

April 2025

# Climate and Planning Unit

## Essex Open Legal Advice Part B



**EPOA**  
Essex Planning  
Officers Association



## **Briefing Note:**

### **Essex Open Legal Advice Part B (31<sup>st</sup> December 2024)**

#### **Advises on the ability of Local Planning Authorities to require higher building fabric & energy efficiency standards in new development prior to Adoption of local plan policy**

*Legal Advice produced by: Estelle Dehon KC, Cornerstone Barristers, 31 December 2024*

*Briefing Note produced by: the Climate and Planning Unit, Essex County Council*

## **Key Messages:**

- **Local Planning Authorities can require higher building fabric and energy efficiency standards than those set in Building Regulations for new development coming forward now and crucially in advance of adopted local plan 'net zero' policy.**
- **Climate change mitigation and adaptation are mandatory material considerations in determining planning applications. Therefore, Local Planning Authorities must consider the climate change impacts of development proposals and failing to do so is an error in law. Local plan policies do not need to be in place in order for climate change mitigation and adaptation to be considered and be part of the reasoning for either granting or refusing planning permission.**
- **The advice reconfirms that nothing in recent government policy or case law prevents Local Planning Authorities from including policies requiring fabric standards and local energy efficiency better than Building Regulations in their Local Plans, so long as there is a robust evidence base for such policies.**

## Context - why do we need the advice?

The Climate and Planning Unit asked Estelle Dehon KC to advise on the ability of local planning authorities (“LPAs”) to mandate higher building fabric and energy efficiency standards for new development which exceed those in Part L of the Building Regulations prior to the adoption of local plan policies.

This was done because it will take time to adopt local plans which embed policies that require higher building fabric and energy efficiency standards in new homes and buildings (commonly known as ‘net zero’ policies) across Essex, and a significant amount of new development is coming forward now. It is imperative that LPAs take the opportunity to ensure that this is built to higher standards so as not to increase carbon emissions or unnecessary energy use, and deliver ultra low-energy, healthy, affordable to run, more climate resilient homes and buildings for Essex residents and businesses.

Furthermore, the Climate Change Commission (CCC) progress report<sup>1</sup> shows that the UK is off track with its statutory climate targets (particularly with regard to the emissions reductions expected from the built environment) and urgent action needs to be taken. There is significant ambition in Essex to take action on climate change. One significant and effective route where LPAs have statutory powers and can take effective action is through the planning system. The CCC advises that there is no time to wait for Government to raise national standards to the necessary level to align with climate targets and recognises that local authorities are justified in taking action now. This legal advice is aimed at supporting Local Authorities take action.

## The Advice – what does it say?

The Advice, (dated 31<sup>st</sup> December 2024 and published as ‘open advice’ [here](#)), concludes that there is a strong foundation in legislation and national policy and guidance for LPAs to require higher building fabric and energy efficiency standards than Building Regulations on developments before the formal adoption of local plan policies. It specifically cites:

- Section 19 of the Planning and Compulsory Purchase Act 2004;
- the National Planning Policy Framework 2024 (“NPPF 2024”) paragraphs 161-164, 166 and footnote 61 (which include explicit reference to the objectives and provisions of the Climate Change Act 2008); and
- paragraph 1 of the Climate Change Planning Practice Guidance.

Furthermore, the Advice confirms that (in line with case law and the latest NPPF 2024 para 163) climate change mitigation and adaptation are mandatory material considerations in planning decision-making as well as plan-making. Therefore local planning authorities must consider the climate impacts of their planning decisions. To do so means that LPAs can require, through their

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<sup>1</sup> CCC, Progress in reducing emissions 2024 Report to Parliament, July 2024, <https://www.theccc.org.uk/publication/progress-in-reducing-emissions-2024-report-to-parliament/#publication-downloads>

Local Information Lists, information relevant to climate change to submitted with planning applications, for example, Energy Statements and/or whole life carbon assessments.

The advice considers the use of Supplementary Planning Documents (SPDs), Design Guides, Design Codes and other non-statutory local policy statements. It concludes that these all offer potential routes that LPAs can use to improve the standards of new development. It explains that SPDs that consist of design guides and design codes with an environmental emphasis can lawfully impose requirements relevant to the determination of planning applications. It advises that one of the most effective routes (other than the adoption of local plan policy) is by embedding the higher standards into a Design Code, and LPAs should consider developing and adopting these.

### *Reconfirming Local Plan Policy Advice:*

With regard to local plan policy, the advice reconfirms (see the [Essex Open Legal Advice – Part A](#)) that LPAs are legally justified to set policies in local plans that require higher fabric standards than Building Regulations which, for example, focus on achieving absolute energy use targets, banning the use of gas boilers in new buildings, and utilising predictive energy modelling to ensure that buildings meet Net Zero Carbon standards in operation. Neither section 1(2) of the Planning and Energy Act 2008 (“PEA 2008”) nor the 2023 WMS<sup>2</sup> prevent local planning authorities from bringing forward such policies and nor do they prevent Inspectors from finding such policies to be sound.

The evidence and model policy developed collaboratively in Essex, led by the Climate and Planning Unit, and published on the Essex Planning Officers Association (EPOA) hosted [Essex Design Guide](#) is endorsed in the Advice as a very robust approach for Essex LPAs to rely upon and adopt into their local plans. To drive forward action in the interim, the Advice suggests that the Essex Design Guide could be used to ratchet up requirements for higher standards by including net zero carbon development guides within it. For those LPAs that refer to the Essex Design Guide in their adopted local plans, for example in their design policies, this would have an immediate effect.

Many Essex authorities are currently progressing ‘net zero’ policies in their emerging local plans, based on the Evidence base and model policy. The advice confirms that these draft policies can form material considerations and be used in decision-making on planning applications, although the weight to be applied should be considered with regard to all three limbs of the test set out in the NPPF (para 49). These relate to the stage of preparation, the extent of unresolved objections and the degree of consistency with the NPPF.

The advice highlights that the model policy and evidence base could also be used by those drafting and bringing forward neighbourhood plans too.

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<sup>2</sup> Written Ministerial Statement “Planning – Local Energy Efficiency Standards Update” (13 December 2023)

## Key implications and actions for Essex Local Planning Authorities – what should we do next?

- 1. Development Management decisions:** Essex authorities can seek higher building fabric and energy efficiency standards on new developments through the Development Management process. The advice sets out the legal justification (as referred to above) for requiring higher building fabric and energy efficiency standards in new development coming forward now. The advice also provides guidance (in paragraphs 55 – 58) to decision-makers on what they should do when considering climate change impact as a mandatory material consideration when assessing a planning application. It is a matter of planning judgement for the decision-maker on how much weight to give material considerations but they can take account of the seriousness of the climate crisis and declarations of climate emergency, for example, when apportioning weight in the planning balance. Failing to take into account a mandatory material consideration is an error of law, laying a decision open to legal challenge (see paragraph 53). Authorities are encouraged to ensure that the full range of climate change impacts are considered and set out in all planning decision reports.
- 2. Update Local Information Lists:** Local Lists (also referred to as ‘Validation Checklists’) set out what information needs to be submitted with a planning application for it to be validated. As already noted, climate change mitigation and adaptation are mandatory material considerations in planning decision-making. For LPAs to be able to consider the climate impacts of their planning decisions, they need the necessary information to be provided with the planning application. LPAs can therefore require developers to submit Energy Statements and/or whole-life carbon assessments as part of planning applications. The advice concludes that it would be prudent for LPAs to update their local lists to require an Energy Statement or similar to be submitted with planning applications.
- 3. Give weight to draft local plan policies in planning decision making:** Those LPAs with draft policies in plans going through the local plan process can start to use those policies to make decisions on planning applications through the development management process. Decision makers must have regard to all three limbs of the test set out in the NPPF (para 49) relating to the weight to be given to relevant policies in emerging plans. .
- 4. Consider using SPD to push for higher standards:** there is scope for the use of SPDs giving strong encouragement for higher fabric standards. There would need to be a clear link with existing local plan policies or, if the plan is very out of date, then clear evidence that any emerging policy made as an SPD were not intended to subvert the development plan process. Wording to use is included in the advice (see paragraph 92). Colchester’s [Climate Change SPD](#) is cited as a good example, as it is effective in providing strong guidance on fabric and energy efficiency standards. Other authorities could consider progressing a similar approach to SPD.
- 5. Consider introducing Design Guides and Design Codes as SPD:** SPDs that consist of design guides and design codes with an environmental emphasis can lawfully impose requirements relevant to the determination of planning applications. On design codes, which can be

development-specific or area-wide, there is considerable opportunity (following the principles of the National Model Design Code) for such codes to be prescriptive about fabric standards and energy efficiency requirements, while still allowing sufficient flexibility to be widely applicable across areas or districts. There are several potential actions relating to this:

- a. **LPAs (*that have not already done so*) could endorse the Essex Design Guide** and require regard to be had to it in the determination of planning applications. Half of Essex LPAs already do this and refer to the EDG in their local plans. The advice recommends that the way to more speedily and robustly achieve the requirements to meet higher fabric and energy efficiency standards than Buildings Regulations in new development in Essex, would be for Essex LPAs to require compliance with the Essex Design Guide. The advice confirms that there is no difficulty in law or in principle with the Essex LPAs having planning policies that refer to, and require mandatory compliance with, documents which are updated over time. The policy can refer to “The Essex Design Guide” generically which would allow the LPA to apply the version in place at the time the application is made (see paragraph 111).
  - b. **Essex Planning Officers Association (EPOA) should continue to update the Essex Design Guide (EDG) with evidence and guidance to support higher building fabric and energy efficiency standards.** Updating the EDG with net zero carbon development guides is a robust approach and could be used to ratchet up requirements for higher fabric standards with immediate effect. This could be in line with the further emerging principles and standards, for example those set out in the recently launched UK Net Zero Carbon Buildings Standard.
  - c. **LPAs could prepare their own Design Guides and Design Codes.** A local example cited in the Advice is the [Uttlesford District Council Area-Wide Design Code](#), which imposes robust energy hierarchy requirements and gives strong guidance on space heating. This is a good option for LPAs which have a local plan policy that refers in general to a design guide or code. It opens the way for a lawful, detailed design guide SPD, which is then applied as development management policy via the local plan policy (see paragraph 107).
  - d. **A thematic ‘net zero’ model design code could be produced** to support the adoption by Essex LPAs of their own design codes. The Advice also notes that a design guide policy ‘hook’ (similar to that noted above) could be included in the Essex model ‘net zero’ policy too (see paragraph 107).
- 6. ECC to continue to provide a leadership and facilitation role.** Led by the work of the Climate and Planning Unit, the Advice suggests a continuation of the support to LPAs to develop a robust evidence base on viability and technical feasibility and embed the model Essex net zero carbon development policy into emerging local plans. The Advice strongly advocates progressing work to set out Case studies of exemplar fossil fuel free developments; develop the supply chain; and support small and medium size developers address climate change and prepare for zero carbon homes.

- 7. Both LPAs and ECC to highlight the ‘net zero’ evidence and model policy work to communities preparing Neighbourhood Plans.** There is an opportunity for Neighbourhood Plans to incorporate higher building fabric and energy efficiency standards in their policies. The Advice suggests that the evidence and model policy work can also be embedded into these plans coming forward.

An analysis of Essex policies relevant to climate, energy efficiency and design (as at December 2024) is included in the advice with some key pointers bespoke to each Essex local planning authority.

## **Conclusion**

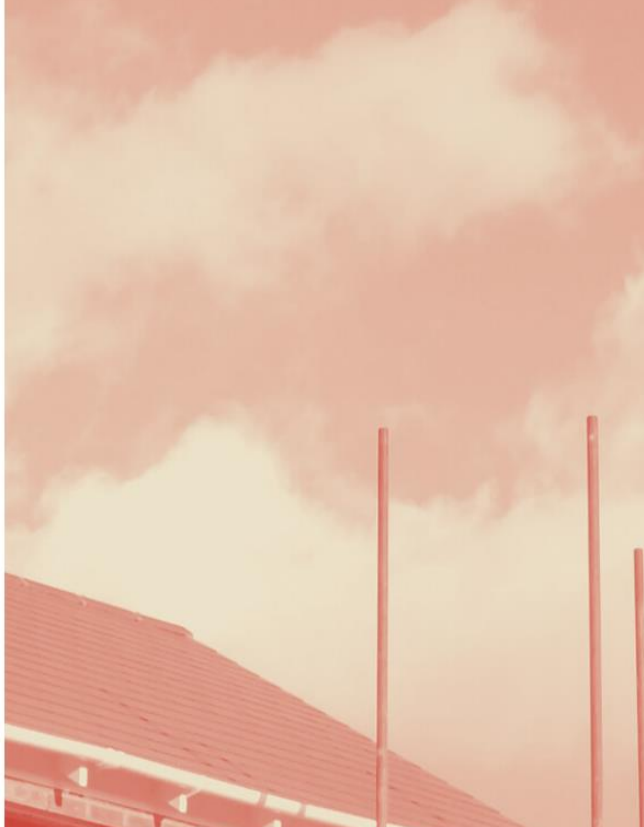
The open legal advice confirms that Essex LPAs have significant scope to implement higher building fabric standards, despite the absence of a single statutory provision explicitly authorising such measures. Through a combination of Local Plans (DPDs), SPDs, design codes, and policy guidance, local authorities can encourage or require developers to meet enhanced energy efficiency targets. Climate change remains a legally mandated material consideration, reinforcing the obligation of LPAs to factor sustainability into planning decisions. By leveraging the legislative framework and emerging case law, Essex LPAs can take proactive steps toward achieving net zero development while ensuring compliance with national planning policies.

## **Authors’ Note**

The Advice is published as ‘open advice’ and can be referred and relied upon in decision-making and public fora.

**Published on the [Essex Design Guide](#) as open advice available here: [essex-open-legal-advice-b-energy-policy-prior-to-plan-adoption-31-12-24-final.pdf](#)**





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## Climate and Planning Unit



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