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Winchester District Local Plan

Winchester District Local Plan 2040

Carbon Neutrality and Embodied Carbon Topic Paper

July 2024

Winchester City Council

Contents

Purpose and structure of the Topic Paper:

Introduction:

1.1. The primary purpose of this Topic Paper is to set out the approach that the City Council has taken toward mitigating and adapting to climate change in the Local Plan.

1.2. The starting point is that mitigating and adapting to climate change are vitally important and are defining issues for the Winchester City Council's Local Plan. This is because the Local Plan has a key role in assisting the Council with meeting its net zero climate emergency target by 2030 and, as a result of this, this plan has been prepared through the lens of climate change.

1.3. The structure of this Topic Paper outlines:

- what the legislation says about how Councils should address climate change issues at a local level;
- the outcome of a meeting that took place with the Department of Levelling Housing and Communities on whether Local Plan should include high energy efficiency standards above Building Regulations;
- the evidence base that has directly informed the City Councils approach towards including the Low Energy Transformation Initiative energy efficiency standards (Policy CN3) in the Regulation 18 Local Plan; and
- examples of other Council's where they have included higher energy efficiency standards in their recently adopted Local Plans.

1.4. The Topic Paper also includes a section on the Government's latest Written Ministerial Statement (WMS) on Local Energy Efficiency Standards Update on the 13th December 2023 and the reasons why the City Council believes that the using Energy Use Intensity standards is the best standard to refer to in the Regulation 19 Local Plan.

1.5. The Topic Paper also addresses how the City Council intends to address embodied carbon in the Regulation 19 Local Plan.

The legislation:

Climate Change Act 2008

2 The Climate Change Act 2008 includes a statutory target of reducing carbon dioxide emissions to at least 100% below 1990 levels by 2050, with interim targets, set through five-yearly carbon budgets. The UK Government are legally bound to meet this target. The Act also created a framework for climate change adaptation. The independent Evidence Report that informs the statutory UK Climate Change Risk Assessment was published in June 2021.

2.1 The Climate Change Act includes a compulsory reporting mechanism of climate change impacts for certain public bodies and organisations. The Council have declared a climate emergency and in doing so committed to becoming carbon neutral by 2030, ahead of the 2050 statutory target. Winchester City Council has published a Carbon Neutrality roadmap and annual report on progress Carbon Neutrality Action Plan - Winchester City Council

Why is this relevant?

2.2 The Climate Change Act provides an evidence base that can be used to identify priorities for action and appropriate adaptation measures, as well as a carbon reduction budget which is directly relevant to planning.

Planning and Compulsory Purchase Act 2004 and the duty on mitigation and adaptation

2.3 The Planning and Compulsory Purchase Act 2004 sets out the structure of the local planning framework for England and Wales, including the duty on plan-making to mitigate and adapt to climate change.

Why is this relevant?

2.4 Local planning authorities are bound by the legal duty set out in Section 19 of the Planning and Compulsory Purchase Act 2004, as amended by the Planning Act 2008, to ensure that, taken as whole, plan policy contributes to the mitigation of, and adaptation to, climate change. This includes a duty on local planning authorities to prioritise climate change issues as part of the plan-making process.

Statutory obligation to reach net zero.

2.5 The United Kingdom is subject to statutory obligation to ensure that its net carbon account for the year 2050 is at least 100% lower than the 1990 baseline, pursuant to section 1(1) of the Climate Change Act 2008 ("CCA 2008"), as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019. Under sections 4 and 9 of the CCA 2008 Climate Change Act 2008 (legislation.gov.uk)., the Secretary of State must set regular carbon budgets for each succeeding five-year period, taking into account advice from the Climate Change Committee ("CCC"), and ensure that the net UK carbon account for each budgetary period does not exceed the carbon budget.

2.6 **Why is this relevant?**

2.7 The concept of net zero is important because it directly impacts the health of humans and the environment. Greenhouse gases stay in the atmosphere for a long time, so it is useful to have a universal term that references a solution.

Planning and Energy Act 2008

2.8 The power for LPAs to set their own energy efficiency standards derives from the Planning Energy Act (PEA) 2008. Section 1 of this statute provides that:

"(1) A local planning authority in England may in their development plan documents, corporate joint committee may in their strategic development plan, and a local planning authority in Wales may in their local development plan, include policies imposing reasonable requirements for-

(a) a proportion of energy used in development in that area to be energy from renewable sources in the locality of the development;

(b) a proportion of energy used in development in their area to be low carbon energy from sources in the locality of the development;

(c) development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.

(4) The power conferred by subsection (1) has effect subject 2 subsections (5) to (7) and to –

(a) section 19 of the Planning and Compulsory Purchase Act 2004 (c.5), in the case of a local planning authority in England; […]

(5) policies included in development plan documents by virtue of subsection 1 must not be inconsistent with the relevant national policies for England."

Why is this relevant?

2.9 The PEA 2008 establishes the LPAs may set higher standards for energy efficiency in their Local Plan policies than the baseline required by the Building Regulations provided that such policies are: a) reasonable, b) not inconsistent with national policies; and c) compliant with the usual provisions around plan making found in section 19 of the Planning and Compulsory Purchase Act 2004.

National Planning Policy Framework

2.10 The National Planning Policy Framework, which was updated in December 2023, states at paragraph 158 that:

'*Plans should take a **proactive approach** to mitigating and adapting to climate change, taking into account the long-term implications for flood risk, coastal change, water supply, biodiversity and landscapes, and the risk of overheating from rising temperatures. Policies should support appropriate measures to ensure the future resilience of communities and infrastructure to climate change impacts, such as providing space for physical protection measures, or making provision for the possible future relocation of vulnerable development and infrastructure'.*

Why is this relevant?

2.11 At the Local Plan Examination is important that the City Council is able to demonstrate to a Local Plan Inspector how the Local Plan has taken a proactive approach towards mitigating and adapting to climate change.

Planning Practice Guidance

2.12 The Planning Practice Guidance (PPG) online resource provides vital additional and detailed guidance on aspects of the NPPF, and it is periodically updated to include interpretations of Ministerial Statements relevant to planning. The relevant sections of the PPG are 'Climate change', 'Renewable and low carbon energy', and 'Flood risk and coastal change'.

2.13 Paragraph 011 of the 'Climate change' section directs planners to the Climate Change Committee for further information and guidance.

2.14 The PPG in paragraph 012 (Ref ID: 6-012-20190315), which was last updated on 15th March 2019, states:

'Different rules apply to residential and non-residential premises. In their development plan policies, local planning authorities:

- *Can set energy performance standards for new housing or the adaptation of buildings to provide dwellings, that are higher than the building regulations, but only up to the equivalent of Level 4 of the Code for Sustainable Homes.*
- *Are not restricted or limited in setting energy performance standards above the building regulations for non-housing developments.*

2.15 *The Planning and Energy Act 2008 allows local planning authorities to set energy efficiency standards in their development plan policies that exceed the energy efficiency requirements of the building regulations. Such policies must not be inconsistent with relevant national policies for England. Section 43 of the Deregulation Act 2015 would amend this provision, but is not yet in force.*

2.16 *The Written Ministerial Statement on Plan Making dated 25 March 2015 clarified the use of plan policies and conditions on energy performance standards for new housing developments. The statement sets out the government's expectation that such policies should not be used to set conditions on planning permissions with requirements above the equivalent of the energy requirement of Level 4 of the Code for Sustainable Homes (this is approximately 20% above current Building Regulations across the build mix).*

2.17 *Provisions in the Planning and Energy Act 2008 also allow development plan policies to impose reasonable requirements for a proportion of energy used in*

development in their area to be energy from renewable sources and/or to be low carbon energy from sources in the locality of the development'.

Why is this relevant?

2.18 At the Local Plan Examination is important that the City Council is able to demonstrate to a Local Plan Inspector the approach that it has taken a towards mitigating and adapting to climate change. It is noticeable that the wording of paragraph 012 of the PPG specifically directs people to the WMS dated 25th March 2015 and it does not refer to the WMS dated 13th December 2023 (which is discussed at paragraph 5 of this Topic Paper).

Can a local planning authority set higher energy performance standards than the building regulations in their local plan?

Written Ministerial Statement 2015 – Streamlining the planning system.

2.19 On the 25 March 2015, Eric Pickles, the then Secretary of State for Communities and Local Government, issued a Written Ministerial Statement that included a number of measures to streamline the planning system.

2.20 In connection with implementing energy efficiency standards the 2015 WMS stated:

2.21 *"For the specific issue of energy performance, local planning authorities will continue to be able to set and apply policies in their Local Plans which require compliance with energy performance standards that exceed the energy requirements of Building Regulations until commencement of amendments to the Planning and Energy Act 2008 in the Deregulation Bill. This is expected to happen alongside the introduction of zero carbon homes policy in late 2016. The Government has stated that, from then, the energy performance requirements in Building Regulations will be set at a level equivalent to the (outgoing) Code for Sustainable Homes Level 4. Until the amendment is commenced, we would expect local planning authorities to take this statement of the Government's intention into account in applying existing policies and not set conditions with requirements above a Code level 4 equivalent. This statement does not modify the National Planning Policy Framework policy allowing the connection of new housing development to low carbon infrastructure such as district heating networks".*

2.22 *"Where there is an existing plan policy which references the Code for Sustainable Homes, authorities may continue to apply a requirement for a water efficiency standard equivalent to the new national technical standard, or in the case of energy a standard consistent with the policy set out in the earlier paragraph in this Statement, concerning energy performance".*

Legal position on energy efficiency targets beyond the national minimum standards

2.23 Accordingly, whilst local energy efficiency policies cannot be inconsistent with national policies, there is nothing in national policy or in law to prevent LPAs from setting higher standards than the national baseline under the Building Regulations, provided that such policies are reasonable.

2.24 As indicated in the sections above local authorities are empowered by statute to set their own standards for energy efficiency of new dwellings and other buildings in excess of Building Regulations, provided that such standards do not conflict with national policy. However, there has been confusion around this power caused by a statutory amendment which was never brought into force. The Planning Practice Guidance on Climate Change has also not been updated to reflect the latest revisions to the Building Regulations. Nevertheless, the statutory power exists in primary legislation and LPAs can exercise that power.

Confirmation that local planning authorities have the power to set their own standards for energy efficiency.

2.25 Confirmation that LPAs have the power to set their own standards for energy efficiency has come from national government in the form of the Future Homes Standard consultation response (January 2021), which stated:

2.26 *"2.33 At present, local planning authorities may include policies in their local plans which require developers to comply with energy efficiency standards for new homes* ***that exceed the minimum requirements of the Building Regulations.***

2.27 *"2.34 The Planning and Energy Act 2008 was amended in 2015 to provide Government with powers to stop local planning authorities from being able to exceed the minimum energy efficiency requirements of the Building Regulations, but this amendment has not been commenced. In the same year, the then Government set out in a Written Ministerial Statement an expectation that local planning authorities should not set energy efficiency standards for new homes higher than the energy requirements of level 4 of the Code for Sustainable Homes, which is equivalent to a 19% improvement on the Part L 2013 standard.*

2.28 *"2.35 The Future Homes Standard consultation recognised that the current position has caused confusion and uncertainty for local planning authorities and home builders, alike. While some local planning authorities are unclear about what powers they have to set their own energy efficiency standards and have not done so,* ***others have continued to set their own energy performance standards which go beyond the building regulations minimum and in some cases beyond the Code for Sustainable Homes"*** *(emphasis added).*

Raising the bar on energy efficiency standards at a Local Plan level

Strategic Issues and Priorities consultation document

3 A key issue that was raised by the City Council in the Strategic Issues & Priorities public consultation document (page 19), which took place in between February and April 2021 was whether the Local Plan should introduce a planning policy that included higher energy efficiency standards than the current Building Regulations. Unsurprisingly, there was a mixed response to this issue with developers not wishing the City Council to go any higher than Building Regulations whereas other people and a range of organisations wanted the Council to include the highest energy efficiency standard as possible. Another key point from this public consultation raised by developers was that if the Local Plan included higher energy efficiency standards than Building Regulations it would need to be justified by evidence and any additional costs would need to be factored into the Local Plan Stage Viability Study.

Meeting with the Department of Levelling up, Housing and Communities

3.1 A meeting took place with Officers of the City Council and the Department of Levelling up, Housing and Communities (DLUHC) on the 7th July 2022 to discuss progress on preparing the Local Plan and a number of Local Plan matters. One of the issues that was discussed with DLUHC was whether a Local Plan could include higher energy efficiency standards beyond the current Building Regulations. Following this meeting it was confirmed in writing by the DLUHC that:

- *Plan-makers may continue to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish.*
- *Local planning authorities have the power to set local energy efficiency standards through the Planning and Energy Act 2008.*
- *The recent 2021 uplift to the Building Regulations will deliver a meaningful reduction in carbon emissions, while ensuring high-quality homes that are in line with our broader housing commitments.*
- *In January 2021, we clarified in the Future Homes Standard consultation response that in the immediate term we will not amend the Planning and Energy Act 2008, which means that local planning authorities still retain these powers".*

Regulation 18 Local Plan consultation document

3.2 The Regulation 18 Local Plan, which was published for public consultation in November 2022, was prepared through the lens of the climate emergency and given its importance of this subject, there is a separate topic in the Regulation 18 Local Plan on Carbon Neutrality and Designing for Low Carbon Infrastructure here.

3.3 Based on the feedback from the meeting with DLUHC and consultants from Introba, the City Council appointed Etude and Currie Brown to prepare the evidence base for setting higher energy efficiency standards that the current

Building Regulations. Currie Brown worked in partnership throughout the commission with Dixon Searle Partnership who were appointed by the City Council to undertake the Local Plan Viability Assessment.

3.4 The wording of Policy CN3 (Energy efficiency standards to reduce carbon emissions) that was included in the Regulation 18 Local Plan was based on the outputs from the Elementa, Etude and Currie Brown report. The costs of introducing the LETI energy efficiency standards in Policy CN3, which were prepared by Currie Brown, directly informed the work on the Local Plan Viability Study Local Plan Viability Study briefing note September 2022 The Local Plan Viability Study was published on the City Council website at the same time as the Council's Regulation 18 Local Plan. At the time of preparing the Regulation 18 Local Plan, the evidence base identified that the costs of achieving the policy requirements in line with the requirements in Policy CN3 would be an additional 5% on build costs (this work has now been updated as result of representations to the Regulation 18 Local Plan – see paragraph 3.5). This outputs from this work will be re-run through the Local Plan Viability Assessment and this will be made available as part of the Regulation 19 Local Plan public consultation.

Representations to the Regulation 18 Local Plan

3.5 Similar to the public consultation on the Strategic Issues & Priorities document, there were a number of representations submitted to Policy CN3 in terms of developers objecting to the inclusion of the policy and a number of other representations that wanted the City Council to go further than the policy. The representations on Policy CN3 were discussed and agreed with the consultants that prepared the evidence base on the LETI energy efficiency standards. As a result of analysing the representations, the Consultants updated the Local Plan evidence base to Policy CN3 https://www.localplan.winchester.gov.uk/LibraryAssets/attach/165/Winchester-City-Council-Evidence-Base_RevF-003-.pdf The output from this updated work concluded that the cost of introducing the LETI energy requirements in Policy CN3 would rise from 5% to 7% on build cost. This increase was a result of a change to the design and cost evidence base for the semi-detached and detached house. The updated work:

- Included costs that are associated with the decentralised mechanical extract ventilation system in lieu of a whole house mechanical ventilation with a heat recovery system baseline in a Part L 2021 home. This change corrects an error in the cost models and aligns with the energy modelling undertaken of the baseline homes. The impact of this change is to increase the relative costs of the zero-carbon home in comparison to the Part L 2021 baseline by £1,400 per unit for the detached house and £1,500 per unit for the semi-detached house; and

- The impact of this change from the original modelling is to change the relative costs of meeting the proposed zero carbon standard in comparison to the Part L 2021 baseline to £11,200 (£79 per m^2) or 5.4% for the detached home and £9,400 (£101 per m^2) or 6.9% for the semi-detached home.

3.6 Overall, this increased the costs of introducing Policy CN3 from 5% to 7% of the overall build cost needs to be accounted for in the Local Plan Viability Assessment and Policy H6 (affordable housing) in the Regulation 19 Local Plan.

3.7 Officers have discussed with Members a number of very minor changes to the supporting text and Policy CN3 that have arisen from the Regulation 18 public consultation that will be incorporated into the Regulation 19 Local Plan.

Recently adopted Local Plans that have included higher energy efficiency standards.

4 It is important to point out that since the Regulation 18 Local Plan was consulted on two local planning authorities have adopted Local Plan documents that have included energy efficiency standards that are higher than Building Regulations:

- The Bath & Somerset Local Plan Council adopts ground-breaking planning framework | Newsroom | Bath & North East Somerset Council (bathnes.gov.uk)

- The Cornwall Climate Emergency Development Plan Document Climate Emergency Development Plan Document (DPD) - Cornwall Council

- To ensure absolute clarity, when preparing their new Local Plan, Bath and North East Somerset Council contacted DLUHC and received the following reply by letter dated 22 June 2022 from Jonathan Mullard, Minister at the then Department for Business, Energy, and Industrial Strategy, who confirmed that he was empowered to speak for DLUHC and that:

- *Plan-makers may continue to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish.*
- *Local planning authorities have the power to set local energy efficiency standards through the Planning and Energy Act 2008.*
- *In January 2021, we clarified in the Future Homes Standard consultation response that in the immediate term we will not amend the Planning and Energy Act 2008, which means that local planning authorities still retain these powers.*

4.1 In the Inspectors 'Report on the Examination of the Cornwall Council Climate Emergency Development Plan Document', dated 10 January 2023, Inspector Paul Griffiths BSc (Hons) BArch IHBC recognised that:

"166. Provisions to allow Councils to go beyond the minimum energy efficiency requirements of the Building Regulations are part of the Planning and Energy Act 2008. The WMS of 25 March 2015 says that in terms of energy performance standards beyond the requirements of the Building Regulations until the Deregulation Bill gives effect to amendments to the Planning and Energy Act 2008. These provisions form part of the Deregulation Act 2015, but they have yet to be enacted. Further, the Government has confirmed that the Planning and Energy Act 2008 will not be amended. ***The result of all this is that*** *Councils are able to set local energy efficiency standards for new homes, without falling foul of Government policy.*

167. ***The WMS of 25 March 2015 has clearly been overtaken by events****. Nothing in it reflects Part L of the Building Regulations, the Future Homes Standard , or the Government's legally binding commitment to bring all greenhouse gas emissions to net zero by 2050. In assessing the Council's approach to sustainable energy and construction, the WMS of 25 March 2015 is of limited relevance" (emphasis added).*

Salt Cross Area Action Plan

4.2 The Salt Cross Area Action Plan ("the AAP") contained several policies to help achieve net zero, including the requirement to demonstrate net zero operational carbon on-site through ultra-low energy fabric specification and fossil fuel free development. However, following the submission of the AAP to independent examination, two Examining Inspectors appointed by the Secretary of State removed most of these net zero policies based on an alleged lack of soundness and justification.

4.3 In their report setting out their reasons for removing the policies, the Inspectors said that they considered the policies would be contrary to a 2015 Written Ministerial Statement and therefore unsound. The 2015 WMS provided that (emphasis added):

"For the specific issue of energy performance, local planning authorities will continue to be able to set and apply policies in their Local Plans which require compliance with energy performance standards that exceed the energy requirements of Building Regulations until commencement of amendments to the Planning and Energy Act 2008 in the Deregulation Bill. This is expected to happen alongside the introduction of zero carbon homes policy in late 2016. The Government has stated that, from then, the energy performance requirements in Building Regulations will be set at a level equivalent to the

(outgoing) Code for Sustainable Homes Level 4. Until the amendment is commenced, we would expect local planning authorities to take this statement of the Government's intention into account in applying existing policies and not set conditions with requirements above a Code level 4 equivalent."

4.4 However, the amendments that were going to be in 2015 Bill (now Act) have not been brought into effect, and the Government has now indicated that it does not intend to bring them into effect. The Building Regulations have also now been amended such that they impose higher requirements for energy efficiency than those set as a maximum in the 2015 WMS.

4.5 The Claimant successfully judicially reviewed the Examining Inspectors' recommendations, arguing that that the Inspectors had misinterpreted the 2015 WMS and failed to have regard to other inspectors' decisions that had found the 2015 WMS to be overtaken by events.

The decision

4.6 Mrs Justice Lieven, a High Court Judge, allowed the claim, finding at [76] that *"the Inspectors' interpretation [of the WMS] neither makes sense on the words, seen in their present context, or of the mischief to which it was applying."* Accordingly, their report recommending main modifications to the AAP was legally flawed and the judicial review succeeded.

4.7 It is also notable that following the final hearing, but before judgment, the Secretary of State formally withdrew the 2015 WMS and issued a new WMS on the 13th December 2023.

4.8 Officers from West Oxfordshire District Council have been contacted and they have advised that they have taken their own independent legal advice which has indicated that the District Council should write to the Planning Inspectorate and ask them to re-open the Salt Cross AAP Public Inquiry on a focused basis. As this is a legal judgement, this means there is no Inspector's report or main modifications relating to Policy 2 in the AAP, so there is no way in which the District Council can adopt the AAP. The outcome of this process is at this stage unknown but it does clearly demonstrate that inconsistency between Inspectors and the way that the Government is interpreting what Local Planning Authorities can and cannot do under the Planning and Energy Act.

Latest Written Ministerial Statement dated 13 December 2023 – Local Energy Efficiency Standards Update

5 On the 13th December 2023, Lee Rowley, the Minister of State for Housing replied to the Parliamentary Secretary of State (Baroness Penn) and published a new Written Ministerial Statement Written statements - Written questions, answers and statements - UK Parliament that superseded the WMS 'Housing standards – streamlining the system' that was published in 2015.

5.1 The WMS dated 13th December 2023 states:

5.2 *"The proliferation of multiple, local standards by local authority area can add further costs to building new homes by adding complexity and undermining economies of scale. Any planning policies that propose local energy efficiency standards for buildings that go beyond current or planned buildings regulation should be rejected at examination if they do not have a well-reasoned and robustly costed rationale that ensures:*

- *That development remains viable, and the impact on housing supply and affordability is considered in accordance with the National Planning Policy Framework.*

- ***The additional requirement is expressed as a percentage uplift of a dwelling's Target Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP).***

5.3 *Where plan policies go beyond current or planned building regulations, those polices should be applied flexibly to decisions on planning applications and appeals where the applicant can demonstrate that meeting the higher standards is not technically feasible, in relation to the availability of appropriate local energy infrastructure (for example adequate existing and planned grid connections) and access to adequate supply chains.*

5.4 *To be sound, local plans must be consistent with national policy – enabling the delivery of sustainable development in accordance with the policies in the National Planning Policy Framework and other statements of national planning policy, including this one.*

5.5 *The Secretary of State will closely monitor the implementation of the policy set out in this WMS and has intervention powers provided by Parliament that may be used in respect to policies in plans or development management decisions, in line with the relevant criteria for such intervention powers.*

5.6 *The above supersedes the section of the 25 March 2015 WMS entitled 'Housing standards: streamlining the system', sub-paragraph 'Plan making' in respect of energy efficiency requirements and standards only. Planning Practice Guidance will also be updated to reflect this statement".*

Discussions with other Local Planning Authorities

5.7 As the current wording of Policy CN3 does not refer to Target Emission Rates (TER), discussions have taken place with a number of other Local Planning Authorities, the Town & Country Planning Association (TCPA), the Royal Town Planning Institute and various Consultants to understand the implications of the 2023 WMS.

5.8 The TCPA, alongside 12 organisations and over 50 local authorities, including Winchester City Council, sent the Secretary of State, Michael Gove a letter on the 21st February 2024 to express concern about the limiting impact of the WMS on local authorities wishing to set standards for net zero new homes in their authorities. A copy of the letter is attached at Appendix 2.

5.9 As the joint letter indicates the organisations are committed to delivering the government's statutory carbon reduction targets through the planning system, but find their effort hindered by this statement of national policy. In the letter the TCPA and other signatories have stated that they are keen to discuss the impacts of the WMS with DLUHC and remove barriers to local authorities that are seeking to deliver the energy efficient homes required in response to the climate emergency and the cost-of-living crisis.

5.10 A response to the joint letter from the TCPA letter to the Secretary of State has been received from Baroness Swinbourne on the 25th March 2024 which is attached at Appendix 4. Unfortunately, the response fails to address the concerns that were raised in the TCPA letter about the shortcoming of using Target Emission Rates.

Pre-action challenge to the 2023 WMS

5.11 There has been a pre-action challenge against the December WMS which was launched by Rights Community Action, supported by the Good Law Project We're challenging the Government to build homes fit for the future - Good Law Project. The Rights Community Action challenged the lawfulness of the December WMS via judicial review. The hearing date for this legal challenge took place between 18-19 June 2024.

5.12 On the 3rd July (the day before the General Election) Mrs Justice Lieven dismissed the appeal. Of particular note is Ground 2 and 3 in the High Court decision Rights Community Action Ltd, R (On the Application Of) v Secretary Of State For Levelling Up, Housing And Communities [2024] EWHC 1693 (Admin) (02 July 2024) (bailii.org) (paragraph 67) which states '*this is not prohibiting the exceedance of the building regulations or planned extensions to them (i.e. the Future Homes Standard), but making clear that national policy requires certain things to be taken into consideration. The same principles apply under s.19 Planning Compulsory Purchase Act and s.38(6) Planning Compulsory*

Purchase Act'. Mrs Justice Levian went onto conclude that '*The WMS statement that these should be applied "flexibly", again that is in accordance with the legal position. National policy can state that decision makers should take specified matters into consideration and that is not inconsistent with the primacy of the development plan under s.38(6) Planning Compulsory Purchase Act'.*

5.13 All three Grounds for Appeal were dismissed. As mentioned in paragraph 5.12 this High Court decision was handed down a day before the General Election and since then there has been a change of administration. It is, however, too early say what the new administration has to say about energy efficiency standards in Local Plans.

5.14 The WMS is a material planning consideration, which provides an opportunity for local authorities to set policies that are not in accordance with the WMS where local evidence and circumstances justify this and the policies are reasonable. Local authorities retain the full power under section 1 of the 2008 Act and they must still comply with their duties under section 19 (1A) of the Planning and Compulsory Purchase Act 2004.

Different ways of expressing energy use:

Regulated and unregulated energy

6 Before discussing the merits of the different ways of expressing energy use, it is important to first outline the difference between regulated and unregulated energy as both of these factors have an influence on the total energy consumption of a property. **Regulated energy:** This is energy consumed by a building, associated with fixed installations for heating, hot water, cooling, ventilation, and lighting systems. In other words, it's the energy uses that are inherent in the actual design and layout of a building.

6.1 However, there is a significant amount of energy consumption that does not fall within the category of regulated energy. This is referred to as unregulated energy use, and it can be a large part of the overall total energy consumption of a property. **Unregulated energy:** This includes items within a building that do not have to perform to a mandated requirement under Building Regulations. For example, energy use that is associated with equipment such as fridges, washing machines, TVs, computers, lifts, and cooking.

Target Emission Rates and Energy Use Intensity

6.2 As mentioned in paragraph 5.8 the 2023 WMS refers to a percentage uplift of a dwelling's Target Emissions Rates (TER) calculated using a specified version of the Standard Assessment Procedure (SAP).

6.3 The next section of this Topic Paper outlines the differences between TERs and Energy Use Intensity (EUI) and why the City Council has instead produced an evidence base that is based on the LETI energy efficiency standards that are based kWh/m^2.

Target Emission Rates

6.4 The target CO_2 emission rate (TER) sets a minimum allowable standard for the energy performance of a building and is defined by the annual CO_2 emissions of a notional building of same type, size and shape to the proposed building. TER is expressed in annual kg of CO_2 per sqm. Building Regulations make use of a relative metric based on an automatically generated 'notional building' and compares a building design against a series of fixed specifications. However, the challenge with this approach, is that excludes the 'plug load' or unregulated energy consumption of a building which makes it impossible to check whether the building's performance is in line with the design and construction prediction.

6.5 For the reasons that have been stated in paragraph 75 in Appendix 3, the improvement of a building against TER excludes the actual design of the building (i.e. the building form), which is a key factor in energy efficiency. Another key challenge with TER is that a notional building has to be identical in terms of the same size, shape, orientation, and glazing proportions as the proposal. In other words, if the proposed building has a heat pump system, then the notional building will also be modelled with a heat pump. This means that TER has a number of shortcomings and it is not a straightforward calculation as you need to ensure that you are modelling like for like. Most importantly, TER considers a range of range of building inputs but unlike EUI it does not consider or prioritise energy efficiency measures.

Energy Use Intensity

6.6 The LETI energy efficiency standards that were included in Policy CN3 in the Regulation 18 Local Plan propose the use of absolute building metrics, expressed as Energy Use Intensity (EUI) and space heating demand alongside renewable energy generation.

6.7 When compared to TER, EUI represents the total amount of energy used by a building divided by the floor area. The amount of energy is calculated using kWh/m^2 year. The use of EUI has been found by multiple planning inspectors to be justified approached in a number of Local Plans. Using EUI is, therefore, considered by the City Council to be a more accurate indicator of the energy efficiency of a home/building than TER and it can be calculated or checked at both design stage and at the post completion stage.

6.8 For homes/buildings heated by an individual heating system, it is very easy to check for the occupant/resident as it will be the 'energy at the meter' divided by the floor area and kWh/m^2. This is exactly the same way that it is expressed on everyone's energy bills. As stated above, another key advantage of referring to EUI in Policy CN3 is that includes both the regulated and unregulated energy use and it prioritises energy efficiency measures.

6.9 It is important to note that the EUI will be the same whether the building has Photovoltaics on the roof or not. The EUI is based on energy use rather than carbon emissions. This means that the main advantage of EUI when it is compared to TER is that it gives a much more accurate overall picture of a building's performance (i.e. energy efficiency). This is why the City Council has included the EUI metric in Policy CN3 as this will meet the City Council's climate emergency declaration of reaching net zero for the District by 2030 and it will result in lower residents' energy bills as it includes both regulated and unregulated energy consumption.

Is there a target that could be expressed as a percentage reduction that could achieve net zero?

6.10 The WMS refers to TER as a percentage reduction. Officers from the City Council have considered whether a target could be expressed as a percentage reduction. However, the main difficulty with this is that a percentage reduction metric, for one home it might be 105%, for another it could be 150% and for one that uses a fossil fuel heating system it may have a different figure which would be problematic in terms of drafting a Local Plan policy.

6.11 When a home is compared against a 'notional building' it is, however, very difficult to understand how a building is performing and more importantly, whether it could be more energy efficient. Not considering all energy uses (i.e. both regulated and unregulated energy) is also a major omission for the reasons that have been outlined in the above paragraphs as it does not provide you with a true and accurate picture of the total energy consumption and it does not address or prioritise energy efficiency measures that can be incorporated into a property.

Could you combine TER and EUI based one in the same Local Plan policy?

6.12 The baseline (notional building) emission rates have all of the inherent problems that have been set out in the above paragraphs. The City Council has discussed with the Consultants whether the two metrics (TER and EUI) could be referred to in Policy CN3 but unfortunately, the conclusion from these discussions are that these two metrics are not comparable.

Government consultation on Home Energy Model: replacement for the Standard Assessment Procedure (SAP)

6.13 On the same day (13th December 2023) that the Government issued the updated WMS they also commenced public consultation on Home Energy Model: replacement for the Standard Assessment Procedure (SAP) - GOV.UK (www.gov.uk). This public consultation is proposing replacing the Standard Assessment Procedure (SAP) that is referred in the WMS with a Home Energy Model. This highlights another inconsistency with the Government's approach on how Local Planning Authorities should model energy efficiency as the WMS specifically refers to SAP.

6.14 **The way forward**

6.15 The PPG (Paragraph: 012 Ref ID: 6-012-20190315) cites that The Planning and Energy Act 2008 which allows local planning authorities to set energy efficiency standards in their development plan policies that exceed the energy efficiency requirements of the building regulations. Alongside this Local Planning Authorities will need to demonstrate to a Local Plan Inspector how they meet the obligation in paragraph 158 of the NPPF to *'contribute to the mitigation and adaptation to, climate change'* and to meet the requirements of the Planning Act 2008.

6.16 The City Council does not consider that it would be appropriate to include two metrics in Policy CN3 (TER and EUI) and it would be impractical to do this for the reasons that are mentioned in paragraph 6.10. As the LETI energy efficiency standards provide you with a true picture of the total energy consumption of a property and it prioritises energy efficiency measures, this is still the preferred way forward in the Regulation 19 Local Plan. There is also a real inconsistency with how exactly energy use should be monitored which has been highlighted in the recent consultation that has proposed replacing SAP with a Home Energy Model. The above approach would also align with the independent open legal opinion from Essex County Council dated February 2024 (Appendix 3) and the council's own legal advice.

6.17 It is important to note that since the challenge to the 2023 WMS was dismissed at appeal, there has been a change in administration and it is too early to say what the new Government will have to say in relation in energy standards in Local Plans. In view of this, Regulation 19 Local Plan continues to include Policy CN3 (the LETI energy efficiency standards) as this is supported by an evidence base and covers both regulated and unregulated energy.

Embodied carbon

7 In the Strategic Issues & Priorities consultation document (page 20), the Council consulted on whether developers, as part of the planning application process, should be required to consider the whole life carbon footprint of a building.

7.1 Whilst embodied carbon was not taken forward as a specific policy in the Regulation 18 Local Plan this issue was raised in the Regulation 18 consultation responses. In order to understand whether there is sufficient justification to include a Local Plan policy on embodied carbon and how far this policy could potentially go Introba were appointed by the City Council to prepare a report on the various options that would be available to the Council. This various options for taking forward embodied carbon is available on the Council's website here.

7.2 The next section of this Topic Paper identifies the alternative options that were considered for including embodied carbon in the Regulation 19 Local Plan and supporting text and a new policy on embodied carbon.

Alternatives options that were considered and how the Regulation 19 Local is going to address embodied carbon.

7.3 As part of the work that was undertaken by Introba, the City Council commissioned them to investigate various options. The Pros and Cons of the various options have been outlined on page 10 of the Report https://www.localplan.winchester.gov.uk/LibraryAssets/attach/170/Embodied-Carbon-Policy.pdf

7.4 The City Council has declared a climate emergency and it wants developers to demonstrate that they have considered embodied carbon as an integral part of design process. After assessing various options, the policy in the Regulation 19 Local Plan requires developers, as part of the design process, to follow the RICS Whole Life Carbon Assessment. Developers would be required to report this as part of the Energy Carbon Assessment that is required under strategic Policy CN1 (Mitigating and adapting to climate change). The intention is to not only ensure that developers demonstrate that they have fully considered embodied carbon as part of the design process.

The supporting text and Policy CN8 on Embodied Carbon

Recycling of valuable materials has become part of everyday lives, and this equally applies to the opportunity that may arise to re-use/ refurbish existing buildings on a site to make them more energy efficient rather than just demolishing them. Existing buildings have less embodied carbon expenditure than new buildings (carbon dioxide (CO_2) or greenhouse gas emissions associated with the manufacture,

construction and use of a building)). If buildings are demolished and new buildings are constructed on a site this requires carbon to build them. It is, however, fully recognised that there may well be good place making reasons as to why buildings cannot be retained/refurbished on a site. This needs to be balanced against the fact that planning permission is not generally required to carry out most demolitions apart from if a building is located in a conservation area or is a listed building (Policy HE14). As new buildings become more efficient, operational emissions start to increasingly reduce, thus embodied carbon emissions make up a greater proportion of the total building whole life carbon.

Therefore, as part of the design process it is important that developers fully consider embodied carbon and the impact is reduced as far as possible through good design and planning.

What is Whole Life Carbon?

Whole life carbon is the sum total of a buildings related carbon emissions, both operational and embodied over the life cycle of a building including its subsequent disposal and deconstruction. It can be broken down into two key elements:

- Operational Carbon - The carbon arising from all energy consumed by an asset in-use, over its life cycle; and

- Embodied Carbon - The carbon emissions associated with materials and construction processes throughout the life cycle of an asset and the eventual decommissioning.

It is important to recognise that a building emits carbon throughout its whole lifetime. It is important to recognise that as new buildings become more efficient, operational emissions start to increasingly reduce, thus embodied carbon emissions make up a greater proportion of the total building whole life carbon.

Whole life carbon is, however, not straight forward as it involves considering all life cycle stages of a project, from raw material extraction, product manufacturing, transport and installation on site through to operation, maintenance and eventual material disposal/deconstruction of a building. The further complication is that whole life carbon assessments and targets are currently not defined in the Building Regulations.

Embodied carbon

The Council recognises that considerable amounts of greenhouse gas emissions in buildings are from embodied carbon (from the manufacturing processes and transportation of various construction materials) and as result of this the Council wants to prioritise collecting data on embodied carbon. By taking this approach it will have the following advantages:

- It would ensure that developers as part of the design process prioritise and fully consider embodied carbon;

- ensure that a significant source of emissions from the built environment are accounted for to align with Council's climate emergency;

- achieve resource efficiency and cost savings, by encouraging and prioritising the refurbishment, and the retention and reuse of existing materials and structures, instead of new construction;

- identify and use building materials that have a low embodied carbon and materials that can be reused, recycled and disposed of sustainability at end of life; and

- Ensure that as part of the design process buildings are designed in a way that are flexible and adaptable to future uses which contribute to greater longevity and reduced obsolescence of buildings and avoid carbon emissions associated with demolition and new construction.

Policy CN8 requires major residential and non-residential development proposals to undertake an embodied carbon assessment following the Royal Institution of Chartered Surveyors (RICS) Whole Life Carbon Assessment Whole Life Carbon Assessment for the Built Environment (rics.org) or through a nationally recognised assessment.

New Policy CN8 Embodied Carbon assessment

To contribute towards the City Council's climate emergency and national climate targets as part of the design process, major residential and non-residential developments should calculate and supply information on the outcome of an embodied carbon assessment which follows the 'RICS Whole Life Carbon Assessment for the Built Environment' methodology or through a nationally recognised assessment. The outcome of the embodied carbon assessment should be included in the Energy and Carbon Statement that is a requirement of Policy CN1 and demonstrate what actions have been taken in the design process to ensure that as far as possible the proposal addresses embodied carbon.

IN THE MATTER OF THE BUILDING REGULATIONS, PART L 2021 AND THE PLANNING AND ENERGY ACT 2008

Re: Ability of local planning authorities to set local plan policies that require development to achieve energy efficiency standards above Building Regulations

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OPEN ADVICE

INTRODUCTION AND SUMMARY

1. I am asked to advise Essex County Council ("**the Council**") and the Essex Climate Action Commission ("**ECAC**") on the ability of local planning authorities ("**LPAs**") to set local plan policies mandating energy efficiency standards for new buildings which exceed those in the Building Regulations, Part L, and also go beyond the 19% improvement over Building Regulations standards[1] referred to in a Written Ministerial Statement on plan-making, published in 2015 ("**the 2015 WMS**").

2. For the reasons set out in detail below:

   2.1 The Planning and Energy Act 2008 ("**PEA 2008**") empowers LPAs, through their local plan policies, to set higher targets for energy performance standards for development in their area than the national baseline, provided such standards are "reasonable" and comply with the usual plan-making requirements of section 19 of the Planning and Compulsory Purchase Act 2004.

   2.2 Some confusion over the ability of LPAs to set standards above the national baseline seems to have arisen due to:

      a. an amendment to the PEA 2008, which was enacted as part of the Deregulation Act 2015 but never brought into force; and

[1] Conservation of fuel and power: Approved Document L, March 2014, updated February 2023, https://www.gov.uk/government/publications/conservation-of-fuel-and-power-approved-document-l.

b. the 2015 WMS, which set out the government's expectation that local plan policies should not be used to set requirements above the equivalent of Level 4 of the Code for Sustainable Homes (19% above the national baseline in the Building Regulations, Part L 2013) and which is still reflected in the Planning Practice Guidance on Climate Change.[2]

2.3 However, the Department of Levelling Up, Housing and Communities has confirmed that the 2015 WMS is otiose in light of the 2021 updates to the Building Regulations and that there are no plans to bring the 2015 amendment to the PEA 2008 into force, or otherwise to amend the Act. Accordingly, the 2015 WMS should not be accorded any weight.

2.4 With one exception, LPAs which have sought to include policies in their local plans mandating energy efficiency standards above the national baseline have been successful, and inspectors have been satisfied that such policies will not have an unreasonable impact on the viability or deliverability of development.

2.5 The exception – the draft Area Action Plan for Salt Cross, found unsound in a report published on 1 March 2023 – is based on a misunderstanding of both national policy and the PEA 2008. There is therefore nothing in the Salt Cross decision which should dissuade an LPA from seeking to adopt net zero policies requiring high new build fabric efficiency standards, provided the LPA evidence such policies thoroughly and clearly indicates an awareness of the impact of the proposed policies on the viability of development.

[2] Planning update, March 2015, https://www.gov.uk/government/speeches/planning-update-march-2015; Planning Practice Guidance: Climate Change, June 2014, updated March 2019, https://www.gov.uk/guidance/climate-change.

REASONS

3. This opinion has the following structure:

FACTUAL BACKGROUND

4. In October 2018, the Intergovernmental Panel on Climate Change ("**IPCC**") reported in its *Special Report on Global Warming of 1.5°C* (the "**SR1.5 Report**"), that human activities had caused the Earth's surface to warm by more than 1°C since the industrial period of 1851-1900.[3] The SR1.5 Report made two further significant findings: (i) the climate impacts of 2°C of warming would be very much more serious than those of 1.5°C of warming; and (ii) there were then only 12 years in which to take action to prevent global temperature rise above 1.5°C.

[3] IPCC 2018 *Special Report on Global Warming of 1.5°C*, Summary for Policymakers ("**SPM**") A1 https://www.ipcc.ch/sr15/.

5. On 9 August 2021 the IPCC published the contribution of Working Group I to the IPCC's Sixth Assessment Report, regarding the physical science basis of climate change. Its key findings of fact can be summarised as follows:[4]

   a. It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.

   b. The scale of recent changes across the climate system as a whole and the present state of many aspects of the climate system are unprecedented when compared to the globe's climate over many thousands of years.

   c. Human-induced climate change is already affecting many weather and climate extremes in every region across the globe; evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones and, in particular, their attribution to human influence, has strengthened since the IPCC published its Fifth Assessment Report in 2013.

   d. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO_2 and other greenhouse gas emissions occur in the coming decades.

   e. Limiting human-induced global warming to a specific level requires limiting cumulative CO_2 emissions, reaching at least Net Zero CO_2 emissions, along with strong reductions in other greenhouse gas emissions.[5] Strong, rapid and sustained reduction in CH_4 (methane) emissions would also limit the warming effect resulting from declining aerosol pollution and would improve air quality.

6. The IPCC estimates a remaining carbon budget of 500 gigatonnes of CO_2 ("**$GtCO_2$**") (from 2020) for a 50:50 chance of restricting warming to 1.5°C, i.e., a little over

[4] IPCC, 2021: SPM in *Climate Change 2021: The Physical Science Basis Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press https://www.ipcc.ch/report/ar6/wg1/.

[5] IPCC, 2018: Annex I: Glossary defines Net Zero CO_2 emissions as being achieved when global CO_2 emissions are balanced by CO_2 removals. Note that Net Zero CO_2 emissions and carbon neutrality have different meanings and can only be used interchangeably at a global scale. At a regional, national, local, or sectoral level, Net Zero requires the reduction of emissions to a level as close to zero as possible, while carbon neutrality can rely on offsetting elsewhere. See IPCC, 2022, Technical Summary ("**TS**") in *Climate Change 2022: Mitigation of Climate Change, Working Group III*, Box TS.6, fn. 19.

420GtCO$_2$ from the start of 2022.[6] This new budget represents just over ten years' worth of global emissions at pre-pandemic (2019) levels (a level that 2021 broadly matched).

7. On 17 January 2022, the UK Government published its *UK Climate Change Risk Assessment 2022*.[7] This details the effects currently being felt across the UK from impacts such as flooding, wildfires, sea level rise, coastal erosion and heating. It also sets out that, even under low warming scenarios, the UK will be subject to a range of significant and costly impacts unless accelerated further action is taken now.[8] For eight of the risks identified, economic damage by 2050 under 2°C of warming could exceed £1 billion per annum.[9] It states:

> *"The evidence shows that we must do more to build climate change into any decisions that have long-term effects, such as new housing or infrastructure, to avoid often costly remedial action in the future."*[10]

8. On 27 February 2022 the IPCC published the contribution of Working Group II to the IPCC's Sixth Assessment Report. Its key findings of fact are:

   a. The extent and magnitude of climate change impacts are larger than estimated in previous assessments;[11]

   b. Climate change has caused increased heat-related mortality; hot extremes including heatwaves have intensified in cities, where they have aggravated air pollution events and limited functioning of key infrastructure;[12]

   c. Continued and accelerating sea level rise will encroach on coastal settlements and infrastructure,[13] and, combined with storm surge and heavy rainfall, will increase compound flood risks;[14]

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6 IPCC, 2021, Table SPM2 and paras D.1.3-D.1.8.
7 UK Climate Change Risk Assessment 2022 (17 January 2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1047003/climate-change-risk-assessment-2022.pdf
8 Ibid, pg 3.
9 Ibid, pg 4.
10 Ibid, pg 4 and pg 9.
11 IPCC, 2022, SPM in *Climate Change 2022, Impacts, Adaptation and Vulnerability, Working Group II contribution*, para SPM.B.1.2 https://www.ipcc.ch/report/ar6/wg2/.
12 Ibid, SPM B.1.1 and SPM.B.1.5.
13 Ibid, SPM.B.3.1.
14 Ibid, SPM.B.5.1.

d. There have been irreversible losses, for example through species extinction driven by climate change;[15]

e. *"The cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all."*[16]

9. On 20 March, the IPCC published its Synthesis Report, which draws together conclusions and recommendations from its detailed reports produced over the last six-year reporting cycle.[17] It emphasises that deep, rapid, sustained, and immediate reductions in greenhouse gas emissions are needed to avoid dangerous and irreversible consequences for human and natural systems.[18] A wide range of co-benefits would accompany rapid and sweeping emissions reductions, especially in terms of air quality and public health.[19] It sets out that substantial emissions and policy gaps presently exist, with implemented policies being on track for warming of 3.2°C, with a range of 2.2°C to 3.5°C.[20] Importantly, it emphasises that even the smallest increments of warming matter.[21] Every fraction of a degree will increase the severity and frequency of floods, droughts, storms, heatwaves, and other extreme weather events.

10. ECAC is an independent body, set up by Essex County Council in May 2020. There are currently 30 commissioners, drawn from a range of public, private, and third sector organisations. In July 2021, ECAC published its report 'Net Zero: Making Essex Carbon Neutral', in which it set out a series of recommendations, which were adopted in full by the County Council. Among these was the recommendation that all new homes and commercial buildings granted planning permission in Essex

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15 Ibid, SPM.B.1.2.
16 Ibid, SPM.D.5.3.
17 IPCC 2023 AR6 Synthesis Report https://www.ipcc.ch/report/ar6/syr/.
18 Ibid, C.2.1 pg 27.
19 Ibid, C.2.3 pg 27.
20 Ibid, figure 5 pg 23.
21 Ibid, B.2.2 pg 15 and figure 4 pg 18.

should be zero carbon by 2025, and carbon positive by 2030.[22] These targets do not have statutory authority, but through leadership and information sharing, ECAC and the County Council, working with district council Chief Planners, are seeking to influence LPAs to adopt energy performance policies in their local plans, and developers to commit to higher standards of energy efficiency.

11. The Essex Developers Group ("**EDG**") has signed up to a Developers Climate Action Charter in June 2022, in support of the ECAC targets. The Charter has been adopted by the EDG as well as Homes England, the South East Local Enterprise Partnership and the Essex Planning Officers Association (representing the 15 local authorities of Essex).[23]

LEGAL AND POLICY BACKGROUND

12. The Courts in the UK have recognised the "*very great importance*" and "*significance*" of climate change, "*with its consequences for human and other life on this planet*": *R (BAAN) v SSLUHC* [2023] EWHC 171 (Admin) at §§1 and 258. The Divisional Court has accepted that the impact of global heating is "*potentially catastrophic*": *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at §560. The Court of Appeal has recognised that the "*issue of climate change is a matter of profound national and international importance of great concern to the public—and, indeed, to the Government of the United Kingdom*": *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at §277.

Statutory obligation to reach Net Zero by 2050

13. The United Kingdom is subject to a statutory obligation to ensure that its net carbon account for the year 2050 is at least 100% lower than the 1990 baseline, pursuant to section 1(1) of the Climate Change Act 2008 ("**CCA 2008**"), as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019. Under sections 4 and 9 of the CCA 2008, the Secretary of State must set regular

[22] ECAC, 'Net Zero: Making Essex Carbon Neutral', pg 33, https://www.essexclimate.org.uk/sites/default/files/DS21_7178%20ECAC_Commission_Report-Final.pdf.
[23] Essex Developers' Group Climate Action Charter, https://www.essexdesignguide.co.uk/climate-change/net-zero-evidence/net-zero-carbon-viability-and-toolkit-study/

carbon budgets for each succeeding five-year period, taking into account advice from the Climate Change Committee ("**CCC**"), and ensure that the net UK carbon account for each budgetary period does not exceed the carbon budget.

14. The duties of the CCC are set out in Part 2 of the CCA 2008 and include obligations to advise the Secretary of State on the setting of carbon budgets (section 34) and to make annual reports to Parliament on the progress that has been made towards meeting the carbon budgets and the 2050 Net Zero target (section 36).

15. The Fourth Carbon Budget, for the period 2023-2027, is set at 1,950 million tonnes carbon dioxide equivalent ("**$MtCO_2e$**") and requires an average of a 51% reduction in emissions compared with 1990 levels.[24] It was set so as to be on track for the previous target of an 80% reduction in greenhouse gas emissions by 2050. The Fifth Carbon Budget (2028-32), set on the same basis, is 1,725 $MtCO_2e$, which requires an average of a 57% reduction.

16. The CCC published its Sixth Carbon Budget recommendation and report in December 2020. The Government accepted the recommendation and enshrined the budget in law by the Carbon Budget Order 2021. It sets a target of 965 $MtCO_2e$ for the period 2033–2037, which would equate to a 78% reduction in emissions by 2035, relative to the 1990 baseline.[25]

17. The adoption of the Sixth Carbon Budget has clear implications for the Fourth and Fifth Carbon Budgets, which were set in line with the previous 'at least 80% reduction' target for 2050 rather than the revised 'at least 100%' target now found in Section 1 of the CCA 2008. In its December 2020 report, the CCC calculated a difference of at least 28-68 $MtCO_2e$ a year in 2030 between the average emissions allowed by the Fifth Carbon Budget, and the CCC's "Balanced Pathway", which is a

[24] CO_2 equivalent emission is a common scale for comparing emissions of different greenhouse gasses, though it does not imply equivalence of the corresponding climate change responses. It is defined in IPCC 2018, Annex 1: Glossary.

[25] CCC, *The Sixth Carbon Budget – The UK's path to Net Zero*, December 2020, https://www.theccc.org.uk/publication/sixth-carbon-budget/.

trajectory that if followed would allow the UK to meet the Sixth Carbon Budget and the 2050 Net Zero target.[26]

18. The CCC has advised that the Fifth Carbon Budget will need to be significantly outperformed to stay on track to meet the Sixth Carbon Budget and the 2050 Net Zero target.[27]

Climate change and planning policy

19. The National Planning Policy Framework 2021 ("**NPPF**") recognises that the duties under the CCA 2008 are relevant to planning for climate change. Paragraph 153 provides that plans should "*take **a proactive approach** to mitigating and adapting to climate change*" (emphasis added). Footnote 53 makes clear this must be "*in line with the objectives and provisions of the Climate Change Act 2008*". Policies "*should support appropriate measures to ensure the future resilience of communities and infrastructure to climate change impacts*". Energy efficiency policies clearly fall within the proactive approach to mitigation and making communities and infrastructure more resilient to climate change.

20. DHLUC has indicated that there is no intention to amend these provisions of the NPPF in the proposed current reforms to national planning policy,[28] and the direction of travel of future reform recognises that planning "*can make an important contribution to…the vitally important task of mitigating and adapting to climate change*". The consultation document indicates that future reform will explore how planning measures can do more to measure and reduce emissions in the built environment,[29] including delivering significant reductions in operational carbon emissions from the built environment.[30] The consultation also recognises the importance of work by LPAs who are frontrunners by innovating and leading

[26] Ibid, pg 432.
[27] Ibid, pgs 24 and 430-433.
[28] Consultation, Levelling Up and Regeneration Bill: reforms to national planning policy (22 December 2022), https://www.gov.uk/government/consultations/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy.
[29] Ibid, Chapter 2 §5.
[30] Ibid, Chapter 7 §12.

the way in addressing climate change through planning.[31] Finally, the draft revised text of the NPPF contains a new provision at §161 that "*to support energy efficiency improvements, significant weight should be given to the need to support energy efficiency improvements through the adaptation of existing buildings, particularly large non-domestic buildings, to improve their energy performance*".[32]

The Net Zero Strategy suite of documents

21. On 18 July 2022, the Net Zero Strategy for meeting the carbon budgets up to and including the Sixth Carbon Budget was found unlawful. In *R(Friends of the Earth Ltd) v Secretary of State for the Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin); [2023] 1 WLR 225, Holgate J held the Secretary of State had not been briefed with sufficient information to enable him to be satisfied that the policies and proposals included in the Net Zero Strategy would allow the UK to meet the Sixth Carbon Budget (§§202–204, 211–217, 256–257). The Net Zero Strategy was required to be re-drafted by 31 March 2023.

22. On 30 March 2023, the Government published its revised strategy to deliver its Net Zero obligations.[33] Rather than a single Net Zero Strategy, a suite of 50 documents were published, including 19 policy documents. The most important of the policy documents is the Carbon Budget Delivery Plan,[34] which will be presented to Parliament pursuant to the section 14 of the CCA 2008 and which is the most direct response to the *Friends of the Earth* judgment.

23. The Carbon Budget Delivery Plan sets out 191 quantified measures across all sectors of the economy (table 5) and indicates that these policies would meet Carbon Budgets Four and Five, but would only provide 97% of the carbon savings required to meet the Sixth Carbon Budget (2033-2037), amounting to a shortfall of 32 million tonnes of CO_2e over the budget period (see Table 1 in particular). Table 6 of the Plan lists another 143 "*unquantified*" policies and proposals, where

[31] Ibid, Chapter 7 §4.
[32] National Planning Policy Framework: draft text for consultation, §161, https://www.gov.uk/government/consultations/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy.
[33] https://www.gov.uk/government/publications/powering-up-britain.
[34] https://www.gov.uk/government/publications/carbon-budget-delivery-plan.

the impact has not been calculated, in some cases because they are at an "*early stage*" or because they are very high level.

24. The Carbon Budget Delivery Plan also makes it clear that it delivers only 92% of the emissions cuts needed to meet the UK's 2030 nationally determined contribution under the Paris Agreement, which is a commitment to reduce economy-wide greenhouse gas emissions by at least 68% by 2030, compared to 1990 levels.

25. The documents which were promoted as the centrepiece of the new Net Zero package are titled "*Powering Up Britain*" and include an Overview[35] of the government's plans as well as the UK's new Energy Security Plan[36] and Net Zero Growth Plan.[37] While these publications largely consolidate existing Government policies, a number of "new" initiatives were announced across various key vectors in the energy transition, including renewables, nuclear, hydrogen, carbon capture, heat and energy efficiency, as well as indications on the direction of travel with respect to reforms for electricity networks and energy markets.

26. The main measures targeted at buildings refine existing energy efficiency support, in particular by rebranding an insulation scheme to upgrade around 300,000 of the country's least energy efficient homes and support the rollout of heat pumps.

Progress towards Net Zero target

27. The CCC will respond to the Carbon Budget Delivery Plan and the new suite of Net Zero Strategy documents in its progress report to Parliament in June 2023. Until that formal response is made, there is conflicting information about whether the UK is on track to meet the Fifth Carbon Budget, or the 'outperformance' of that budget needed for compliance with the Sixth Carbon Budget. On 18 October 2022, the then Department for Business Energy and Industrial Strategy ("**BEIS**"), now

[35] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147340/powering-up-britain-joint-overview.pdf.
[36] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147339/powering-up-britain-energy-security-plan.pdf.
[37] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147338/powering-up-britain-net-zero-growth-plan.pdf.

the Department for Energy Security and Net Zero, released its *Updated Energy Projections*, analysing and projecting future energy use and greenhouse gas emissions in the UK, which allow the monitoring of progress towards meeting the carbon budgets.[38] These showed that:

a. The Fifth Carbon Budget will be missed by 73 $MtCO_2e$, achieving a 56% reduction on 1990 level rather than the required 58% level, meaning the UK is off track to outperform this carbon budget; and
b. The Sixth Carbon Budget will be missed by 976 $MtCO_2e$, only achieving a 54% reduction on 1990 levels, rather than a 77% reduction.

28. The Updated Energy Projections 2022 include policies that have been implemented or where funding has been agreed. They include schemes to make public buildings, private homes and social housing more energy-efficient and install clean heating systems, phase out coal and support renewables, and faster uptake of electric vehicles. It is not clear how the analysis made in the Updated Energy Projections in October 2022 aligns with that made in the Carbon Budget Delivery Plan in March 2023, given that the Plan mostly restates policies already announced.

29. In June 2022, the CCC found in its previous progress report to Parliament that either significant risks or policy gaps exist in relation to 38% of the emissions reductions required to meet the Sixth Carbon Budget.[39] This was particularly so in relation to land use and the energy efficiency of buildings.[40] The CCC also highlighted that, under the current Building Regulations, "*the UK continues to build new homes to standards which do not align with the Net Zero target.*"[41]

30. In a letter to Chancellor Jeremy Hunt in November 2022, the CCC recommended that the government consider bringing forward the date for the introduction of the

[38] https://www.gov.uk/government/collections/energy-and-emissions-projections.
[39] CCC, Progress Report, June 2022, pg 22, https://www.theccc.org.uk/publication/2022-progress-report-to-parliament/.
[40] CCC, Progress Report, pg 14.
[41] CCC, Progress Report, pg 180.

Future Homes Standard from 2025.[42] This recommendation was not followed in the Carbon Budget Delivery Plan, which still envisages regulation from 2025 (policy 97, pg 78). A similar recommendation made in the independent Net Zero Review, carried out by former energy minister Chris Skidmore MP,[43] was rejected.[44] The Government intends to consult on the specification in 2023, then legislate in 2024 ahead of implementation in 2025. As part of the consultation the Government will "*explore what transitional arrangements are appropriate to make sure that as many homes as possible are built to the new standard as quickly as possible.*".[45]

31. In a further letter to the Under Secretary of State for Levelling Up, Housing and Communities, dated 2 February 2023, the Chair of the CCC, Lord Deben, also highlighted the problems inherent in using the current rating metrics for domestic Energy Performance Certificates ("**EPCs**") to assess the energy efficiency of buildings.[46] At present, these metrics reflect energy costs and carbon emissions per square metre, but do not provide a direct measurement of fabric efficiency. The fact that energy costs form the basis for one of the two metrics used to inform current EPC ratings has given rise to perverse incentives. For example, a home heated by a modern gas boiler will usually achieve a better EPC rating than one heated via low-carbon technology such as heat pumps. The letter recommended that the metrics be improved, to support better the delivery of national climate policy targets, and that they be used to measure: 1) energy use intensity; 2) space heating demand intensity; 3) heating system type; and 4) energy cost intensity. It appears this recommendation has not been followed in the Carbon Budget Delivery Plan or the Powering Up Britain documents.

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[42] CCC, Letter: Reducing energy demand in buildings in response to the energy price crisis, November 2022,https://www.theccc.org.uk/publication/letter-reducing-energy-demand-in-buildings-in-response-to-the-energy-price-crisis/.

[43] Mission Zero: Independent Review of Net Zero, January 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128689/mission-zero-independent-review.pdf.

[44] Responding to the Independent Review of Net Zero's Recommendations, March 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147370/responding-to-independent-review-of-net-zero.pdf.

[45] Ibid, pg 54, response 108.

[46] CCC, Letter: Reform of domestic EPC rating metrics, February 2023, https://www.theccc.org.uk/publication/letter-reform-of-domestic-epc-rating-metrics-to-lee-rowley-mp/.

32. National policy gaps, including on the energy efficiency of buildings, do not mean that LPAs are prevented from taking action now, or in advance of national policy. On the contrary: localised action is all the more important for keeping the UK on track to meet its Sixth Carbon Budget and the 2050 Net Zero target. Local authorities, commercial developers and associated partners, and third sector organisations all have a role to play in delivering higher energy performance standards in new development.

33. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that, "*if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.*" This makes local development plans a crucial avenue for promoting higher standards in new development and ensuring that homes built today will not require expensive retrofits in years to come.

34. On the consumer side, there is a growing market among buyers and renters for more sustainable homes and workplaces, and a potential 'green premium' to be enjoyed by developers who deliver high standards of energy efficiency:

    a. In 2021 and 2022, Royal Institution of Chartered Surveyors measured global occupier and investor appetite for green and sustainable buildings and found that there is a net balance of +48%, pointing to a pick-up in occupier and investor appetite for climate adapted real estate; a figure which was continuing to rise across the globe.[47]

    b. Research by Legal & General and YouGov among a UK representative sample of 2,405 adults open to buying or renting a new home, found that 62% saw investment in energy efficient homes as an attractive or very attractive option to address the cost of living crisis, that renters were willing to pay a 13% premium for a low carbon property, and buyers a

[47] RICS Sustainability Report 2022 https://www.rics.org/news-insights/current-topics-campaigns/sustainability.

10.5% premium, rising to 20% for Gen Z future buyers (i.e. those born after 1997). The research also found a 34% uptick in online searched for eco-friendly homes.[48]

c. Polling carried out by Opinium and Santander of 2,000 UK representative adults, 175 estate agents, and 108 mortgage brokers found that 79% of potential buyers said that increased energy costs had made them think more about the importance of energy efficiency, that those who were willing to pay more for an energy efficient home put a 9.4% premium on the price of such a property and that estate agents reported buyers spending an average of 15.5% more on energy efficient properties. Santander concluded that this 'green premium' equated to an average of £26,600 over and above the average UK house price.[49]

d. Shakespeare Martineau found that 77% of 500 potential buyers surveyed would consider purchasing a green home, rising to 80% for first time buyers.[50]

e. On the commercial side, research by Knight Frank and BRE Group on 2,701 buildings found that Central London office space which had a BREEAM Outstanding certification commanded a 12.3% rental premium when controlling for other property characteristics.[51]

35. Some developers, such as the members of the EDG who signed the Developers Climate Action Charter, have recognised this 'green premium' and voluntarily committed to higher standards for energy efficiency. Initiatives such as

[48] Legal & General/YouGov Research, July–August 2022: https://group.legalandgeneral.com/media/ym0g2fyp/low-carbon-homes-release-final.pdf

[49] Santander, Buying into the Green Homes Revolution, October 2022, https://www.santander.co.uk/about-santander/media-centre/press-releases/a-green-premium-house-buyers-willing-to-pay-almost-10.

[50] Shakespeare Martineau Green Homes Report: https://www.housinglin.org.uk/_assets/_Resources/Housing/OtherOrganisation/Green-Homes-Report-FINAL.pdf.

[51] Knight Frank, The Sustainability Series, September 2021, https://content.knightfrank.com/research/2311/documents/en/the-sustainability-series-september-2021-8395.pdf.

developers' charters are important statements of intent, even though they have no power legally to bind their signatories.

36. A number of leading developers also favour approaches to projects which address climate change more robustly than present legislation, standards and policy require. For example, Berkeley Group stated that they achieved carbon neutrality via emissions reductions and offsetting in 2018 and has committed to a target of Net Zero carbon emissions across scopes 1, 2 and 3 by 2040.[52] Commitments of this nature are partly driven by investors and funders and their approach to ESG (Environmental, Social and Governance) requirements. The "E" in ESG is ever more focused on carbon reduction, which is arguably the most pressing concern for the industry.

2021 updates to the Building Regulations

37. Approved Documents F (Ventilation) and L (Conservation of Fuel and Power), which provide guidance on how compliance with the Building Regulations can be achieved with respect to energy efficiency, were updated in 2021 with measures which came into effect in June 2022. A new Approved Document O (Overheating) was also published.

38. The new measures essentially function as staging posts on the way to the introduction of the government's Future Homes Standard and Future Buildings Standard in 2025. They mandate that carbon emissions from new residential buildings must be 31% lower and those from new non-residential buildings 27% lower than the previous 2013 baseline. The updated guidance also includes a range of new energy efficiency standards and metrics in relation to components of the fabric and heating systems of new buildings to achieve the required overall emissions reductions.

[52] Berkeley Group, Our Vision 2030, https://www.berkeleygroup.co.uk/our-vision/climate-action.

39. It should be noted that, with this update to the Building Regulations, Part L, the national baseline for emissions from new buildings is now lower than Level 4 of the Code for Sustainable Homes, against which the 2015 WMS was benchmarked.

LEGAL POSITION ON ENERGY EFFICIENCY TARGETS BEYOND NATIONAL MINIMUM STANDARDS

40. Local authorities are empowered by statute to set their own standards for energy efficiency of new dwellings and other buildings in excess of Building Regulations, provided that such standards do not conflict with national policy. As set out below, confusion around this power has been caused by: a statutory amendment which was never brought into force; the 2015 WMS, which has now been overtaken by events; and the Planning Practice Guidance on Climate Change, which has not been updated to reflect the latest revisions to the Building Regulations. Nevertheless, the statutory power exists in primary legislation and LPAs can exercise that power with confidence.

Planning and Energy Act 2008

41. The power for LPAs to set their own energy efficiency standards derives from the PEA 2008. Section 1 of this statute provides that:

"(1) A local planning authority in England may in their development plan documents, corporate joint committee may in their strategic development plan, and a local planning authority in Wales may in their local development plan, include policies imposing reasonable requirements for—

(a) a proportion of energy used in development in their area to be energy from renewable sources in the locality of the development;

(b) a proportion of energy used in development in their area to be low carbon energy from sources in the locality of the development;

(c) development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.

[...]

(4) The power conferred by subsection (1) has effect subject to subsections (5) to (7) and to—

(a) section 19 of the Planning and Compulsory Purchase Act 2004 (c. 5), in the case of a local planning authority in England; [...]

(5) Policies included in development plan documents by virtue of subsection (1) must not be inconsistent with relevant national policies for England."

42. The PEA 2008 therefore establishes that LPAs may set higher standards for energy efficiency in their local plan policies than the baseline required by the Building Regulations provided that such policies are: a) reasonable, b) not inconsistent with national policies; and c) compliant with the usual provisions around plan-making found in section 19 of the Planning and Compulsory Purchase Act 2004.

43. Accordingly, while local energy efficiency policies cannot be inconsistent with national policies, there is nothing in national policy or in law to prevent LPAs from setting higher standards than the national baseline under the Building Regulations, provided that such policies are reasonable.

Why the Deregulation Act 2015 and the Written Ministerial Statement 2015 do not undermine local planning authorities' powers

44. Two potential sources of confusion around the extent of LPAs' powers under the PEA 2008 arise in the form of section 43 of the Deregulation Act 2015, and the 2015 WMS. Section 43 of the Deregulation Act 2015 would have inserted a new section 1A into the PEA 2008, excluding the construction or adaptation of residential dwellings from the scope of section 1(c). This provision was never brought into force. The then Ministry of Housing, Communities and Local Government, now the Department for Levelling Up, Housing and Communities ("**DLUHC**"), clarified in January 2021, in its response to Future Homes Standard consultation, that there are no plans ever to bring the provision into force, or otherwise to amend or repeal the PEA 2008.[53] This was re-confirmed on 22 June 2022, as discussed further below.[54]

[53] The Future Homes Standard: summary of responses, and government response, January 2021, https://www.gov.uk/government/consultations/the-future-homes-standard-changes-to-part-l-and-part-f-of-the-building-regulations-for-new-dwellings.

[54] Bath and North East Somerset, Examination Note on Local Energy Efficiency Targets, §1.5, https://beta.bathnes.gov.uk/sites/default/files/EXAM%2010%20Note%20on%20Local%20Energy%20Efficiency%20Targets%20FINAL.pdf.

45. The other potential source of confusion over the extent of LPAs' powers under the PEA 2008 arises out of the 2015 WMS. This statement indicated that local plan policies could not be used to set requirements above the equivalent of Level 4 of the Code for Sustainable Homes, which was 19% above the national baseline in the Building Regulations, Part L 2013. Despite having been overtaken by the updated baseline from June 2022, which now exceeds Code Level 4, this outdated piece of guidance is still included in the Planning Practice Guidance on Climate Change, which has not been updated since March 2019.

Confirmation of local planning authorities' powers by Ministers and Planning Inspectors

46. Confirmation that LPAs have the power to set their own standards for energy efficiency has come from national government in the form of the Future Homes Standard consultation response, which stated:

> *"2.33 At present, local planning authorities may include policies in their local plans which require developers to comply with energy efficiency standards for new homes* ***that exceed the minimum requirements of the Building Regulations****.*
>
> *"2.34 The Planning and Energy Act 2008 was amended in 2015 to provide Government with powers to stop local planning authorities from being able to exceed the minimum energy efficiency requirements of the Building Regulations, but this amendment has not been commenced. In the same year, the then Government set out in a Written Ministerial Statement an expectation that local planning authorities should not set energy efficiency standards for new homes higher than the energy requirements of Level 4 of the Code for Sustainable Homes, which is equivalent to a 19% improvement on the Part L 2013 standard.*
>
> *"2.35 The Future Homes Standard consultation recognised that the current position has caused confusion and uncertainty for local planning authorities and home builders, alike. While some local planning authorities are unclear about what powers they have to set their own energy efficiency standards and have not done so,* ***others have continued to set their own energy performance standards which go beyond the Building***

Regulations minimum and in some cases beyond the Code for Sustainable Homes" (emphasis added).

47. To ensure absolute clarity, when preparing their new local plan, Bath and North East Somerset Council wrote to DLUHC and received the following reply by letter dated 22 June 2022 from Jonathan Mullard, Minister at the then Department for Business, Energy and Industrial Strategy, who confirmed that he was empowered to speak for DLUHC and that:

> *"- Plan-makers may continue to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish.*
> *- Local planning authorities have the power to set local energy efficiency standards through the Planning and Energy Act 2008.*
> *- In January 2021, we clarified in the Future Homes Standard consultation response that in the immediate term we will not amend the Planning and Energy Act 2008, which means that local planning authorities still retain these powers."*[55]

48. Finally, in his 'Report on the Examination of the Cornwall Council Climate Emergency Development Plan Document', dated 10 January 2023, Inspector Paul Griffiths BSc (Hons) BArch IHBC recognised that:

> *"166. Provisions to allow Councils to go beyond the minimum energy efficiency requirements of the Building Regulations are part of the Planning and Energy Act 2008. The WMS of 25 March 2015 says that in terms of energy performance, Councils can set and apply policies which require compliance with energy performance standards beyond the requirements of the Building Regulations until the Deregulation Bill gives effect to amendments to the Planning and Energy Act 2008. These provisions form part of the Deregulation Act 2015, but they have yet to be enacted. Further, the Government has confirmed that the Planning and Energy Act 2008 will not be amended.* ***The result of all this is that***

[55] Bath and North East Somerset, Examination Note on Local Energy Efficiency Targets, §1.5, https://beta.bathnes.gov.uk/sites/default/files/EXAM%2010%20Note%20on%20Local%20Energy%20Efficiency%20Targets%20FINAL.pdf.

Councils are able to set local energy efficiency standards for new homes, without falling foul of Government policy.

167. ***The WMS of 25 March 2015 has clearly been overtaken by events.*** *Nothing in it reflects Part L of the Building Regulations, the Future Homes Standard, or the Government's legally binding commitment to bring all greenhouse gas emissions to net zero by 2050. In assessing the Council's approach to sustainable energy and construction, the WMS of 25 March 2015 is of limited relevance*" (emphasis added).[56]

49. Accordingly, despite the 2015 WMS remaining extant and despite the failure to update the Planning Practice Guidance, it is clear that the Government does not consider that they constrain LPAs and that the PEA 2008 empowers LPAs to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish. This is the correct approach in law. In my view, the right approach is that adopted in the Report on the Examination of the Cornwall Council Climate Emergency Development Plan Document: the 2015 WMS should not be accorded any weight.

Conclusion

50. Local authorities have a clear power, in sections 1-5 of the PEA 2008, to adopt planning policies that set higher targets for energy performance standards for development in their area than the national baseline, provided such standards comply with the usual plan-making requirements of section 19 of the Planning and Compulsory Purchase Act 2004 and are reasonable, in that they do not affect the viability of new development to an unreasonable extent.

ENERGY EFFICIENCY POLICY CASE STUDIES

51. Six case studies illustrate the fact that a range of LPAs — from densely populated urban centres such as London and Reading, to rural authorities like South Gloucestershire, Cornwall, Bath and North East Somerset, and the three local

[56] Cornwall Climate Emergency DPD, Inspector's Report, 10 January 2023, https://www.cornwall.gov.uk/media/10pmiq1e/appendix-1-cornwall-climate-emergency-dpd-final-report-1.pdf.

authority areas that comprise Central Lincolnshire — have successfully included energy efficiency and/or other emissions reduction requirements beyond those of the Building Regulations in development plan documents which have passed examination.

52. These case studies are important in light of the well-established principle of consistency in planning decision-making. It is important and in the interests of developers, third parties and local planning authorities alike, because it serves to maintain public confidence in the operation of the development control system. Whilst it is open to the decision maker to depart from the reasoning in a previous decision, clear reasons for the departure should be given: *North Wiltshire DC v. Secretary of State for the Environment* (1992) 65 P & CR 137 at 145.

53. In summary, while like cases do not have to be decided alike, a departure from a sufficiently similar decision requires a "clear explanation": *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2019] JPL 63 at §74. As consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a relevant appeal decision bearing on the issues in the appeal he is considering: *DLA Delivery Limited v Baroness Cumberlege of Newick* [2018] JPL 1268 at §34.

Energy efficiency policies which have passed examination

54. **The London Plan 2021** and the **Reading Borough Local Plan 2019** both include policies for energy efficiency which are benchmarked against the Building Regulations and exceed them by a fixed percentage for different types of development.

55. Policy SI 2 of the London Plan 2021 on 'Minimising greenhouse gas emissions' provides that:

> *"Major development should be net zero-carbon. [...] A minimum on-site reduction of at least 35 per cent beyond Building Regulations is required for major development. Residential development should achieve 10 per*

cent, and non-residential development should achieve 15 per cent through energy efficiency measures.".[57]

56. These requirements were based on the Building Regulations 2013, but the policy provided for the threshold to be reviewed if the regulatory requirements were updated.[58] The threshold was updated via the GLA Energy Assessment Guidance, published June 2022, such that the targets under Policy S1 2 now relate to the baseline in the Building Regulations 2021.[59]

57. Policy H5 of the Reading Borough Local Plan on 'Standards for new housing' provides that:

"New build housing should be built to the following standards, unless it can be clearly demonstrated that this would render a development unviable [...]

c. All major new-build residential development should be designed to achieve zero carbon homes.

d. All other new build housing will achieve at a minimum a 19% improvement in the dwelling emission rate over the target emission rate, as defined in the 2013 Building Regulations." [60]

58. Policy PSP6 of the **South Gloucestershire Policies, Sites and Places Plan** ("**PSP**") (adopted November 2017) on 'Onsite renewable and low carbon energy' includes a mandatory emissions reduction target over and above Building Regulations standards, though no mandatory fabric efficiency requirement. It provides that all development proposals will:

"1. be encouraged to minimise end-user energy requirements over and above those required by the current building regulations through energy reduction and efficiency measures, and in respect of residential for sale and

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[57] London Plan 2021, https://www.london.gov.uk/programmes-strategies/planning/london-plan/new-london-plan/london-plan-2021, pgs 342–343.

[58] London Plan, 2021, p. 342, fn. 152.

[59] GLA Energy Assessment Guidance, June 2022, https://www.london.gov.uk/sites/default/files/gla_energy_assessment_guidance_june_2022_0.pdf

[60] Reading Borough Local Plan 2019, https://www.reading.gov.uk/planning-and-building-control/planning-policy/new-local-plan/, pg 82, with guidance at pg 84.

speculative commercial development offer micro renewables as an optional extra, and

2. be expected to ensure the design and orientation of roofs will assist the potential siting and efficient operation of solar technology.

In addition, all major greenfield residential development will be required to reduce CO2 emissions further by at least 20% via the use of renewable and/or low carbon energy generation sources on or near the site providing this is practical and viable."[61]

59. Cornwall and Bath and North East Somerset collaborated to develop local planning policies which set quantified limits on space heating and total energy consumption (regulated and unregulated), rather than benchmarking against the Building Regulations. Both **Cornwall's Climate Emergency Development Plan Document** ("**DPD**") and **Bath and North East Somerset's Local Plan Partial Update** ("**LPPU**") include requirements that all new development have a space heating demand of no more than 30kWh/m2/yr and a total energy consumption of no more than 40kWh/m2/yr.[62] These policies also require residual energy requirements to be met from renewable sources, in what is seemingly a creative application of the LPAs' powers under sections 1(a)–(b) of the PEA 2008 to require that a proportion of energy for development in the area come from renewable or low carbon source, in combination with their powers to mandate energy efficiency standards above the national baseline under section 1(c).

60. Finally, the **Central Lincolnshire Local Plan**, adopted in April 2023, contains Policy S7 requiring residential development to achieve a site average space heating demand of 15-20kWh/m2/yr and a site average total energy demand of 35 kWh/m2/yr, and Policy S8 requiring non-residential development to achieve space heating and total energy demands of 15-20kWh/m2/yr and 70 kWh/m2/yr

[61] South Gloucestershire Policies, Sites and Places Plan 2017, https://beta.southglos.gov.uk/static/326a821580d49330ee788f663103b1b8/PSP-Plan-Nov2017.pdf, pg 19, with guidance at pgs 19–20.

[62] Bath and North East Somerset Local Plan Partial Update, December 2021, https://beta.bathnes.gov.uk/lppu-core-documents; Cornwall Climate Emergency DPD, February 2023, https://www.cornwall.gov.uk/planning-and-building-control/planning-policy/adopted-plans/climate-emergency-development-plan-document/.

respectively.[63] These policies also require residual energy consumption to be met via onsite renewable energy sources. There are caveats for development in areas of especially low land value or on brownfield sites, which do not have to demonstrate full policy compliance but where the applicant must still submit an Energy Statement detailing the extent to which the relevant policy requirements have been complied with.

61. These policies are part of a wider suite of policies designed to mitigate and adapt to the effects of climate change, with the introductory text to Chapter 3 on Energy, Climate Change and Flooding stating at §3.1.14:

> *"The Central Lincolnshire Joint Strategic Planning Committee (CLJSPC) is rising to [the] challenge as set by parliament. No longer will planning decision makers in Central Lincolnshire merely 'encourage' development proposals to achieve certain standards, or only 'welcome' development that goes a little beyond certain building regulation basic minimums. Development in Central Lincolnshire must do, and can do, far better than that. We are legally obliged to do more. And, for future generations, we are morally obliged to do more."*

The Salt Cross Decision

62. The draft Area Action Plan for Salt Cross, a proposed new garden village in West Oxfordshire, included a Net Zero policy which, among other requirements, would have capped space heating requirements for all new development at 15kWh/m2/yr and total energy use requirements for residential development at 35kWh/m2/yr. In a letter dated 26 May 2022, the Inspectors examining the Area Action Plan indicated their view that the policy was unsound and recommended significant modification of the policy.

63. The Inspectors' Report, published on 1 March 2023, set out the bases for their decision that the policy was unsound:

[63] Central Lincolnshire Local Plan, April 2023, pgs 30–34, https://www.n-kesteven.gov.uk/sites/default/files/2023-04/Local%20Plan%20for%20adoption%20Approved%20 by%20Committee.pdf.

a. It was inconsistent with the 2015 WMS and the PPG, which in their view still represented current national policy, notwithstanding "various Government consultations linked with the Future Homes Standard [which] have signalled potential ways forward".[64]

b. The prescriptiveness of the policy was not justified on the basis of the evidence submitted, specifically the reliance on generic typologies in the viability appraisal.[65]

64. The lawfulness of the inspectors' decision was challenged by way of pre-action correspondence before the publication of the report. A claim for judicial review has since been issued.[66] The TCPA also indicated in its public response to the decision letter that it believed it to be based on a misunderstanding of national policy.[67] This remains the TCPA's view.[68]

65. Given the reliance in the Inspectors' Report on the 2015 WMS and the PPG, and in light of the legal position set out at §§40–51 above, I am of the opinion that the TCPA was correct that the inspectors misunderstood both national policy and the proper extent of the LPA's powers, derived from primary legislation. In my view, there is therefore nothing in the Salt Cross decision which should dissuade an LPA from seeking to adopt net zero policies requiring high new build fabric efficiency standards, provided the LPA evidences such policies thoroughly and clearly indicates an awareness of the impact of the proposed policies on the viability of development.

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[64] Report on the Examination of the Salt Cross Garden Village Area Action Plan, 1 March 2023, https://www.westoxon.gov.uk/media/djkhe03s/salt-cross-aap-inspectors-report-main-mods-appendix-final.pdf.

[65] Inspectors' Report, §§131–138.

[66] https://www.leighday.co.uk/news/news/2023-news/rights-and-climate-collective-issues-high-court-challenge-after-planning-inspector-dilutes-west-oxfordshire-council-s-net-zero-plans-for-salt-cross-garden-village/.

[67] The application of net zero in local plan policy: A statement from the Town and Country Planning Association, July 2022, 20220714-climate-statement-W-Ox.docx (live.com).

[68] https://www.tcpa.org.uk/planning-inspectorate-west-oxfordshire/.

66. It should be noted that the mere fact that the Inspectors erred in law in may not result in a legal challenge which is successful overall in quashing the decision. The Secretary of State may resist a challenge on the basis of discretion: even if a Court were satisfied that the decision was unlawful, were it to find that the outcome of the decision would necessarily have been the same if the error had not occurred, the decision would not be quashed. On the basis of the issues with the evidence base on viability, which the inspectors identified at §§131–138 of their report, the Secretary of State might be able to mount a successful 'no difference' discretion argument that the policy would still have been found to lack justification even if it had been found to be consistent with national policy.

67. Accordingly, the only circumstance in which the advice set out above would change as a result of the legal challenge to the Salt Cross decision would be if the High Court were to make findings on LPA's legislative powers in the PEA 2008 and on national policy which undermine those set out in §§40–51 above.

CONCLUSION

68. In light of the above, LPAs have statutory authority to set energy efficiency targets that exceed the baseline in national Building Regulations, and to mandate that a proportion of the energy used in development in their area be from renewable and/or low carbon sources in the locality of the development. Nothing in law or national policy prevents them from doing so, or limits the amount by which they may exceed the baseline, provided that the relevant policies are reasonable, properly prepared, and do not conflict with any other national planning policies.

69. The amendment limiting the scope of section 1(c) of the PEA 2008 will not be brought into force, nor are any other amendments to the Act planned. The 2015 WMS has been overtaken by events and regard does not need to be paid to it, nor to the portion of the PPG on Climate Change which cites it. Government ministers and planning inspectors alike have recognised the power of LPAs to set ambitious energy efficiency targets through their local plans.

70. A summary of my advice is given in §2 above. Please do not hesitate to contact me if anything requires clarification, or if I can be of further assistance.

28 April 2023

ESTELLE DEHON KC

cornerstone barristers

Appendix 2 – Joint Local Planning Authority letter to the Secretary of State regarding the Written Ministerial Statement

Town and Country Planning Association
17 Carlton House Terrace
London SW1Y 5AS
020 7930 8903

21 February 2024

The Rt Hon Michael Gove MP
Secretary of State for Levelling Up, Housing and Communities
Sent by email

cc. Joanna Averley, Chief Planner

Dear Secretary of State

The signatories of this letter share a common goal of delivering the government's statutory carbon reduction targets. Together we represent a group of local authorities, businesses and NGOs at the cutting edge of delivering net zero homes and communities. Many of the signatories of this letter have collectively developed and supported an innovative approach to building standards that achieves energy efficient, net zero buildings (defined in a way that addresses total energy use in a building and aligns with climate targets), that dramatically reduce energy demand and costs for future residents. This approach is backed by cross-industry support and evidence demonstrating the viability and deliverability of these standards.

All of this innovative work is now threatened by the government's decision to restrict the ability of local authorities to set energy performance standards other than through the limited approach of a Target Emissions Rate (TER), measured through the Standard Assessment Procedure (SAP). These restrictions were set out in the Written Ministerial Statement (WMS) published on 13 December 2023. As far as we are aware, this statement was published without any discussion with local authorities or any form of public consultation.

The WMS contains a number of clear factual errors including the assertion that local authorities are adopting a confusing array of differing standards. This is entirely false. Local authorities have been working collaboratively to establish consistent policies using absolute energy metrics, based on LETI published guidance. This policy approach

achieves more energy efficient buildings and avoids the 'performance gap' of SAP calculations, which the government has recognised.

Standards for net zero homes and buildings expressed using energy metrics have been adopted as local plan policy requirements in Bath and North East Somerset, Cornwall and Central Lincolnshire, and many more are hoping to achieve the same standards for new homes.

The measures in the WMS are unnecessarily draconian and will have a severe impact on the many local authorities who have invested significant sums to develop much more effective energy performance standards in local policy. Until Building Regulations universally achieve net zero buildings,[1] local authorities must be able to adopt policies that secure net zero homes in line with the obligations placed upon them by the *Levelling Up and Regeneration Act 2023* and through the powers conveyed upon them in the *Planning and Energy Act 2008*.

We most strongly urge government to clarify the policy in the WMS by making clear that local planning authorities can adopt standards in local plans which utilise absolute energy metrics and go beyond current and future Building Regulations so long as such policy is robustly evidenced and viable. Government must not prescribe approaches which both undermine their own carbon reduction targets and prevent the innovation in policy and technology which this nation urgently needs to tackle the climate crisis.

The TCPA, along with a delegation of Local Planning Authorities, would welcome the opportunity to meet with DLUHC. This would provide an opportunity to discuss the challenge presented by the WMS and explore a way forward that enables planning authorities to establish policies designed to increase housing supply, support net zero targets and reduce energy bills.

Yours sincerely

Fiona Howie
Chief Executive
Town and Country Planning Association

The following organisations and local authorities are also co-signatories to this letter:

Organisations

Brigitte Clements, Strategic Lead, **ACAN (Architects Climate Action Network)**

Sue Riddlestone OBE, Chief Executive and co-founder, **Bioregional**

[1] Defined as buildings that address total energy use in a building and align with climate targets.

Paul Miner, Head of Campaigns and Policy, **Campaign to Protect Rural England** (CPRE)

Isaac Beevor, Partnerships Director, **Climate Emergency UK**

Dan Stone, Policy and Influencing Officer, **Centre for Sustainable Energy**

Thomas Lefevre, Director, **Etude**

Magnus Gallie MRTPI, Senior Planner, **Friends of the Earth**

Lynne Sullivan OBE, Chair, **Good Homes Alliance**

Leani Hairn, Planning Director, **ONH**

Jon Bootland, CEO, **Passivhaus Trust**

Dr Naomi Luhde-Thompson, Director, **Rights: Community: Action**

Philip Haile, Trustee, **Transition Bath**

Local authorities

Councillor Dr Richard Moore, Cabinet Member for Strategic Planning, Infrastructure & Planning Enforcement, **Basildon Council**

Councillor Andy Konieczko, Cabinet Member for Strategic Planning and Infrastructure, **Basingstoke and Deane Borough Council**

Sophie Broadfield, Executive Director, Sustainable Communities, **Bath and North East Somerset Council**

Councillor John Cotton, Leader of the Council and Councillor Majid Mahmood, Cabinet Member for Environment, **Birmingham City Council**

Andrew Hunter, Executive Director Place Planning and Regeneration, **Bracknell Forest Council**

Councillor Richard Wright, Chairman, **Central Lincolnshire Joint Strategic Planning Committee**

Kieron Manning, Assistant Director, Planning and Services, **City of Lincoln**

Councillor Andrea Luxford Vaughan, Portfolio Holder for Planning, Environment and Sustainability, **Colchester City Council**

Councillor Juliet Layton, Cabinet Member for Planning and Regulatory Services, **Cotswold District Council**

Jennifer Peters, Assistant Director for Planning, Design and Sustainability, **Ealing Council**

Councillor Angela Glass, Portfolio Holder for Regulation & Enforcement, **East Hampshire District Council**

Councillor Kay Yule, Cabinet Member for Planning and Coastal Management, **East Suffolk Council**

Nigel Richardson, Director of Planning Services, **Epping Forest District Council**

Emma Goodings, Chair of **Essex Planning Officers Association**, on behalf of the Chief Planners from 15 Local Authorities in Essex:

- **Basildon Council**
- **Braintree District Council**
- **Brentwood Council**
- **Castle Point Borough Council**
- **Chelmsford City Council**
- **Colchester City Council**
- **Epping Forest District Council**
- **Essex County Council**
- **Harlow Council**
- **Maldon District Council**
- **Rochford Council**
- **Southend-on-Sea City Council**
- **Tendring District Council**
- **Thurrock Council**
- **Uttlesford District Council**

Emma Chisnall, Acting Climate Change and Sustainability Lead Officer, **Havant Borough Council**

Councillor Carole Jones, Portfolio holder Planning & Museums, **Ipswich Borough Council**

Councillor Helen Hayden, Executive Member for Sustainable Development and Infrastructure, **Leeds City Council**

Councillor Colin Davie, Executive Councillor for Economic Development, Environment and Planning, **Lincolnshire County Council**

Councillor Danny Beales, Cabinet Member for New Homes, Jobs and Community Investment, **London Borough of Camden**

Councillor Danny Adilypour, Deputy Leader and Cabinet Member for Sustainable Growth and New Homes, **London Borough of Lambeth**

Paul Moore, Interim Director of Place, **London Borough of Richmond upon Thames**

Councillor Ahsan Khan, Deputy Leader and Housing and Regeneration portfolio holder, **London Borough of Waltham Forest**

Sue Frost, Director Sustainable Development, **Luton Council**

Councillor Eggleston, Council Leader and Councillor Gibson, Cabinet Member for Sustainability, **Mid Sussex District Council**

Councillor Richard Wright, Council Leader, **North Kesteven District Council**

Councillor David Brackenbury, Executive Member for Growth and Regeneration, **North Northamptonshire Council**

Councillor Mark Canniford, Portfolio Holder for Spatial Planning, Placemaking and Economy, **North Somerset Council**

Councillor Derek Bastiman, Executive Member for Open to Business, **North Yorkshire Council**

Councillor Tom Briars-Delve, Cabinet Member for Environment and Climate Change and Councillor Mark Coker, Cabinet Member for Strategic Planning and Transport, **Plymouth City Council**

Planning Policy Officers, **Reading Borough Council**

Councillor Paul Browne, Cabinet Portfolio Holder for Planning, Property and Economic Development, **Rutland County Council**

Councillor Eamonn Keogh, Cabinet Member for Environment and Transport, **Southampton City Council**

Patrick Conroy, Strategic Planning Policy and Specialist Advice Team Manager **South Gloucestershire Council**

Aidan Godfrey, Council Leader, **Stafford Borough Council**

Councillor Simon Speller, Portfolio Holder for Environment and Performance, **Stevenage Borough Council**

Gavin Chinniah, Head of Planning, **Surrey Heath Borough Council**

Joanne Johnson, Interim Head of Planning, **Swale Borough Council**

Councillor Trevor Young, Leader of the Council, **West Lindsey Council**

Chris Hargraves, Planning Policy Manager, **West Oxfordshire Council**

Councillor Gerald Kelly, Portfolio Holder for Governance, Regulatory and Environment, **West Suffolk Council**

Councillor Jackie Porter, Cabinet Member for Place and the Local Plan, **Winchester City Council**

Trevor Saunders, Assistant Director, Planning (Interim), **Wokingham Borough Council**

Appendix 3 – Essex County Council Open legal opinion advice February 2024

IN THE MATTER OF THE BUILDING REGULATIONS, PART L 2021 AND THE PLANNING AND ENERGY ACT 2008

Re: Ability of local planning authorities to set local plan policies that require development to achieve energy efficiency standards above Building Regulations

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UPDATED OPEN ADVICE

INTRODUCTION AND SUMMARY

1. I am asked to advise Essex County Council ("**the Council**") and the Essex Climate Action Commission ("**ECAC**") on the ability of local planning authorities ("**LPAs**") to set local plan policies mandating energy efficiency standards for new buildings which exceed those in the Building Regulations, Part L. I initially advised in April 2023, but was asked to update the advice in early 2024. This advice supersedes and replaces my previous advice.

2. For the updated reasons set out in detail below:

   2.1 The Planning and Energy Act 2008 ("**PEA 2008**") empowers LPAs, through their local plan policies, to set higher targets for energy performance standards for development in their area than the national baseline, provided such standards are "reasonable" and comply with the usual plan-making requirements of section 19 of the Planning and Compulsory Purchase Act 2004. That statutory power has not been revoked and remains fully extant.

   2.2 The making, on 13 December 2023, of a Written Ministerial Statement titled "Planning – Local Energy Efficiency Standards Update" ("**the 2023 WMS**") does not change that position. In light of the Court of Appeal's decision in *R (West Berkshire DC) v SSCLG* [2016] 1 WLR 3923, the 2023 WMS cannot lawfully seek to countermand or frustrate the effective operation of section 1 of the PEA 2008 (or any other relevant statutory power). The correct position in law is that LPAs and local plan inspectors have to treat the trenchant language in which the 2023 WMS is written with circumspection. The 2023 WMS must be interpreted in a way that allows for the effective

operation of LPAs' power to set their own energy efficiency standards in their development plan documents, as well as the obligation on LPAs to ensure development plan documents include policies designed to secure that development of land in the local authority's area "*contribute to the mitigation of, and adaptation to, climate change*". This means that the 2023 WMS cannot be interpreted to prevent LPAs from putting forward, and planning inspectors from finding sound, policies which are justified and evidenced and which use metrics other than that specified in the 2023 WMS, and/or do not require calculation by the method specified in the WMS. Additionally, local decision-makers are free to rely on local or exceptional circumstances to depart from the 2023 WMS.

2.3 Confusion over the ability of LPAs to set standards above the national baseline previously arose due to an amendment to the PEA 2008, which was enacted as part of the Deregulation Act 2015 but never brought into force; and a 2015 Written Ministerial Statement ("**the 2015 WMS**"), now superseded by the 2023 WMS. The Department for Levelling Up, Housing and Communities ("**DLUHC**") confirmed that the 2015 WMS was otiose and that there are no plans to bring the 2015 amendment to the PEA 2008 into force, or otherwise to amend the Act. Thereafter the 2015 WMS should not have been accorded any weight. This was re-confirmed in the 2023 WMS.

2.4 With one exception, LPAs which have sought to include policies in their local plans mandating energy efficiency standards above the national baseline have been successful, and Inspectors have been satisfied that such policies will not have an unreasonable impact on the viability or deliverability of development. The exception – the draft Area Action Plan for Salt Cross, found unsound in a report published on 1 March 2023 – was based on an unlawful interpretation of the 2015 WMS and was quashed by the High Court. There is therefore nothing in the Salt Cross decision which should dissuade an LPA from seeking to adopt net zero policies requiring high new build fabric efficiency standards, provided the LPA evidence such policies thoroughly and clearly indicates an awareness of the impact of the proposed policies on the viability of development.

REASONS

3. This opinion has the following structure:

FACTUAL BACKGROUND

4. In October 2018, the Intergovernmental Panel on Climate Change ("**IPCC**") reported in its *Special Report on Global Warming of 1.5ºC* (the "**SR1.5 Report**"), that human activities had caused the Earth's surface to warm by more than 1ºC since the industrial period of 1851-1900.[1] The SR1.5 Report made two further significant findings: (i) the climate impacts of 2°C of warming would be very much more serious than those of 1.5°C of warming; and (ii) there were then only 12 years in which to take action to prevent global temperature rise above 1.5ºC.

[1] IPCC 2018 *Special Report on Global Warming of 1.5ºC*, Summary for Policymakers ("**SPM**") A1 https://www.ipcc.ch/sr15/.

5. On 9 August 2021 the IPCC published the contribution of Working Group I to the IPCC's Sixth Assessment Report, regarding the physical science basis of climate change. Its key findings of fact can be summarised as follows:[2]

   a. It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.

   b. The scale of recent changes across the climate system as a whole and the present state of many aspects of the climate system are unprecedented when compared to the globe's climate over many thousands of years.

   c. Human-induced climate change is already affecting many weather and climate extremes in every region across the globe; evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones and, in particular, their attribution to human influence, has strengthened since the IPCC published its Fifth Assessment Report in 2013.

   d. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in CO_2 and other greenhouse gas emissions occur in the coming decades.

   e. Limiting human-induced global warming to a specific level requires limiting cumulative CO_2 emissions, reaching at least Net Zero CO_2 emissions, along with strong reductions in other greenhouse gas emissions.[3] Strong, rapid and sustained reduction in CH_4 (methane) emissions would also limit the warming effect resulting from declining aerosol pollution and would improve air quality.

6. The IPCC estimates a remaining carbon budget of 500 gigatonnes of CO_2 ("**$GtCO_2$**") (from 2020) for a 50:50 chance of restricting warming to 1.5°C, i.e., a little over

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[2] IPCC, 2021: SPM in *Climate Change 2021: The Physical Science Basis Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press https://www.ipcc.ch/report/ar6/wg1/.

[3] IPCC, 2018: Annex I: Glossary defines Net Zero CO_2 emissions as being achieved when global CO_2 emissions are balanced by CO_2 removals. Note that Net Zero CO_2 emissions and carbon neutrality have different meanings and can only be used interchangeably at a global scale. At a regional, national, local, or sectoral level, Net Zero requires the reduction of emissions to a level as close to zero as possible, while carbon neutrality can rely on offsetting elsewhere. See IPCC, 2022, Technical Summary ("**TS**") in *Climate Change 2022: Mitigation of Climate Change, Working Group III*, Box TS.6, fn. 19.

420GtCO$_2$ from the start of 2022.[4] This new budget represents just over ten years' worth of global emissions at pre-pandemic (2019) levels (a level that 2021 broadly matched).

7. On 17 January 2022, the UK Government published its *UK Climate Change Risk Assessment 2022*.[5] This details the effects currently being felt across the UK from impacts such as flooding, wildfires, sea level rise, coastal erosion and heating. It also sets out that, even under low warming scenarios, the UK will be subject to a range of significant and costly impacts unless accelerated further action is taken now.[6] For eight of the risks identified, economic damage by 2050 under 2°C of warming could exceed £1 billion per annum.[7] It states:

> *"The evidence shows that we must do more to build climate change into any decisions that have long-term effects, such as new housing or infrastructure, to avoid often costly remedial action in the future."*[8]

8. On 27 February 2022 the IPCC published the contribution of Working Group II to the IPCC's Sixth Assessment Report. Its key findings of fact are:
   a. The extent and magnitude of climate change impacts are larger than estimated in previous assessments;[9]
   b. Climate change has caused increased heat-related mortality; hot extremes including heatwaves have intensified in cities, where they have aggravated air pollution events and limited functioning of key infrastructure;[10]
   c. Continued and accelerating sea level rise will encroach on coastal settlements and infrastructure,[11] and, combined with storm surge and heavy rainfall, will increase compound flood risks;[12]

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4 IPCC, 2021, Table SPM2 and paras D.1.3-D.1.8.
5 UK Climate Change Risk Assessment 2022 (17 January 2022) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1047003/climate-change-risk-assessment-2022.pdf
6 Ibid, pg 3.
7 Ibid, pg 4.
8 Ibid, pg 4 and pg 9.
9 IPCC, 2022, SPM in *Climate Change 2022, Impacts, Adaptation and Vulnerability, Working Group II contribution*, para SPM.B.1.2 https://www.ipcc.ch/report/ar6/wg2/.
10 Ibid, SPM B.1.1 and SPM.B.1.5.
11 Ibid, SPM.B.3.1.
12 Ibid, SPM.B.5.1.

d. There have been irreversible losses, for example through species extinction driven by climate change;[13]

e. *"The cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all."*[14]

9. On 20 March, the IPCC published its Synthesis Report, which draws together conclusions and recommendations from its detailed reports produced over the last six-year reporting cycle.[15] It emphasises that deep, rapid, sustained, and immediate reductions in greenhouse gas emissions are needed to avoid dangerous and irreversible consequences for human and natural systems.[16] A wide range of co-benefits would accompany rapid and sweeping emissions reductions, especially in terms of air quality and public health.[17] It sets out that substantial emissions and policy gaps presently exist, with implemented policies being on track for warming of 3.2°C, with a range of 2.2°C to 3.5°C.[18] Importantly, it emphasises that even the smallest increments of warming matter.[19] Every fraction of a degree will increase the severity and frequency of floods, droughts, storms, heatwaves, and other extreme weather events.

10. Buildings are the UK's second-highest emitting sector: as at 2022, the operational greenhouse gas emissions from energy needed to heat, cool and power buildings accounted for 17% of total emissions.[20] To meet the UK's domestic climate commitments requires a 30% reduction in total energy demand in buildings by 2035 (compared to 2021 levels).[21]

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13 Ibid, SPM.B.1.2.
14 Ibid, SPM.D.5.3.
15 IPCC 2023 AR6 Synthesis Report https://www.ipcc.ch/report/ar6/syr/.
16 Ibid, C.2.1 pg 27.
17 Ibid, C.2.3 pg 27.
18 Ibid, figure 5 pg 23.
19 Ibid, B.2.2 pg 15 and figure 4 pg 18.
20 Climate Change Committee *Progress in reducing UK emissions 2023 Report to Parliament* pg 140 https://www.theccc.org.uk/wp-content/uploads/2023/06/Progress-in-reducing-UK-emissions-2023-Report-to-Parliament-1.pdf.
21 Ibid, pg 143.

11. ECAC is an independent body, set up by Essex County Council in May 2020. There are currently 30 commissioners, drawn from a range of public, private, and third sector organisations. In July 2021, ECAC published its report 'Net Zero: Making Essex Carbon Neutral', in which it set out a series of recommendations, which were adopted in full by the County Council. Among these was the recommendation that all new homes and commercial buildings granted planning permission in Essex should be zero carbon by 2025, and carbon positive by 2030.[22] These targets do not have statutory authority, but through leadership and information sharing, ECAC and the County Council, working with district council Chief Planners, are seeking to influence LPAs to adopt energy performance policies in their local plans, and developers to commit to higher standards of energy efficiency.

12. The Essex Developers Group ("**EDG**") has signed up to a Developers Climate Action Charter in June 2022, in support of the ECAC targets.[23] The Charter has been adopted by the EDG as well as Homes England, the South East Local Enterprise Partnership and the Essex Planning Officers Association (representing the 15 local authorities of Essex).[24]

LEGAL AND POLICY BACKGROUND

13. The Courts in the UK have recognised the "*very great importance*" and "*significance*" of climate change, "*with its consequences for human and other life on this planet*": *R (BAAN) v SSLUHC* [2023] EWHC 171 (Admin) at §§1 and 258. The Divisional Court has accepted that the impact of global heating is "*potentially catastrophic*": *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at §560. The Court of Appeal has recognised that the "*issue of climate change is a matter of profound national and international importance of great concern to the public—and, indeed, to the Government of the United Kingdom*": *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at §277.

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[22] ECAC, 'Net Zero: Making Essex Carbon Neutral', pg 33, https://www.essexclimate.org.uk/sites/default/files/DS21_7178%20ECAC_Commission_Report-Final.pdf.

[23] https://www.housingessex.org/topic/climate-action.

[24] Essex Developers' Group Climate Action Charter, https://www.housingessex.org/assets/uploads/2022/10/Essex-Developers-Climate-Action-Charter-2022-signed-version-FINAL-1.pdf

14. In *R (Frack Free Balcombe Residents Association) v SSLUHC* [2023] EWHC 2548 (Admin) at §65, Lieven J held that climate change "*is likely to be a material consideration in every planning decision given the policy context as well as the much wider issues*".

Statutory obligation to reach Net Zero by 2050

15. The United Kingdom is subject to a statutory obligation to ensure that its net carbon account for the year 2050 is at least 100% lower than the 1990 baseline, pursuant to section 1(1) of the Climate Change Act 2008 ("**CCA 2008**"), as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019. Under sections 4 and 9 of the CCA 2008, the Secretary of State must set regular carbon budgets for each succeeding five-year period, taking into account advice from the Climate Change Committee ("**CCC**"), and ensure that the net UK carbon account for each budgetary period does not exceed the carbon budget.

16. The duties of the CCC are set out in Part 2 of the CCA 2008 and include obligations to advise the Secretary of State on the setting of carbon budgets (section 34) and to make annual reports to Parliament on the progress that has been made towards meeting the carbon budgets and the 2050 Net Zero target (section 36).

17. The Fourth Carbon Budget, for the period 2023-2027, is set at 1,950 million tonnes carbon dioxide equivalent ("**$MtCO_2e$**") and requires an average of a 51% reduction in emissions compared with 1990 levels.[25] It was set so as to be on track for the previous target of an 80% reduction in greenhouse gas emissions by 2050. The Fifth Carbon Budget (2028-32), set on the same basis, is 1,725 $MtCO_2e$, which requires an average of a 57% reduction.

18. The CCC published its Sixth Carbon Budget recommendation and report in December 2020. The Government accepted the recommendation and enshrined the budget in law by the Carbon Budget Order 2021. It sets a target of 965 $MtCO_2e$

[25] CO_2 equivalent emission is a common scale for comparing emissions of different greenhouse gasses, though it does not imply equivalence of the corresponding climate change responses. It is defined in IPCC 2018, Annex 1: Glossary.

for the period 2033–2037, which would equate to a 78% reduction in emissions by 2035, relative to the 1990 baseline.[26]

19. The adoption of the Sixth Carbon Budget has clear implications for the Fourth and Fifth Carbon Budgets, which were set in line with the previous 'at least 80% reduction' target for 2050 rather than the revised 'at least 100%' target now found in Section 1 of the CCA 2008. In its December 2020 report, the CCC calculated a difference of at least 28-68 $MtCO_2e$ a year in 2030 between the average emissions allowed by the Fifth Carbon Budget, and the CCC's "Balanced Pathway", which is a trajectory that if followed would allow the UK to meet the Sixth Carbon Budget and the 2050 Net Zero target.[27]

20. The CCC has advised that the Fifth Carbon Budget will need to be significantly outperformed to stay on track to meet the Sixth Carbon Budget and the 2050 Net Zero target.[28]

Climate change and planning policy

21. The National Planning Policy Framework 2023 ("**NPPF**"), published in December 2023, recognises that the duties under the CCA 2008 are relevant to planning for climate change. Paragraph 158, which is unchanged from the September 2023, July 2021, February 2019 and March 2012 versions of the NPPF (in which it was paragraph 153), provides that plans should "*take **a proactive approach** to mitigating and adapting to climate change*" (emphasis added). Footnote 56 makes clear this must be "*in line with the objectives and provisions of the Climate Change Act 2008*".[29] Policies "*should support appropriate measures to ensure the future resilience of communities and infrastructure to climate change impacts*". Energy efficiency policies clearly fall within the proactive approach to mitigation and making communities and infrastructure more resilient to climate change.

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[26] CCC, *The Sixth Carbon Budget – The UK's path to Net Zero*, December 2020, https://www.theccc.org.uk/publication/sixth-carbon-budget/.
[27] Ibid, pg 432.
[28] Ibid, pgs 24 and 430-433.
[29] This is also reflected in the paragraph 1 of the Planning Practice Guidance: Climate Change (ID 6-001-20140306) https://www.gov.uk/guidance/climate-change. The PPG on Climate Change is addressed further at §56-60 and 98-99 below.

22. DHLUC stated in its consultation on the updating of the NPPF that planning "*can make an important contribution to … the vitally important task of mitigating and adapting to climate change*".[30]

The Net Zero Strategy and the Carbon Budget Delivery Plan suite of documents

23. On 18 July 2022, the Net Zero Strategy for meeting the carbon budgets up to and including the Sixth Carbon Budget was found unlawful. In *R (Friends of the Earth Ltd) v Secretary of State for the Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin); [2023] 1 WLR 225, Holgate J held the Secretary of State had not been briefed with sufficient information to enable him to be satisfied that the policies and proposals included in the Net Zero Strategy would allow the UK to meet the Sixth Carbon Budget (§§202–204, 211–217, 256–257). The Net Zero Strategy was required to be re-drafted by 31 March 2023.

24. On 30 March 2023, the Government published its revised strategy to deliver its Net Zero obligations.[31] Rather than a single Net Zero Strategy, a suite of 50 documents were published, including 19 policy documents. The most important of the policy documents is the Carbon Budget Delivery Plan,[32] which will be presented to Parliament pursuant to the section 14 of the CCA 2008 and which is the most direct response to the *Friends of the Earth* judgment.

25. The Carbon Budget Delivery Plan sets out 191 quantified measures across all sectors of the economy (table 5) and indicates that these policies would meet Carbon Budgets Four and Five, but would only provide 97% of the carbon savings required to meet the Sixth Carbon Budget (2033-2037), amounting to a shortfall of 32 million tonnes of CO_2e over the budget period (see Table 1 in particular). Table 6 of the Plan lists another 143 "*unquantified*" policies and proposals, where the impact has not been calculated, in some cases because they are at an "*early stage*" or because they are very high level.

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[30] Consultation, Levelling Up and Regeneration Bill: reforms to national planning policy (22 December 2022), Chpt 2 §5 https://www.gov.uk/government/consultations/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy.

[31] https://www.gov.uk/government/publications/powering-up-britain.

[32] https://www.gov.uk/government/publications/carbon-budget-delivery-plan.

26. The Carbon Budget Delivery Plan also makes it clear that it delivers only 92% of the emissions cuts needed to meet the UK's 2030 nationally determined contribution under the Paris Agreement, which is a commitment to reduce economy-wide greenhouse gas emissions by at least 68% by 2030, compared to 1990 levels.

27. The documents which were promoted as the centrepiece of the new Net Zero package are titled "*Powering Up Britain*" and include an Overview[33] of the Government's plans as well as the UK's new Energy Security Plan[34] and Net Zero Growth Plan.[35] While these publications largely consolidate existing Government policies, a number of "new" initiatives were announced across various key vectors in the energy transition, including renewables, nuclear, hydrogen, carbon capture, heat and energy efficiency, as well as indications on the direction of travel with respect to reforms for electricity networks and energy markets.

28. The main measures targeted at buildings refine existing energy efficiency support, in particular by rebranding an insulation scheme to upgrade around 300,000 of the country's least energy efficient homes and support the rollout of heat pumps.

Progress towards the Net Zero obligation

29. In June 2022, the CCC found in its *Progress Report to Parliament* concerning the previous Net Zero Strategy that either significant risks or policy gaps existed in relation to 38% of the emissions reductions required to meet the Sixth Carbon Budget.[36] This was particularly so in relation to land use and the energy efficiency of buildings.[37] The CCC also highlighted that, under the current Building Regulations, "*the UK continues to build new homes to standards which do not align with the Net Zero target.*"[38]

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33 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147340/powering-up-britain-joint-overview.pdf.
34 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147339/powering-up-britain-energy-security-plan.pdf.
35 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147338/powering-up-britain-net-zero-growth-plan.pdf.
36 CCC, Progress Report, June 2022, pg 22, https://www.theccc.org.uk/publication/2022-progress-report-to-parliament/.
37 CCC, Progress Report, pg 14.
38 CCC, Progress Report, pg 180.

30. In a letter to Chancellor Jeremy Hunt in November 2022, the CCC recommended that the Government consider bringing forward the date for the introduction of the Future Homes Standard from 2025.[39] This recommendation was not followed in the Carbon Budget Delivery Plan, which still envisages regulation from 2025.[40] A similar recommendation made in the independent Net Zero Review, carried out by former energy minister Chris Skidmore MP,[41] was rejected.[42] The Government launched its consultation on the specification in December 2023 (see §43 below) and intends to legislate in 2024 ahead of implementation in 2025. In March 2023, the Government indicated that it would, as part of the consultation, "*explore what transitional arrangements are appropriate to make sure that as many homes as possible are built to the new standard as quickly as possible.*".[43]

31. In a further letter to the Under Secretary of State for Levelling Up, Housing and Communities, dated 2 February 2023, the Chair of the CCC, Lord Deben, also highlighted the problems inherent in using the current rating metrics for domestic Energy Performance Certificates ("**EPCs**") to assess the energy efficiency of buildings.[44] At present, these metrics reflect energy costs and carbon emissions per square metre, but do not provide a direct measurement of fabric efficiency. The fact that energy costs form the basis for one of the two metrics used to inform current EPC ratings has given rise to perverse incentives. For example, a home heated by a modern gas boiler will usually achieve a better EPC rating than one heated via low-carbon technology such as heat pumps. The letter recommended that the metrics be improved, to support better the delivery of national climate policy targets, and that they be used to measure: 1) energy use intensity; 2) space heating demand intensity; 3) heating system type; and 4) energy cost intensity. It

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[39] CCC, Letter: Reducing energy demand in buildings in response to the energy price crisis, November 2022,https://www.theccc.org.uk/publication/letter-reducing-energy-demand-in-buildings-in-response-to-the-energy-price-crisis/.

[40] Policy 97, pg 78.

[41] Mission Zero: Independent Review of Net Zero, January 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128689/mission-zero-independent-review.pdf.

[42] Responding to the Independent Review of Net Zero's Recommendations, March 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147370/responding-to-independent-review-of-net-zero.pdf.

[43] Ibid, pg 54, response 108.

[44] CCC, Letter: Reform of domestic EPC rating metrics, February 2023, https://www.theccc.org.uk/publication/letter-reform-of-domestic-epc-rating-metrics-to-lee-rowley-mp/.

appears this recommendation has not been followed in the Carbon Budget Delivery Plan or the Powering Up Britain documents.

32. On 28 June 2023, the CCC responded to the Carbon Budget Delivery Plan and the new suite of Net Zero Strategy documents in its *Progress Report to Parliament* ("**2023 Progress Report**").[45] This set out that, despite new detail from Government, the CCC's confidence in the UK meeting its 2030 NDC and the Sixth Carbon Budget had decreased. The CCC made the point that, excluding the power sector, emissions had only fallen by an average of 1% in the last eight years, but that rate of progress would need almost to quadruple in the next eight years for the UK to meet its 2030 NDC commitment. It concluded a doubling of progress on buildings is required, but that policy gaps remained, particularly for energy efficiency measures, which it reported are significantly off track.

33. Focusing on buildings, the 2023 Progress Report recorded that most indicators are off track and that the UK need significant new policies and programmes to underpin the delivery or, inter alia, energy efficiency.[46] The CCC judged most of the policies in the CBDP and net zero suite of documents to achieve emission reductions from buildings "*to be either at significant risk or with insufficient plans*".[47]

34. National policy gaps, including on the energy efficiency of buildings, do not mean that LPAs are prevented from taking action now, or in advance of national policy. On the contrary: localised action is all the more important for keeping the UK on track to meet its 2030 NDC, the Sixth Carbon Budget and the 2050 Net Zero target. Local authorities, commercial developers and associated partners, and third sector organisations all have a role to play in delivering higher energy performance standards in new development.

35. This is bolstered by section 19(1A) of the Planning and Compulsory Purchase Act 2004 ("**2004 Act**"), which requires that development plan documents must

[45] https://www.theccc.org.uk/publication/2023-progress-report-to-parliament/.
[46] Ibid, pgs 140-141.
[47] Ibid, pg 151.

include policies designed to secure that development of land in the local authority's area "*contribute to the mitigation of, and adaptation to, climate change*". This, read with the NPPF provisions set out at §21 above, means that both statute and national government policy require LPAs to bring forward carbon literate planning policies to secure compliance with the UK's climate obligations.

36. Furthermore, Section 38(6) of the 2004 Act provides that, "*if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.*" This makes local development plans a crucial avenue for promoting higher standards in new development and ensuring that homes built today will not require expensive retrofits in years to come.

37. On the consumer side, there is a growing market among buyers and renters for more sustainable homes and workplaces, and a potential 'green premium' to be enjoyed by developers who deliver high standards of energy efficiency:

    a. In 2021 and 2022, Royal Institution of Chartered Surveyors measured global occupier and investor appetite for green and sustainable buildings and found that there is a net balance of +48%, pointing to a pick-up in occupier and investor appetite for climate adapted real estate; a figure which was continuing to rise across the globe.[48]

    b. Research by Legal & General and YouGov among a UK representative sample of 2,405 adults open to buying or renting a new home, found that 62% saw investment in energy efficient homes as an attractive or very attractive option to address the cost of living crisis, that renters were willing to pay a 13% premium for a low carbon property, and buyers a 10.5% premium, rising to 20% for Gen Z future buyers (i.e. those born after 1997). The research also found a 34% uptick in online searched for eco-friendly homes.[49]

[48] RICS Sustainability Report 2022 https://www.rics.org/news-insights/current-topics-campaigns/sustainability.

[49] Legal & General/YouGov Research, July–August 2022: https://group.legalandgeneral.com/media/vm0g2fvp/low-carbon-homes-release-final.pdf

c. Polling carried out by Opinium and Santander of 2,000 UK representative adults, 175 estate agents, and 108 mortgage brokers found that 79% of potential buyers said that increased energy costs had made them think more about the importance of energy efficiency, that those who were willing to pay more for an energy efficient home put a 9.4% premium on the price of such a property and that estate agents reported buyers spending an average of 15.5% more on energy efficient properties. Santander concluded that this 'green premium' equated to an average of £26,600 over and above the average UK house price.[50]

d. Shakespeare Martineau found that 77% of 500 potential buyers surveyed would consider purchasing a green home, rising to 80% for first time buyers.[51]

e. On the commercial side, research by Knight Frank and BRE Group on 2,701 buildings found that Central London office space which had a BREEAM Outstanding certification commanded a 12.3% rental premium when controlling for other property characteristics.[52]

38. Some developers, such as the members of the EDG who signed the Developers Climate Action Charter, have recognised this 'green premium' and voluntarily committed to higher standards for energy efficiency. Initiatives such as developers' charters are important statements of intent, even though they have no power legally to bind their signatories.

39. A number of leading developers also favour approaches to projects which address climate change more robustly than present legislation, standards and policy require. For example, Berkeley Group stated that they achieved carbon neutrality via emissions reductions and offsetting in 2018 and has committed to a target of

[50] Santander, Buying into the Green Homes Revolution, October 2022, https://www.santander.co.uk/about-santander/media-centre/press-releases/a-green-premium-house-buyers-willing-to-pay-almost-10.

[51] Shakespeare Martineau Green Homes Report: https://www.housinglin.org.uk/_assets/_Resources/Housing/OtherOrganisation/Green-Homes-Report-FINAL.pdf.

[52] Knight Frank, The Sustainability Series, September 2021, https://content.knightfrank.com/research/2311/documents/en/the-sustainability-series-september-2021-8395.pdf.

Net Zero carbon emissions across scopes 1, 2 and 3 by 2040.[53] Commitments of this nature are partly driven by investors and funders and their approach to ESG (Environmental, Social and Governance) requirements. The "E" in ESG is ever more focused on carbon reduction, which is arguably the most pressing concern for the industry.

2021 updates to the Building Regulations

40. Approved Documents F (Ventilation) and L (Conservation of Fuel and Power), which provide guidance on how compliance with the Building Regulations can be achieved with respect to energy efficiency, were updated in 2021 with measures which came into effect in June 2022. A new Approved Document O (Overheating) was also published.

41. The new measures essentially function as staging posts on the way to the introduction of the Government's Future Homes Standard and Future Buildings Standard in 2025. They mandate that carbon emissions from new residential buildings must be 31% lower and those from new non-residential buildings 27% lower than the previous 2013 baseline. The updated guidance also includes a range of new energy efficiency standards and metrics in relation to components of the fabric and heating systems of new buildings to achieve the required overall emissions reductions.

The 2023 WMS and the Future Homes and Buildings Standard Consultations

42. On 13 December 2023, the 2023 WMS, titled "Planning – Local Energy Efficiency Standards Update", was made by Parliamentary Under Secretary of State (Housing and Communities), Baroness Penn, in the House of Lords (HLWS120) and then by Lee Rowley as Minister of State for Housing (HCWS123).[54] The 2023 WMS stated that the 2021 Part L amendments effectively rendered the 2015 WMS moot. The 2023 WMS explicitly supersedes the 2015 WMS.

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[53] Berkeley Group, Our Vision 2030, https://www.berkeleygroup.co.uk/our-vision/climate-action.
[54] https://questions-statements.parliament.uk/written-statements/detail/2023-12-13/hlws120 and https://questions-statements.parliament.uk/written-statements/detail/2023-12-13/hcws123

43. Also on 13 December 2023, DLUHC launched two consultations:

a. The Future Homes and Buildings Standards: 2023 consultation on changes to Part 6, Part L (conservation of fuel and power) and Part F (ventilation) of the Building Regulations for dwellings and non-domestic buildings and seeking evidence on previous changes to Part O (overheating).[55] This is quite a technical consultation, with a focus on the metrics to be used for the Standards and the technical and personnel requirements for their implementation. It is notable that the two options for metrics on which the consultation focuses are the least ambitious of the various options which had been presented to the Government in the runup to the consultation, nor does it include various requirements identified by the CCC as necessary in its *UK Housing: Fit for the Future?* report in February 2019.[56]

b. Home Energy Model: Future Homes Standard. This is the methodology which will be used to demonstrate that new dwellings comply with the future Homes Standard. It will replace the Standard Assessment Procedure ("**SAP**") version 10.2 for the energy rating of dwellings. The introduction of the Home Energy Model ("**HEM**") is significant, because it is not just an updated version of SAP, but a completely new modelling tool designed to allow more accurate calculation of energy use.

LEGAL POSITION ON ENERGY EFFICIENCY TARGETS BEYOND NATIONAL MINIMUM STANDARDS

44. Local authorities are empowered by statute to set their own standards for energy efficiency of new dwellings and other buildings in excess of Building Regulations, provided that such standards do not conflict with national policy. As set out below, confusion around this power has been caused by: a statutory amendment which was never brought into force; the 2023 WMS; the 2015 WMS (which has now been overtaken by events); and the Planning Practice Guidance ("**PPG**") on Climate Change, which has not been updated to reflect the latest revisions to the Building Regulations.

[55] https://www.gov.uk/government/consultations/the-future-homes-and-buildings-standards-2023-consultation.

[56] https://www.theccc.org.uk/wp-content/uploads/2019/02/UK-housing-Fit-for-the-future-CCC-2019.pdf For example, this recommended a space heat demand of 15-20 kWh/m2/yr (pg 14).

45. Despite these apparently confounding factors, the statutory power exists in primary legislation and LPAs can exercise that power with confidence.

Planning and Energy Act 2008

46. The power for LPAs to set their own energy efficiency standards derives from the PEA 2008. Section 1 of this statute provides that:

"(1) A local planning authority in England may in their development plan documents, corporate joint committee may in their strategic development plan, and a local planning authority in Wales may in their local development plan, include policies imposing reasonable requirements for—

(a) a proportion of energy used in development in their area to be energy from renewable sources in the locality of the development;

(b) a proportion of energy used in development in their area to be low carbon energy from sources in the locality of the development;

(c) development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.

[...]

(4) The power conferred by subsection (1) has effect subject to subsections (5) to (7) and to—

(a) section 19 of the Planning and Compulsory Purchase Act 2004 (c. 5), in the case of a local planning authority in England; [...]

(5) Policies included in development plan documents by virtue of subsection (1) must not be inconsistent with relevant national policies for England."

47. The PEA 2008 therefore establishes that LPAs may set higher standards for energy efficiency in their local plan policies than the baseline required by the Building Regulations provided that such policies are: a) reasonable, b) not inconsistent with national policies; and c) compliant with the usual provisions around plan-making found in section 19 of the Planning and Compulsory Purchase Act 2004.

48. The power in section 1(1) is constrained by the requirement in section 1(5) that policies included in development plans by virtue of section 1(1) "*must not be inconsistent with relevant national policies for England*". There is no definition of what the "*relevant national policies for England*" comprise, although it is notable that the NPPF is the "*Government's planning policies for England*" (NPPF paragraph

1). It may be the case that various policies pull in different directions, which would mean that they cannot be applied so as to constrain the power in section 1(1).

49. In relation to local energy efficiency policies, the key relevant national policies for England – the NPPF and the PPG – are clear that plans should take a proactive approach to mitigating and adapting to climate change, in line with the objectives and provisions of the CCA 2008. This bolsters, rather than limits, the section 1(1) power, and is in line with the duty in section 19(1A) of the 2004 Act. I address the 2023 WMS at §§61-80 below. The 2023 WMS cannot operate to frustrate or negate the power in section 1(1). In light of other national policies that were promulgated after consultation and within the legislative framework of the 2004 Act, and which pull against the 2023 WMS, my view is that the 2023 WMS cannot of itself operate under section 1(5) to abrogate the section 1(1) power.

Why the Deregulation Act 2015 does not undermine local planning authorities' powers

50. Section 43 of the Deregulation Act 2015 would have inserted a new section 1A into the PEA 2008, excluding the construction or adaptation of residential dwellings from the scope of section 1(c). This provision was never brought into force. The then Ministry of Housing, Communities and Local Government, now DLUHC, clarified in January 2021, in its response to Future Homes Standard consultation, that there was no intention to bring the provision into force, or otherwise to amend or repeal the PEA Act 2008.[57] The consultation had specifically asked when, if at all, the government should commence the amendment to the PEA Act 2008. The consultation responses showed that an overwhelming majority of respondents were in favour of the Government not commencing the amendment. The Government's response was:

> *"2.39 All levels of Government have a role to play in meeting the net zero target and local councils have been excellent advocates of the importance of taking action to tackle climate change. Local authorities have a unique combination of powers, assets, access to funding, local*

[57] The Future Homes Standard: summary of responses, and government response, January 2021, https://www.gov.uk/government/consultations/the-future-homes-standard-changes-to-part-l-and-part-f-of-the-building-regulations-for-new-dwellings.

knowledge, relationships with key stakeholders and democratic accountability. This enables them to drive local progress towards our national climate change commitments in a way that maximises the benefits to the communities they serve. As part of this, the Government wishes to ensure that we have a planning system in place that enables the creation of beautiful places that will stand the test of time, protects and enhances our precious environment, and supports our efforts to combat climate change and bring greenhouse gas emissions to net zero by 2050.

2.40 We recognise that there is a need to provide local authorities with a renewed understanding of the role that Government expects local plans to play in creating a greener built environment; and to provide developers with the confidence that they need to invest in the skills and supply chains needed to deliver new homes from 2021 onwards. To provide some certainty in the immediate term, the Government will not amend the Planning and Energy Act 2008, which means that local planning authorities will retain powers to set local energy efficiency standards for new homes.

2.41 Last year, the Planning for the Future white paper set out how a simpler planning process could improve certainty about what can be built where, as well as offering greater flexibility in the use of land to meet our changing economic and social needs. The white paper indicated that while development management policies would focus on identifying areas for development and protection, they would be set nationally. Further, as we move to ever higher levels of energy efficiency standards for new homes with the 2021 Part L uplift and Future Homes Standard, it is less likely that local authorities will need to set local energy efficiency standards in order to achieve our shared net zero goal.

2.42 The planning white paper consultation closed on 29 October 2020. The responses we received will be considered carefully, and a Government response will be published in due course. The new planning reforms will clarify the longer-term role of local planning authorities in determining local energy efficiency standards."

51. The same line was taken on 13 January 2022 in the Government's policy paper "Local Government and the path to net zero: government response to the Select Committee report",[58] which stated:

> *"Local authorities have the power to set local energy efficiency standards that go beyond the minimum standards set through the Building Regulations, through the Planning and Energy Act 2008. In January 2021, we clarified in the Future Homes Standard consultation response that in the immediate term we will not amend the Planning and Energy Act 2008, which means that local authorities still retain powers to set local energy efficiency standards that go beyond the minimum standards set through the Building Regulations. In addition, there are clear policies in the NPPF on climate change as set out above. The Framework does not set out an exhaustive list of the steps local authorities might take to meet the challenge of climate change and they can go beyond this.*
>
> *We are considering the best way forward for the planning reforms, taking account of stakeholder feedback and responses to our White Paper. As part of our review of the NPPF, we will consider how planning policy can best support local authorities in efforts to deliver net zero."*

52. The Government set out its proposed approach to planning reform, in light of the responses to the white paper consultation, in the Levelling Up and Regeneration Bill ("**LURB**") and accompanying Policy Paper, published on 11 May 2022. This did not address local energy efficiency directly. It referred to the British Energy Security Strategy, published in April 2022, which did not address the role of LPAs in determining local energy efficiency standards. Neither the LURB, nor the subsequent Levelling Up and Regeneration Act 2023, addressed local energy efficiency standards, nor did the amendments to the National Planning Policy Framework at the end of 2023. Accordingly, nothing in the planning reforms or current planning policy suggests that the PEA 2008 will be amended.

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[58] https://www.gov.uk/government/publications/local-government-and-the-path-to-net-zero-government-response-to-the-select-committee-report/local-government-and-the-path-to-net-zero-government-response-to-the-select-committee-report

53. The Government's position was re-confirmed in June 2022 (after the publication of the LURB Policy Paper), in open correspondence between Bath and North East Somerset Council and DLUHC. The written reply, dated 22 June 2022 and from Jonathan Mullard, Minister at the then Department for Business, Energy and Industrial Strategy,[59] who confirmed that he was empowered to speak for DLUHC, stated:

> *"- Plan-makers may continue to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish.*
> *- Local planning authorities have the power to set local energy efficiency standards through the Planning and Energy Act 2008.*
> *- In January 2021, we clarified in the Future Homes Standard consultation response that in the immediate term we will not amend the Planning and Energy Act 2008, which means that local planning authorities still retain these powers."*

54. The Government's intention not to bring the amendments into force was confirmed in November 2023 before the High Court.[60]

55. Accordingly, far from undermining the power in section 1 of the PEA 2008, section 43 of the Deregulation Act 2015 and the Government's clearly asserted position that it will not be brought into force reinforce that LPAs have the power to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish.

Why the 2015 WMS did not undermine local planning authorities' powers

56. The 2015 WMS indicated that local plan policies could not be used to set requirements above the equivalent of Level 4 of the Code for Sustainable Homes, which was 19% above the national baseline in the Building Regulations, Part L 2013.[61] This was overtaken by the updated baseline from June 2022, which

[59] Bath and North East Somerset, Examination Note on Local Energy Efficiency Targets, §1.5, https://beta.bathnes.gov.uk/sites/default/files/EXAM_10_Note_on_Local_Energy_Efficiency_Targets_FINAL.pdf.
[60] *R (Rights:Community:Action Ltd) v SSLUHC* [2024] EWHC 359 (Admin) at §67.
[61] Conservation of fuel and power: Approved Document L, March 2014, updated February 2023, https://www.gov.uk/government/publications/conservation-of-fuel-and-power-approved-document-l.

exceeds Code Level 4. However, the 2015 WMS remained extant until December 2023 and the PPG on Climate Change has throughout reflected the 2015 WMS.[62] Indeed, it has not been updated since March 2019 and so still reflects the 2015 WMS, [63] despite this now having been superseded.

57. In the Report of Inspector Lewis to Bath and North East Somerset Council, dated 13 December 2022, he concluded:

> *"84.* ***The WMS 2015 has clearly been overtaken by events*** *and does not reflect Part L of the Building Regulations, the Future Homes Standard, or the legally binding commitment to bring all greenhouse gas emissions to net zero by 2050.*
>
> *85.* ***I therefore consider that the relevance of the WMS 2015 to assessing the soundness of the Policy has been reduced significantly, along with the relevant parts of the PPG on Climate Change, given national policy on climate change.*** *The NPPF is clear that mitigating and adapting to climate change, including moving to a low carbon economy, is one of the key elements of sustainable development, and that the planning system should support the transition to a low carbon future in a changing climate. Whilst NPPF154 sets out that any local requirements for the sustainability of buildings should reflect the Government's policy for national technical standards, for the reasons set out, that whilst I give the WMS 2015 some weight, any inconsistency with it, given that it has been overtaken by events, does not lead me to conclude that Policy SCR6 is unsound, nor inconsistent with relevant national policies."* (emphasis added)[64]

58. In his Report on the Examination of the Cornwall Council Climate Emergency Development Plan Document, dated 10 January 2023, Inspector Paul Griffiths recognised that:

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[62] Planning update, March 2015, https://www.gov.uk/government/speeches/planning-update-march-2015

[63] Planning Practice Guidance: Climate Change, June 2014, updated March 2019, https://www.gov.uk/guidance/climate-change (last accessed on 21 February 2024).

[64] Report on the Examination of the Local Plan (Core Strategy and Placemaking Plan) Partial Update https://beta.bathnes.gov.uk/sites/default/files/2022-12/EXAM24%20Inspectors%20Report.pdf

"166. Provisions to allow Councils to go beyond the minimum energy efficiency requirements of the Building Regulations are part of the Planning and Energy Act 2008. The WMS of 25 March 2015 says that in terms of energy performance, Councils can set and apply policies which require compliance with energy performance standards beyond the requirements of the Building Regulations until the Deregulation Bill gives effect to amendments to the Planning and Energy Act 2008. These provisions form part of the Deregulation Act 2015, but they have yet to be enacted. Further, the Government has confirmed that the Planning and Energy Act 2008 will not be amended. ***The result of all this is that Councils are able to set local energy efficiency standards for new homes, without falling foul of Government policy.***

167. ***The WMS of 25 March 2015 has clearly been overtaken by events.*** *Nothing in it reflects Part L of the Building Regulations, the Future Homes Standard, or the Government's legally binding commitment to bring all greenhouse gas emissions to net zero by 2050.* ***In assessing the Council's approach to sustainable energy and construction, the WMS of 25 March 2015 is of limited relevance"*** (emphasis added).[65]

59. The Report of Inspectors Matthew Birkinshaw and Clive Coyne regarding the Central Lincolnshire Local Plan Review, dated 28 March 2023, concluded:

"177. In summary therefore, we conclude that the approach of Policy S7, which seeks to go above and beyond the requirements of the Building Regulations, is not inconsistent with national planning policy for the purposes of the Planning and Energy Act 2008. When read as a whole, it is also consistent with the Framework which states that the planning system should support the transition to a low carbon future in a changing climate and help shape places in ways that contribute to radical changes in greenhouse gas emissions. ***Whilst we find conflict with national planning practice guidance, both the PPG and the 2015 WMS have clearly been overtaken by existing and proposed changes to the Building Regulations brought into force in 2022.*** *MMs are therefore not*

[65] Cornwall Climate Emergency DPD, Inspector's Report https://www.cornwall.gov.uk/media/10pmiq1e/appendix-1-cornwall-climate-emergency-dpd-final-report-1.pdf.

necessary to require the Plan to adhere to Code for Sustainable Homes Level 4 equivalent standards, which are now exceeded by the Building Regulations."[66] (emphasis added)

60. In my view, these decisions took the correct approach in law and gave clear, cogent and accurate reasons for giving the 2015 WMS limited or no weight. The 2015 WMS had been overtaken by events and did not prevent the setting of energy efficiency standards at the local level which go beyond national Building Regulations standards.[67]

Why the 2023 WMS does not undermine local planning authorities' powers

61. The 2023 WMS addresses both plan-making and decision-taking. On plan-making, it states that, in the context of the improvement in standards already in force through the 2021 Part L uplift, alongside the standards due in 2025, "*the Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned buildings regulations*" (emphasis added).

62. The inclusion of "*planned buildings regulations*" means that local authorities can set local energy efficiency standards at the level of proposed future regulations, which it is assumed must be discerned from the consultations on the Future Homes and Buildings Standards and on the Home Energy Model: Future Homes Standard, published on the same day as the 2023 WMS.

63. The 2023 WMS also gives guidance to local plan examiners that they should reject energy efficiency standards going beyond "*current or planned building regulation*", "*if they do not have a well-reasoned and robustly costed rationale that ensures:*

- *That development remains viable, and the impact on housing supply and affordability is considered in accordance with the National Planning Policy Framework.*

[66] Report on the Examination of the Central Lincolnshire Local Plan Review https://www.n-kesteven.gov.uk/sites/default/files/2023-03/EX040%20Central%20Lincs%20Local%20Plan%20-%20Inspectors%20Report%20-%20FINAL.pdf

[67] This is addressed further below at §§96-99, in light of the decision in *R (Rights:Community:Action Ltd) v SSLUHC* [2024] EWHC 359 (Admin).

- *The additional requirement is expressed as a percentage uplift of a dwelling's Target Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP).*" (emphasis added)

64. Again this does not foreclose the possibility of setting higher standards, so long as the two bullet points are met. The first bullet point is a re-statement of the usual legal and policy position for this type of local plan policy.

65. The 2023 WMS concludes by reminding decision-makers that the Secretary of State has powers of intervention in respect of local plans and planning decisions, and that the Secretary of State will "*closely monitor the implementation of the policy set out in the WMS*" and may use the intervention powers "*in line with the relevant criteria*" for intervening.

66. The 2023 WMS is thus stated in trenchant language, backed by a 'threat' of monitoring and intervention.

67. Nevertheless, there is very clear case law on how such a WMS is required to be interpreted. In *R (West Berkshire DC) v SSCLG* [2016] 1 WLR 3923; [2016] EWCA Civ 441 ("***West Berkshire***"), the Court of Appeal considered an appeal against the quashing by the High Court of a WMS on affordable housing which purported to exclude from affordable housing levies and tariff-based contributions developments of ten units or 1,000 m^2 or less. It is notable that, unlike the 2023 WMS, the WMS in the *West Berkshire* case was arguably more considered and more entrenched, as it followed consultation and was accompanied by amendment to the NPPF.

68. A key reason that the WMS in the *West Berkshire* case was found by the High Court to be unlawful was that the language constituted "*an instruction to planning decision-makers to depart from established local plan policies*" (see §14), which was held to conflict with section 38(6) of the 2004 Act and section 70(2) of the Town and Country Planning Act 1990.

69. The Court of Appeal held that policy-makers are entitled to express policies in unqualified terms, without the need to remind those applying the policy that they have to do so consistently with sections 38(6) and 70(2), so the Secretary of State could use the trenchant language in the affordable housing WMS (see §21ff). These statutory provisions remain requirements that the law imposes on the application of the WMS. So "the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions." (§21).

70. Importantly, however, the Court of Appeal held explicitly that the Secretary of State "*was not entitled to seek by his policy to countermand or frustrate the effective operation of sections 38(6) and 70(2)*", even though he could express the policy in absolute terms (§22). Any WMS must lawfully be applied subject to relevant statutory powers, and also subject to any justifiable local exceptions, rather than in a blanket fashion (§30).

71. This applies to the 2023 WMS. It cannot seek to countermand or frustrate the effective operation section 1 of the PEA 2008, empowering LPAs to set their own energy efficiency standards in their development plan documents. Nor can it seek to countermand or frustrate the duty in section 19(1A) of the 2004 Act, requiring LPAs to ensure their development plan documents include policies designed to secure that development of land in the local authority's area contribute to the mitigation of, and adaptation to, climate change. This duty is reflected in national planning policy, in both the NPPF and the PPG on Climate Change, which are "*relevant national policies for England*" under section 1(5) of the PEA 2008. The 2023 WMS must also not be applied in a way that fetters the discretion of local plan inspectors in a way that frustrates the effective operations of section 1 of the PEA 2008 and section 19(1A) of the 2004 Act.

72. Accordingly, the correct position in law is that LPAs and local plan inspectors have to treat the trenchant language in which the 2023 WMS is written with circumspection. LPAs still have and can exercise the statutory power in section 1 of the PEA 2008. They are still bound by the duty in section 19(1A) of the 2004

Act. Neither the making of the WMS nor its wording can prevent the setting of local energy efficiency standards in development plan documents.

73. Section 1(5) of the PEA 2008 does not change that analysis. As set out at §§48-49 above, in light of other national policies that were promulgated after consultation and within the legislative framework of the 2004 Act, and which pull against the 2023 WMS, the 2023 WMS cannot of itself operate under section 1(5) to abrogate the section 1(1) power, particularly in light of the duty in section 19(1A) of the 2004 Act.

74. The meaning given to the 2023 WMS, and the weight then afforded to it, is required not to frustrate the effective operation of the relevant statutory powers. This applies both to the general "expectation" of the WMS that plan-makers will not set local energy efficiency standards that go beyond current or planned buildings regulations, and to the specification that any local plan policy seeking to do so be expressed as a percentage uplift of a dwelling's TER, calculated using SAP.

75. That last point is important, because TER is a metric used under the Building Regulations to deal with conservation of fuel and power and is essentially a carbon metric, rather than an energy efficiency metric. A percentage uplift of a dwelling's TER may in fact be achieved with a poor level of energy efficiency. The improvement of a building against the TER does not consider the impact of the design of the dwelling (i.e. the building form), which is a key factor in energy efficiency. The TER also cannot be measured post-construction and 'in-use', which makes it unsuitable for use where LPAs need to determine whether their policies actually deliver buildings that are more energy efficient. If the use of TER alone in policy were to frustrate the effective operation of the section 1 PEA 2008 power, then the 2023 WMS cannot lawfully be interpreted to require the use of TER alone.

76. In this regard, it is notable that other metrics – space heating demand; Energy Use Intensity ("**EUI**") and renewable energy generation – have been found by multiple planning inspectors to be justified in order to achieve the energy efficiency levels necessary for particular local areas, and to be sound in light of the evidence base,

taking into account housing delivery.[68] While policies expressed as a percentage uplift of TER may also have been chosen by LPAs and found to be sound, that does not mean that the TER metric operates as an energy efficiency metric, or that it alone is suitable for all LPAs and to be used in all local energy efficiency policies.

77. Similarly, given that there is an ongoing consultation on the replacement of SAP by HEM, the references in the 2023 WMS to basing policy on "planned buildings regulations" may mean it is open to LPAs not to put forward policies requiring calculation using SAP. That reading is bolstered by the requirement that the WMS be understood in a way that does not frustrate the effective operation of the section 1 PEA 2008 power (or any other relevant statutory power/duty).

78. Accordingly, my view is that, in light of the *West Berkshire* decision, LPAs and planning inspectors cannot lawfully interpret the 2023 WMS in a way that removes or frustrates the effective operation of the power that LPAs still have in sections 1-5 PEA 2008 to set their own energy efficiency standards in their development plan documents, or the duty in section 19(1A) of the 2004 Act. This means that the 2023 WMS cannot be interpreted to prevent LPAs from putting forward, and planning inspectors from finding sound, policies which are justified and evidenced and which use metrics other than the TER metric and/or do not require calculation by SAP. The central question remains whether policies which set energy efficiency standards that go further than Building Regulations comply with the usual plan-making requirements of section 19 of the 2004 Act, are justified on the evidence and are reasonable, in that they do not affect the viability of new development to an unreasonable extent.

79. Furthermore, the Courts have also emphasised that guidance from the Secretary of State "*does not amount to a legal rule, and that local decision-makers are free to rely on local or exceptional circumstances as to why a departure from that national guidance is considered to be justified*": see, for example, *Keep Bourne End Green v*

[68] See, for example, the Report on the Examination of the Central Lincolnshire Local Plan Review (n64 above) at §§169 and 177-184 re Policy S7; Bath & North East Somerset Inspector's Report on the Examination of the Local Plan (Core Strategy and Placemaking Plan) Partial Update (n62 above) at §89 re Policy SCR7; and Cornwall Climate Emergency DPD, Inspector's Report (n63 above) at §§162-163 and 168-169 re policy SEC1.

Buckinghamshire CC & SSHCLG [2020] EWHC 1984 (Admin) at §105. Accordingly, local decision-makers are free to rely on local or exceptional circumstances to depart from the WMS (over and above their reliance on the statutory powers referred to above).

80. Finally, and aside from the above, there are significant doubts about the lawfulness of the 2023 WMS. It is already the subject of pre-action correspondence from various parties who may challenge its lawfulness via judicial review. There are, in my view, cogent reasons to question to 2023 WMS's lawfulness, including:

a. The justification for the 2023 WMS, given in the second paragraph, is a purported "*long-standing debate within planning about both the best method and body to set energy efficiency and environmental standards*", but there is no long-standing debate. The Government's position, endorsing the ability of local authorities to set local energy efficiency standards higher than national building regulations, is clear and settled (see §§50-55 above).

b. The 2023 WMS asserts that multiple local standards "*add further costs to building new homes by adding complexity and undermining economies of scale*". This is asserted without justification. It is not borne out by the Government's own response to the Future Homes Standard in January 2021, where the consultation on bringing into force the amendment to the PEA 2008 explicitly raised question of costs and inefficiencies, for example in supply chains (see §50 above). Nor is it borne out by the experience of the local authorities who (a) successfully progressed such policies through local examination on the basis of evidence of their viability; or (b) the work of a number of local authorities in compiling evidence supporting such local policies (see §82ff below). Nor is it correct as a matter of fact that there are varied local standards which lack consistency and clarity.

c. No justification is given within the WMS for the requirement to express policy as a percentage uplift of a dwelling's TER, despite the issues with that metric set out at §§74-75 above; nor is there any justification for requiring the use of a specified version of SAP, despite it being likely that will be replaced within the next three years.

d. There was no consultation before the 2023 WMS was made, despite this plainly being a situation where fairness demanded consultation,[69] and despite the Government previously having stated explicitly that it would consult on "*what transitional arrangements are appropriate to make sure that as many homes as possible are built to the new standard as quickly as possible.*" (see §30 above).

Conclusion

81. Local authorities have a clear power, in sections 1-5 of the PEA 2008, to adopt planning policies that set higher targets for energy performance standards for development in their area than the national baseline, provided such standards comply with the usual plan-making requirements of section 19 of the Planning and Compulsory Purchase Act 2004 and are reasonable, in that they do not affect the viability of new development to an unreasonable extent.

82. This position has not been changed by the 2023 WMS. The correct position in law is that LPAs and local plan inspectors have to treat the trenchant language in which the 2023 WMS is written with circumspection. LPAs and planning inspectors cannot lawfully interpret the 2023 WMS in a way that removes or frustrates the effective operation of the power that LPAs still have, via sections 1-5 of the PEA 2008. Nor can it be read to remove or frustrate section 19(1A) of the 2004 Act. This means that the 2023 WMS cannot be interpreted to prevent LPAs from putting forward, and planning inspectors from finding sound, policies which are justified and evidenced and which use metrics other than the TER metric and/or do not require calculation by SAP. Additionally, local decision-makers are also free to rely on local or exceptional circumstances to depart from the 2023 WMS.

ENERGY EFFICIENCY POLICY CASE STUDIES

83. Six case studies illustrate the fact that a range of LPAs — from densely populated urban centres such as London and Reading, to rural authorities like South Gloucestershire, Cornwall, Bath and North East Somerset, and the three local

[69] *R (Stirling) v Haringey LBC (SC(E))* [2014] 1 WLR 3947 at §23. Also sometimes called *R (Moseley) v Haringey LBC.*

authority areas that comprise Central Lincolnshire — have successfully included energy efficiency and/or other emissions reduction requirements beyond those of the Building Regulations in development plan documents which have passed examination.

84. These case studies are important in light of the well-established principle of consistency in planning decision-making. It is important and in the interests of developers, third parties and LPAs alike, because it serves to maintain public confidence in the operation of the development control system. Whilst it is open to the decision maker to depart from the reasoning in a previous decision, clear reasons for the departure should be given: *North Wiltshire DC v Secretary of State for the Environment* (1992) 65 P & CR 137 at 145.

85. In summary, while like cases do not have to be decided alike, a departure from a sufficiently similar decision requires a "clear explanation": *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2019] JPL 63 at §74. As consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a relevant appeal decision bearing on the issues in the appeal he is considering: *DLA Delivery Limited v Baroness Cumberlege of Newick* [2018] JPL 1268 at §34.

Energy efficiency policies which have passed examination

86. **The London Plan 2021** and the **Reading Borough Local Plan 2019** both include policies for energy efficiency which are benchmarked against the Building Regulations and exceed them by a fixed percentage for different types of development.

87. Policy SI 2 of the London Plan 2021 on 'Minimising greenhouse gas emissions' provides that:

> *"Major development should be net zero-carbon. [...] A minimum on-site reduction of at least 35 per cent beyond Building Regulations is required for major development. Residential development should achieve 10 per*

cent, and non-residential development should achieve 15 per cent through energy efficiency measures.".[70]

88. These requirements were based on the Building Regulations 2013, but the policy provided for the threshold to be reviewed if the regulatory requirements were updated.[71] The threshold was updated via the GLA Energy Assessment Guidance, published June 2022, such that the targets under Policy S1 2 now relate to the baseline in the Building Regulations 2021.[72]

89. Policy H5 of the Reading Borough Local Plan on 'Standards for new housing' provides that:

"New build housing should be built to the following standards, unless it can be clearly demonstrated that this would render a development unviable [...]
c. All major new-build residential development should be designed to achieve zero carbon homes.
d. All other new build housing will achieve at a minimum a 19% improvement in the dwelling emission rate over the target emission rate, as defined in the 2013 Building Regulations." [73]

90. Policy PSP6 of the **South Gloucestershire Policies, Sites and Places Plan** ("**PSP**") (adopted November 2017) on 'Onsite renewable and low carbon energy' includes a mandatory emissions reduction target over and above Building Regulations standards, though no mandatory fabric efficiency requirement. It provides that all development proposals will:

"1. be encouraged to minimise end-user energy requirements over and above those required by the current building regulations through energy reduction and efficiency measures, and in respect of residential for sale and

[70] London Plan 2021, https://www.london.gov.uk/programmes-strategies/planning/london-plan/new-london-plan/london-plan-2021, pgs 342–343.
[71] London Plan, 2021, p. 342, fn. 152.
[72] GLA Energy Assessment Guidance, June 2022, https://www.london.gov.uk/sites/default/files/gla_energy_assessment_guidance_june_2022_0.pdf
[73] Reading Borough Local Plan 2019, https://www.reading.gov.uk/planning-and-building-control/planning-policy/new-local-plan/, pg 82, with guidance at pg 84.

speculative commercial development offer micro renewables as an optional extra, and

2. be expected to ensure the design and orientation of roofs will assist the potential siting and efficient operation of solar technology.

In addition, all major greenfield residential development will be required to reduce CO2 emissions further by at least 20% via the use of renewable and/or low carbon energy generation sources on or near the site providing this is practical and viable."[74]

91. Cornwall and Bath and North East Somerset collaborated to develop local planning policies which set quantified limits on space heating and total energy consumption (regulated and unregulated), rather than benchmarking against the Building Regulations. Both **Cornwall's Climate Emergency Development Plan Document** ("**DPD**") and **Bath and North East Somerset's Local Plan Partial Update** ("**LPPU**") include requirements that all new development have a space heating demand of no more than 30kWh/m2/yr and a total energy consumption of no more than 40kWh/m2/yr.[75] These policies also require residual energy requirements to be met from renewable sources, in what is seemingly a creative application of the LPAs' powers under sections 1(a)–(b) of the PEA 2008 to require that a proportion of energy for development in the area come from renewable or low carbon source, in combination with their powers to mandate energy efficiency standards above the national baseline under section 1(c).

92. Finally, the **Central Lincolnshire Local Plan**, adopted in April 2023, contains Policy S7 requiring residential development to achieve a site average space heating demand of 15-20kWh/m2/yr and a site average total energy demand of 35 kWh/m2/yr, and Policy S8 requiring non-residential development to achieve space heating and total energy demands of 15-20kWh/m2/yr and 70 kWh/m2/yr

[74] South Gloucestershire Policies, Sites and Places Plan 2017, https://beta.southglos.gov.uk/static/326a821580d49330ee788f6663103b1b8/PSP-Plan-Nov2017.pdf, pg 19, with guidance at pgs 19–20.

[75] Bath and North East Somerset Local Plan Partial Update, December 2021, https://beta.bathnes.gov.uk/lppu-core-documents; Cornwall Climate Emergency DPD, February 2023, https://www.cornwall.gov.uk/planning-and-building-control/planning-policy/adopted-plans/climate-emergency-development-plan-document/.

respectively.[76] These policies also require residual energy consumption to be met via onsite renewable energy sources. There are caveats for development in areas of especially low land value or on brownfield sites, which do not have to demonstrate full policy compliance but where the applicant must still submit an Energy Statement detailing the extent to which the relevant policy requirements have been complied with.

93. These policies are part of a wider suite of policies designed to mitigate and adapt to the effects of climate change, with the introductory text to Chapter 3 on Energy, Climate Change and Flooding stating at §3.1.14:

> *"The Central Lincolnshire Joint Strategic Planning Committee (CLJSPC) is rising to [the] challenge as set by parliament. No longer will planning decision makers in Central Lincolnshire merely 'encourage' development proposals to achieve certain standards, or only 'welcome' development that goes a little beyond certain building regulation basic minimums. Development in Central Lincolnshire must do, and can do, far better than that. We are legally obliged to do more. And, for future generations, we are morally obliged to do more."*

The Salt Cross Decision

94. The draft Area Action Plan for Salt Cross, a proposed new garden village in West Oxfordshire, included a Net Zero policy which, among other requirements, would have capped space heating requirements for all new development at 15kWh/m2/yr and total energy use requirements for residential development at 35kWh/m2/yr. In a letter dated 26 May 2022, the Inspectors examining the Area Action Plan indicated their view that the policy was unsound and recommended significant modification of the policy.

95. The Inspectors' Report, published on 1 March 2023, set out the bases for their decision that the policy was unsound:

[76] Central Lincolnshire Local Plan, April 2023, pgs 30–34, https://www.n-kesteven.gov.uk/sites/default/files/2023-04/Local%20Plan%20for%20adoption%20Approved%20by%20Committee.pdf.

a. It was inconsistent with the 2015 WMS and the PPG, which in their view still represented current national policy, notwithstanding "various Government consultations linked with the Future Homes Standard [which] have signalled potential ways forward".[77]

b. The prescriptiveness of the policy was not justified on the basis of the evidence submitted, specifically the reliance on generic typologies in the viability appraisal.[78]

96. The TCPA indicated in its public response to the decision letter that it believed it to be based on a misunderstanding of national policy.[79] This remains the TCPA's view.[80] Given the reliance in the Inspectors' Report on the 2015 WMS and the PPG, and in light of the legal position set out at §§40–51 above, I am of the opinion that the TCPA is correct.

97. The lawfulness of the inspectors' decision was successfully challenged in *R (Rights: Community:Action Ltd) v SSLUHC* [2024] EWHC 359 (Admin). Lieven J held that the 2015 WMS had to be interpreted in accordance with the mischief that it was seeking to address, and with an "updating construction", ie a construction that allows for changes that have occurred since the policy was initially made. Accordingly, the inspectors should have taken into account that the proposed amendment to the PEA 2008 was not brought into force and that the restriction on setting conditions above Code Level 4 no longer applied, in light of amendments to the Building Regulations (see §75 of the judgment). So understood, the inspectors' interpretation of the WMS as preventing or restricting the ability of LPAs under sections 1-5 of the PEA 2008 to set a standard higher than Level 4 "was plainly wrong in light of subsequent events" (§76). The Court found that this

[77] Report on the Examination of the Salt Cross Garden Village Area Action Plan, 1 March 2023, https://www.westoxon.gov.uk/media/djkhe03s/salt-cross-aap-inspectors-report-main-mods-appendix-final.pdf.
[78] Inspectors' Report, §§131–138.
[79] The application of net zero in local plan policy: A statement from the Town and Country Planning Association, July 2022, 20220714-climate-statement-W-Ox.docx (live.com).
[80] https://www.tcpa.org.uk/planning-inspectorate-west-oxfordshire/.

accorded with the position of the Government, in particular in the January 2022 response to the Select Committee (set out at §51 above).

98. Lieven J held at §78 that the same analysis necessarily follows in respect of the PPG on Climate Change, which merely reflects the language of the 2015 WMS.

99. The Court thus held that the inspectors misinterpreted the WMS and the PPG and quashed their decision, on the basis that it was not highly likely the outcome of their determination on Policy 2 would have been the same absent their misinterpretation, which was relied on throughout the inspectors' reasoning (see §§91-95 of the judgment).

100. In light of the High Court's judgment, it is clear that the analysis set out in this advice at §§57-60 is correct.

CONCLUSION

101. In light of the above, LPAs have statutory authority to set energy efficiency targets that exceed the baseline in national Building Regulations, and to mandate that a proportion of the energy used in development in their area be from renewable and/or low carbon sources in the locality of the development.

102. This position has not been changed by the 2023 WMS. The correct position in law is that LPAs and local plan inspectors have to treat the trenchant language in which the 2023 WMS is written with circumspection. LPAs and planning inspectors cannot lawfully interpret the 2023 WMS in a way that removes or frustrates the effective operation of the power that LPAs still have, via sections 1-5 of the PEA 2008. Accordingly, the 2023 WMS must be interpreted in a way that:

    a. allows for the effective operation of the PEA 2008 powers; and
    b. allows LPAs effectively to meet the obligation on them to ensure development plan documents include policies designed to secure that development of land in the local authority's area "*contribute to the mitigation of, and adaptation to, climate change*".

103. This means that the 2023 WMS cannot be interpreted to prevent LPAs from putting forward, and planning inspectors from finding sound, policies which are justified and evidenced and which use metrics other than the TER metric and/or do not require calculation by SAP. As seen in the case studies, inspectors have found to be sound a wide range of policies across different types of areas: from densely populated urban centres such as London and Reading, to rural authorities like South Gloucestershire, Cornwall, Bath and North East Somerset, and the three local authority areas that comprise Central Lincolnshire. The key question remains whether policies which set energy efficiency standards that go further than Building Regulations comply with the usual plan-making requirements of section 19 of the 2004 Act, are justified on the evidence and are reasonable, in that they do not affect the viability of new development to an unreasonable extent.

104. Over and above this obligation of interpretation of the 2023 WMS set out above, local decision-makers are also free to rely on local or exceptional circumstances to depart from the WMS, where they are justified in so doing.

105. A summary of my advice is given in §2 above. Please do not hesitate to contact me if anything requires clarification, or if I can be of further assistance.

25 February 2024

ESTELLE DEHON KC

cornerstone barristers

2-3 GRAY'S INN SQUARE
LONDON
WC1R 5JH
estelled@cornerstonebarristers.com

Appendix 4 – Department for Levelling Up, Housing & Communities response March 2024

Department for Levelling Up, Housing & Communities

Baroness Swinburne
Parliamentary Under Secretary of State
2 Marsham Street
London
SW1P 4DF

Our reference: MC2024/04852

Fiona Howie
Chief Executive, Town and Country Planning Association
[redacted]

25 March 2024

Dear Ms Howie,

Thank you for your email of 21 February to the Rt Hon Michael Gove MP regarding planning and energy efficiency standards. I am replying as the Minister responsible for this policy area.

I appreciate you taking the time to write to me on this matter on behalf of the many organisations you represent. I understand that you were concerned by the Written Ministerial Statement (WMS) published on 13 December, particularly surrounding local authority standards for energy efficiency measures. I hope the following information will clarify the Government's position on this matter.

I want to clarify that local plan-makers retain the ability to set energy efficiency standards at the local level that go further than the Building Regulations. The Planning and Energy Act 2008 permits plan-makers to do this, provided they do so in a manner that is consistent with national policy. This ability is not revoked by the new WMS.

However, the WMS does set out that, if local plan-makers wish to set standards that go further than the Building Regulations, this must be done in a way that is coherent and easily understandable for housebuilders. Hence, it states that any additional requirement must be expressed as percentage uplift of a dwelling's Target Emissions Rate. The Target Emissions Rate is a recognised metric which has been used to demonstrate compliance with Part L (conservation of fuel and power) of the Building Regulations for several years.

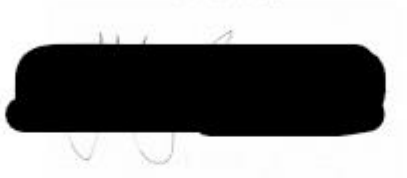
Discrepancy in energy efficiency standards across the country can make it challenging for volume housebuilders to maintain cost-effective development and supply chains, as they are forced to adapt design in different areas. The WMS therefore also sets out that development must remain viable – that is, local standards should not prevent housing development from coming forward and therefore reduce housing supply. It is important to strike a balance between making progress on improving the efficiency and performance of homes whilst still ensuring that housing is built in sufficient numbers to support those who wish to own or rent their own home.

The upcoming Future Homes Standard will deliver the new homes needed for a net zero future. From 2025, homes built to the Future Homes Standard will be future-proofed with low-carbon heating and very high fabric standards. They will be 'zero-carbon ready', meaning that no further work will be needed for them to become zero-carbon in use as the electricity grid is decarbonised.

We are currently consulting on changes to Part 6, Part L and Part F (ventilation) of the Building

Regulations for dwellings and non-domestic buildings and seeking evidence on previous changes to Part O (overheating). We would value your response prior to the consultations closure on 27 March: https://www.gov.uk/government/consultations/the-future-homes-and-buildings-standards-2023-consultation.

Yours ever,



BARONESS SWINBURNE
Parliamentary Under Secretary of State