planning aficionados. However, the esoteric nature of the policy should not mask its potential significance, especially during and after the current crisis. Sadly, one of the inevitable consequences of Covid-19 is that more buildings will become vacant and the economic pressures on the house building sector increased. This pressure could be alleviated to some extent by the sensible application of VBC.
2. The aim of VBC is obvious – to incentivise the development of brownfield land – but the policy itself is less than clear and, as a consequence, the opportunities it presents

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to encourage brownfield delivery are not being maximised. To make matters even more challenging, local authorities do not apply VBC policy consistently across the country.

3. This paper seeks to summarise the policy position, unravel some of its complexities and to identify the opportunities that VBC offers.

Backing Brownfield

4. Re-use of brownfield land has long been a stated political objective of this Government and it is borne out in many of the policies in the National Planning Policy Framework ('NPPF'). See for example the requirement to make as much use as possible of brownfield land to meet objectively assessed need¹; the direction to policies and decision to "*give substantial weight to the value of using suitable brownfield land*"²; requiring local planning authorities to take a "*proactive role in identifying and helping to bring forward land that may be suitable for meeting development needs, including suitable sites on brownfield registers*"³.
5. The approach of 'brownfield first' was recently reasserted in the 'Planning for the Future' document published on 12 March⁴, stating that the "*Government will back brownfield*". The initiatives put forward in March include investing £400m to use brownfield land productively and launching a national brownfield map.

¹ NPPF 117.

² NPPF §118(c)

³ NPPF§119.

⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872091/Planning_for_the_Future.pdf

Vacant Building Credit – the policy

The policy

6. Part of ‘backing brownfield’ is the policy on Vacant Building Credit. It may surprise some that the policy has been around for some time, going back all the way to Brandon Lewis as the Minister for Housing and Planning. Introduced in a written ministerial statement on 28 November 2014⁵, the intention was to “*tackle the disproportionate burden of developer contributions on small-scale developers, custom and self-builders*”.
7. Following the policy being upheld by the Court of Appeal in *West Berkshire v SoSCLG*⁶, in July 2018, VBC was included in NPPF §63:

To support the re-use of brownfield land, where vacant buildings are being reused or redeveloped, any affordable housing contribution due should be reduced by a proportionate amount ²⁸.

NB – the NPPF policy does not confine itself to small-scale developers, custom and self-builders.

8. Footnote 28 to the policy states that the reduction in affordable housing contributions will be:

Equivalent to the existing gross floorspace of the existing buildings. This does not apply to vacant buildings which have been abandoned.

9. The policy intention and practical application of VBC is set out in the Planning Practice Guidance (‘PPG’):

The policy is intended to incentivise brownfield development, including the reuse or redevelopment of empty and redundant buildings. In considering

⁵ <https://www.parliament.uk/documents/commons-vote-office/November%202014/28%20Nov%202014/2.%20DCLG-SupportForSmallScaleDevelopersCustomAndSelf-Builders.pdf>

⁶ [2016] EWCA Civ 441 at §30

*how the vacant building credit should apply to a particular development, local planning authorities should have regard to the intention of national policy.*⁷

10. Although the NPPF/PPG do not set ‘criteria’, they pose a number of questions:
 - 10.1. There must be a building or buildings. As such, if a relevant building has been demolished at the date that VBC is calculated, a plain reading of the NPPF and PPG is that the site promoter would not be entitled to VBC;
 - 10.2. It must be vacant;
 - 10.3. The building(s) must not be abandoned;
 - 10.4. The floorspace of the vacant building should be calculated. The PPG uses the expression ‘gross floorspace’ but does not say whether this is gross external or internal floorspace. The gross external floor area is more straightforward way of making this measurement and more properly reflects the impact in the real world of existing buildings;
 - 10.5. Where the consented development would result in an increase in gross external floorspace, the developer is entitled to a credit “*which is the equivalent of the gross floorspace of any relevant vacant buildings being brought back into use or demolished as part of the scheme and deducted from the overall affordable housing contribution calculation*”⁸. This credit can result in either a reduction in the number of affordable units or a smaller off-site contribution. Clearly, where there is either a reduction in floorspace or the entirety of the existing buildings will be used for residential development, the credit applied is 100% and no affordable units are required.
11. The PPG also indicates that the following factors ‘may’ be relevant:

⁷ PPG §028 Reference ID: 23b-028-20190315

⁸ PPG §027 Reference ID: 23b-027-20190315.

- 11.1. whether the building has been made vacant for the sole purposes of re-development;
- 11.2. whether the building is covered by an extant or recently expired planning permission for the same or substantially the same development⁹.
12. Each of these potentially relevant factors is directed at ensuring that site promoters do not ‘play the system’ by deliberately purchasing a building and letting it run to neglect or by seeking to reduce affordable housing contributions notwithstanding an existing planning permission with a full affordable housing complement.
13. The calculation of the credit “*is the equivalent of the gross floorspace of any relevant vacant buildings being brought back into use or demolished as part of the scheme and deducted from the overall affordable housing contribution calculation*”¹⁰. The formula works out as follows:
- $$\frac{\text{(Difference between proposed and existing floorspace / proposed floorspace)}}{\text{* policy requirement}}$$
14. So where the proposed floorspace is 30,000m², the existing floorspace is 20,000m² and the local plan policy is for 30% affordable housing, the calculation would look like this:
- $$(30,000 - 20,000) / 30,000 * 30 = 10\%$$
15. In this worked example, the requirement would be for 10% affordable housing when the VBC is applied.
16. Clearly VBC has potentially significant commercial advantages to those promoting sites with vacant buildings. However, the process is not as simple as it may seem and there are plenty of potential hazards in the road.

⁹ See Appeal Decision Ref: 3227271, §10-11 where VBC was discounted due to a subsequent planning permission that included a policy compliant level of affordable housing.

VBC – the potential pitfalls

17. Whilst the maths looks simple, it isn't all plain sailing. The policy contains a number of areas on which judgment calls must be made. Of course where there is judgment, there is fertile ground for argument.

Abandonment

18. VBC can only be applied where the building has not been abandoned. Whether a particular use has been 'abandoned' is a term of art in planning law. The PPG makes it clear that the legal definition applies to consideration of VBC¹¹.
19. The PPG refers to the four factors set out in *Trustees of the Castell-y-Mynach Estate v Secretary of State for Wales* [1985] 1 WLUK 659 and which have been approved in subsequent cases.
20. If a building or land “*remains unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned*”¹², then the concept of abandonment applies. It involves a cessation of use in such a way, and for such a time, as to give the impression to a reasonable onlooker, (applying an objective rather than a subjective test), that it was not to be resumed¹³.
21. For the developer arguing for VBC, ensuring that there is sufficient evidence within the criteria above will be essential. However, abandonment is a high hurdle and Inspectors are likely to require compelling evidence that the '4 factors' point clearly to abandonment¹⁴.

¹¹ Paragraph: 028 Reference ID: 23b-028-20190315

¹² per Lord Denning, in *Hartley v MHLG* [1970] 1QB 413

¹³ *Nicholls v SSE and Bristol CC* [1981] JPL 890, J.363.

¹⁴ See Appeal Decision ref: 3234924 at §11-12.

Vacancy

22. There is a lacuna in the NPPF and PPG, which leaves these key questions unanswered:
 - 22.1. When is the question of vacancy to be determined? At the date of the planning application? At the date of determination?
 - 22.2. For how long must the building(s) be vacant in order to qualify for VBC?
23. Our view is that the date of determination of the planning application is the appropriate stage to reach the VBC judgment. This approach accords the basic principles of planning law; namely that the factual and policy matrix existing at the time of the decision (to grant or refuse) should be applied.
24. However, in practice it is highly unlikely that any developer would seek to rely upon VBC where there was doubt about whether the relevant building was vacant at the time a planning application is submitted. If a building is not vacant at the date of application, it seems unlikely that a LPA will be satisfied that the building has been vacant long enough – unless the determination period is exceptionally long.
25. As to the period of vacancy, some authorities have used Regulation 40(11)(ii) of the CIL Regulations as a proxy for assessing the period of vacancy. This provision defines ‘in use building’, as one that:

“contains a part that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development.”

I.e. if a building does not meet this definition, it is ‘vacant’.
26. Whilst it may not be irrational for an authority to adopt this as part of their criteria for assessing whether a building is vacant, depending upon the reasons behind the adoption. An argument could be made that unless the CIL and VBC regimes reflected each other a developer could benefit from a building being both in-use for CIL purposes, and vacant for VBC purposes.

27. But equally to draw direct comparisons between the two regimes would be problematic for a few reasons:
- 27.1. The CIL Regulations address a completely different part of the planning system and do not transpose well to other areas;
 - 27.2. For the purposes of the CIL Regulations, the determination of whether a building is ‘in use’ is carried out when planning permission is granted. That does not translate to the assessment of VBC, which must have been done before permission is granted;
 - 27.3. This rather straitjacketed approach prevents the parties having a sensible discussion about whether buildings are truly vacant. *E.g.* where buildings have become vacant as a consequence of a flood or fire and there is no prospect of them being brought back into use, it would be nonsensical to apply the ‘6 months out of 3 years’ test;
 - 27.4. Application of the CIL ‘test’ could undermine the Government’s intention to re-use brownfield land and its objective to boost the supply of housing if site promoters were required to wait for up to 2 ½ years in order to secure VBC especially if there is a pressing need for housing in a particular area.

Deliberate vacancy

- 28. The PPG suggests it may be appropriate for local authorities to consider whether the building has been made vacant for the sole purposes of re-development.
- 29. The PPG does not state that any VBC would automatically be lost in the case of deliberate vacancy. Although it is reasonable to assume that it is more likely that a decision taker would refuse to apply VBC if the vacancy was an obvious ploy to avoid meeting in full the affordable housing contributions set out in local policy. How the LPA would prove that would be open to significant scrutiny.

Subsequent applications

30. The third consideration open to LPAs is whether the building is covered by an extant or recently expired planning permission for the same or substantially the same development.
31. The acid test will always be whether the previous planning permission (without VBC) is for 'substantially the same development'. This expression is not defined by the PPG so the judgment will be one of fact and degree, taking into account a number of different factors, including:
 - 31.1. Whether the previous planning permission was granted before or after VBC could be applied: i.e. before or after 28th November 2014 when VBC was introduced by a Written Ministerial Statement. It would be wholly unreasonable to refuse to apply VBC if the relevant planning permission was granted prior to VBC being available to developers;
 - 31.2. The number of dwellings. A material increase or decrease in the number of units is highly likely to have an impact on the level of VBC;
 - 31.3. Any change in local policy concerning the provision of affordable housing. If there is an increase in the percentage of affordable units required between the grant of the 'old' planning permission and a fresh planning application the application of VBC, it would be unreasonable to refuse VBC.

VBC and Viability

32. It may be pertinent in some circumstances to consider what role the VBC will play in the viability or otherwise of a scheme.
33. Although there may be a practical and commercial link between VBC and viability, there is nothing in policy or practice that requires developers to demonstrate that a proposed development would not be viable save for the application of VBC. There is

no explicit link in the NPPF or PPG between the policies on VBC and those on viability.

34. Furthermore, the guidance by the Royal Institute of Chartered Surveyors: Financial viability in planning: Conduct and Reporting (May 2019) does not indicate any relationship between viability and VBC.
35. It is therefore difficult to see a direct and legitimate relationship between viability and VBC in policy terms, even if there is such a link in the ‘real world’. If there was a policy link then VBC could be relevant as a reason for granting planning permission only in a few circumstances:
 36. If a scheme is viable without VBC, logic would dictate that the full amount of affordable housing should be required. On that basis, VBC would be irrelevant and could never be applied to viable schemes;
 37. If a scheme is unviable even with VBC, the developer would have a strong argument independent of VBC that the full amount of affordable housing should not be required; so
38. VBC would only be relevant in those cases where the application of VBC would make an otherwise unviable scheme viable. In our view, this narrow application does not reflect Government’s intention.
39. Consequently, it would undermine the policy if local authorities were to refuse to apply VBC where the proposed development is viable without it.

VBC in practice

40. The application of VBC is a mixed picture. Whilst some LPAs have adopted policies to implement it, others have not. It is arguable that a local plan policy is not required in any case as the NPPF and PPG includes the VBC, they are both material considerations of significant weight, and so VBC should be applied as a result. That the VBC does not have statutory force or a requirement to be included in local plans

is a weakness. Where VBC is being applied, it can be a time consuming experience that puts off some developers.

41. The information needed to satisfy the criteria for securing VBC needs to be known well before buildings become vacant as it relies on past tenant/building information but the owner is not always fully aware of tenants plans.
42. If an authority accepts VBC and existing floorspace justifies no or significantly reduced affordable housing provision it does present a very significant risk of delays in securing a consent as it is not always politically acceptable locally and may require an alternative offer of affordable housing proposal (see point on delay and empty rates below).
43. There is clearly a low take-up of VBC relative to viability submissions. Is it easier for LPAs to say a viability appraisal has been assessed and accepted by an independent consultant than it is to shoulder the responsibility for zero or large (20-30%) reduction in affordable housing? Will we see this change and VBC become more important now that viability is meant to be considered through the plan-making process and less so at the application stage?
44. VBC is a useful and welcomed initiative but does not work effectively in isolation and its successful application is dependent on numerous factors - willingness of authority to apply VBC, time needed for agreement of application of VBC and planning decision, scheme viability, empty rates.

Some Tips

45. Given the vagueness of VBC and its inconsistent application by LPAs, it is difficult to provide a definitive list of 'dos and don'ts'. What follows are some general suggestions to improve the chances of securing the maximum VBC.

Record Keeping

46. Where possible, detailed records should be kept setting out:
 - 46.1. Number and length of existing tenancies within the buildings;
 - 46.2. A clear narrative as to why a particular building has become vacant. *E.g.* has the former occupant moved to larger premises or become insolvent?

Demolition

47. It stands to reason that demolition removes the entitlement to VBC (as well as potentially preventing reliance on CIL reductions for ‘in use’ buildings). Applicants should think extremely carefully before demolishing existing buildings in these circumstances.
48. It would pay to ‘do the math’ in these circumstances. *I.e.* it should be possible to work out the costs associated with retaining the buildings with the potential savings of applying VBC. In many cases, leaving the buildings standing and claiming the benefit of VBC will be more advantageous.

Subsequent Applications

49. Think very carefully about submitting a ‘second go’ application, especially if that application includes a full amount of affordable housing. LPAs and Inspectors are likely to pay close attention to the objective of the VBC to incentivise brownfield development in such circumstances. Why (they will ask rhetorically) should VBC be applied when the applicant is able to deliver a full amount of affordable housing without the VBC incentive?

Outline planning permissions

50. Whilst it will be possible to calculate the *existing* floorspace at the time the planning application is determined and to conclude that there is an entitlement in principle to VBC it will not be possible precisely to know the proposed floorspace until the reserved matters have been approved. There is nothing in the NPPF or PPG which accounts for this situation. In our view, the better way to proceed would be as follows:
- 50.1. Secure confirmation from the local planning authority that the development is entitled to VBC and fix the existing floorspace at the date of determining the outline planning application;
- 50.2. Provide a planning obligation under s.106 which sets out (i) the existing floorspace of the vacant building; (ii) formally recognises the entitlement of the development to VBC; and (iii) imports a formula to assess the VBC deduction (if any) at the point that the reserved matters are determined. This approach seems to have been followed in an appeal in Midsomer Norton (Bath and North East Somerset).¹⁵.

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¹⁵ Ref: 3201692, 14th February 2019 – see §31 especially.