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:

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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

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[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

[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

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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/vm0g2fvp/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

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