

# 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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## FURTHER UPDATED OPEN ADVICE

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### 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 and provided updated advice in early 2024. There have since been a number of developments, including a new iteration of the NPPF and new case law, which have prompted this further update. Going forward, this advice should be preferred to the previous iteration.
2. For the updated reasons set out in detail below:
  - 2.1 The Planning and Energy Act 2008 (**“PEA 2008”**) confirms one way in which LPAs’ pre-existing powers can be exercised to set higher targets for energy performance standards for development in their area than the national baseline. That statutory power has not been revoked and remains fully extant. It supports authorities bringing forward policies using energy efficiency standards set out or endorsed in national policies or guidance (such as those focused on reducing regulated carbon emissions and any energy efficiency standard recognised as part of an assessment of whole life energy costs or whole life-cycle carbon assessments) that go beyond current Building Regulations standards.
  - 2.2 The PEA 2008 is not the only power on which LPAs can rely, nor does it circumscribe other powers or foreclose other legislative routes by which

LPAs are obliged or empowered to act. Quite the opposite, as the debate at the time the PEA 2008 was put into place shows, it was always recognised that climate-related legislative amendments might result in provisions providing such powers.

- 2.3 There are other legislative routes by which LPAs have different or more ambitious powers, such as the general power flowing from the duty in section 19(1A) of the Planning and Compulsory Purchase Act 2004 (“**PCPA 2004**”), which requires that development plan documents must, taken as a whole, “*include policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change*”.
- 2.4 This is reinforced by the requirements in the National Planning Policy Framework (“**NPPF**”) that plans must take a proactive approach to mitigating and adapting to climate change and that plan making must support the transition to net zero by 2050, including through securing radical reductions in greenhouse gas emissions. It is notable that energy efficiency policies address both mitigation and adaptation, and are thus strongly supported.
- 2.5 There is no conflict between the PEA 2008 and section 19(1A) of the 2004 Act (indeed, it was anticipated they would work together), and where there are two different, overlapping ways of achieving a local authority’s objective, it is open to the authority to choose the power on which it relies. Accordingly, LPAs can choose the power under which they bring forward local energy efficiency policies.
- 2.6 The Written Ministerial Statement titled “Planning – Local Energy Efficiency Standards Update” (“**the 2023 WMS**”), made on 13 December 2023, 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 relevant statutory powers. The judgment in R (Rights Community Action) v SSLUHC [2025] PTSR 135 rejected the contention that the 2023 WMS emasculated or was incompatible with the powers in section 19 of the PCPA 2004. The 2023

WMS is simply one among many aspects of national policy to which LPAs and Examining Inspectors must have regard. It is a material consideration to which whatever weight is rationally justified can be given in the exercise of planning judgment.

- 2.7 Section 1(5) PEA 2008 cannot lawfully be read as changing that usual position or giving additional legislative force to national policies in the context of energy efficiency, such as the 2023 WMS.
- 2.8 So long as there is a robust evidence base – a reasoned and robustly costed rationale – it is open to Examining Inspectors, in the exercise of their planning judgment, to determine that policies using metrics and methods of calculation other than those specified in the 2023 WMS are sound. Such policies would be consistent with national policy on climate change mitigation, adaptation and the net zero obligation. To the extent that there would be deviation from one part of the 2023 WMS, that can be justified on the evidence and does not prevent overall consistency of the proposed local plan with national policy (particularly as national policy can pull in different directions).
- 2.9 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. That remains the case after the 2023 WMS. The exception – the draft Area Action Plan for Salt Cross, found unsound in a report published on 1 March 2023 – 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 higher new build fabric efficiency 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, provided the LPA evidences such policies thoroughly and clearly indicates an awareness of the impact of the proposed policies on the viability of development.

## **REASONS**

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## FACTUAL BACKGROUND

### The Climate Crisis

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.<sup>1</sup> 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.
  
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:<sup>2</sup>
  - 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 21<sup>st</sup> century unless deep reductions in CO<sub>2</sub> and other greenhouse gas emissions occur in the coming decades.

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<sup>1</sup> IPCC 2018 [\*Special Report on Global Warming of 1.5°C, Summary for Policymakers\*](#) (“**SPM**”) A1.

<sup>2</sup> 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.

- e. Limiting human-induced global warming to a specific level requires limiting cumulative CO<sub>2</sub> emissions, reaching at least Net Zero CO<sub>2</sub> emissions, along with strong reductions in other greenhouse gas emissions.<sup>3</sup> Strong, rapid and sustained reduction in CH<sub>4</sub> (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<sub>2</sub> (“GtCO<sub>2</sub>”) (from 2020) for a 50:50 chance of restricting warming to 1.5°C, i.e., a little over 420GtCO<sub>2</sub> from the start of 2022.<sup>4</sup> This new budget represents just over ten years’ worth of global emissions at pre-pandemic (2019) levels (a level that 2021 broadly matched).
7. The Government’s latest Climate Change Risk Assessment,<sup>5</sup> based on a series of reports by the Climate Change Committee (“CCC”)<sup>6</sup> and an independent Technical Report,<sup>7</sup> and presented to Parliament pursuant to section 56 of the Climate Change Act 2008 (“CCA 2008”), set out that the effects of climate change are being felt now across the UK and identified future risks which threaten property and lives from impacts such as flooding; wildfires; drought; 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.<sup>8</sup> For eight of the risks identified, economic damage by 2050 under 2°C of warming could exceed £1 billion per annum.<sup>9</sup> It states:

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<sup>3</sup> IPCC, 2018: Annex I: Glossary defines Net Zero CO<sub>2</sub> emissions as being achieved when global CO<sub>2</sub> emissions are balanced by CO<sub>2</sub> removals. Note that Net Zero CO<sub>2</sub> 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.

<sup>4</sup> IPCC, 2021, Table SPM2 and paras D.1.3-D.1.8.

<sup>5</sup> [UK Climate Change Risk Assessment 2022](#) (17 January 2022).

<sup>6</sup> <https://www.ukclimaterisk.org/publications/technical-report-ccra3-ia/>.

<sup>7</sup> [Technical report](#) (CCRA3-IA) (16 June 2021).

<sup>8</sup> *UK Climate Change Risk Assessment 2022* pg 3.

<sup>9</sup> *Ibid*, pg 4.

*“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.”<sup>10</sup>*

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;<sup>11</sup>
  - 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;<sup>12</sup>
  - c. Continued and accelerating sea level rise will encroach on coastal settlements and infrastructure,<sup>13</sup> and, combined with storm surge and heavy rainfall, will increase compound flood risks;<sup>14</sup>
  - d. There have been irreversible losses, for example through species extinction driven by climate change;<sup>15</sup>
  - 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.”<sup>16</sup>*
9. On 20 March 2023, the IPCC published its Synthesis Report, which draws together conclusions and recommendations from its detailed reports produced over the last six-year reporting cycle.<sup>17</sup> 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.<sup>18</sup> A wide range of

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<sup>10</sup> Ibid, pg 4 and pg 9.

<sup>11</sup> IPCC, 2022, SPM in [Climate Change 2022, Impacts, Adaptation and Vulnerability, Working Group II contribution](#), para SPM.B.1.2.

<sup>12</sup> Ibid, SPM B.1.1 and SPM.B.1.5.

<sup>13</sup> Ibid, SPM.B.3.1.

<sup>14</sup> Ibid, SPM.B.5.1.

<sup>15</sup> Ibid, SPM.B.1.2.

<sup>16</sup> Ibid, SPM.D.5.3.

<sup>17</sup> IPCC 2023 [AR6 Synthesis Report](#).

<sup>18</sup> Ibid, C.2.1 pg 27.

co-benefits would accompany rapid and sweeping emissions reductions, especially in terms of air quality and public health.<sup>19</sup> 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.<sup>20</sup> Importantly, it emphasises that even the smallest increments of warming matter.<sup>21</sup> 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,<sup>22</sup> and as at 2023 the operational emissions from just residential buildings accounted for 12% of UK emissions.<sup>23</sup> To meet the UK's domestic climate commitments requires a 30% reduction in total energy demand in buildings by 2035 (compared to 2021 levels).<sup>24</sup>

### **Work in Essex to Address the Climate Crisis**

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.<sup>25</sup> 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.

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<sup>19</sup> Ibid, C.2.3 pg 27.

<sup>20</sup> Ibid, figure 5 pg 23.

<sup>21</sup> Ibid, B.2.2 pg 15 and figure 4 pg 18.

<sup>22</sup> Climate Change Committee [Progress in reducing UK emissions 2023 Report to Parliament](#) pg 140.

<sup>23</sup> Climate Change Committee [The Seventh Carbon Budget](#) pg 159.

<sup>24</sup> Climate Change Committee [Progress in reducing UK emissions 2023 Report to Parliament](#) pg 143.

<sup>25</sup> ECAC, '[Net Zero: Making Essex Carbon Neutral](#)' pg 33.



12. The Essex Developers Group (“**EDG**”) has signed up to a Developers Climate Action Charter in June 2022, in support of the ECAC targets.<sup>26</sup> 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).<sup>27</sup>

### The Essex Model Net Zero Carbon Homes and Buildings Policy

13. In November 2023, the County Council published the “Planning Policy Position for Net Zero Carbon Homes and Buildings in Greater Essex” (“**the Net Zero Model Policy**”), which provides two model policies relevant to the climate change impact of development: Policy NZ1 on Net Zero Carbon Development (in Operation) and Policy NZ2 on Net Zero Carbon Development (Embodied Carbon).<sup>28</sup>
14. The Net Zero Model Policy is the culmination of collaborative work between the County Council and officers from all the Essex LPAs<sup>29</sup> to establish a robust evidence base to support a consistent, clearly defined net zero carbon planning policy for new homes and buildings across Essex. It has, in my view, a very robust evidence base, iterated and added to over the past few years:
- a. Net Zero Carbon Viability and Toolkit Study (Report of Findings) (Three Dragons, Qoda and Ward Williams Associates, August 2022);<sup>30</sup>
  - b. Essex Net Zero Policy Study (Reports 1 and 2) (Introba, Etude, Currie & Brown, July 2023);<sup>31</sup>

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<sup>26</sup> <https://www.housingessex.org/topic/climate-action>.

<sup>27</sup> [Essex Developers’ Group Climate Action Charter](#).

<sup>28</sup> <https://www.essexdesignguide.co.uk/media/2954/net-zero-carbon-planning-policy-for-greater-essex-november-2023.pdf>. The Net Zero Model Policy is in the process of being updated, partly to incorporate an Essex-specific embodied carbon policy as policy NZ2.

<sup>29</sup> The work was funded by the County Council (responding to the work of the ECAC) and led by the Climate and Planning Unit within the County Council, but was steered by the Climate Planning Policy Support Group, comprised of officers from planning policy and/or climate teams from all the LPAs in Greater Essex.

<sup>30</sup> <https://www.essexdesignguide.co.uk/climate-change/essex-net-zero-evidence/net-zero-carbon-viability-and-toolkit-study/>.

<sup>31</sup> <https://www.essexdesignguide.co.uk/climate-change/essex-net-zero-policy-study/>.

- c. Essex Embodied Carbon Policy Study– technical evidence base (Levitt Bernstein, Etude, Introba, Hawkins/Brown, Currie & Brown, June 2024);<sup>32</sup>
  - d. ‘Essex Net Zero Specifications’ – Specification Guidance (Introba, Currie & Brown, Etude, Levitt Bernstein July 2024).<sup>33</sup>
15. The Essex Net Zero Policy Study includes costs that can be used in local plan viability assessments, thus proving the basis for a consistent approach across Essex towards evaluating the costs of net zero policy and also providing helpful viability information relevant to the determination of planning applications (which can be augmented by information specific to the LPA and the particular development proposal under consideration). Both the model policy and the evidence base could also be used by those drafting and bringing forward neighbourhood plans.

## LEGAL AND POLICY BACKGROUND

### Climate Change Case Law

16. The UK Supreme Court in *R (Finch) v Surrey County Council* [2024] UKSC 20 at §141 recorded that, in adopting the Paris Agreement on 12 December 2015, “*most of the nations of the world have acknowledged that climate change represents ‘an urgent and potentially irreversible threat to human societies and the planet’ (Preamble to the decision to adopt the agreement) and have agreed on the goal of ‘holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels’: article 2(1)(a).*”
17. 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

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<sup>32</sup> <https://www.essexdesignguide.co.uk/media/2981/essex-embodied-carbon-policy-study-technical-evidence-june-2024.pdf>.

<sup>33</sup> <https://www.essexdesignguide.co.uk/climate-change/essex-net-zero-specification/>.

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.

18. 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**

19. 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.
20. 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).
21. The Fourth Carbon Budget, for the period 2023-2027, is set at 1,950 million tonnes carbon dioxide equivalent (“**MtCO<sub>2e</sub>**”) and requires an average of a 51% reduction in emissions compared with 1990 levels.<sup>34</sup> It was set so as to be on track for the previous target of an 80% reduction in greenhouse gas emissions by 2050. The

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<sup>34</sup> CO<sub>2</sub> 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.

Fifth Carbon Budget (2028-32), set on the same basis, is 1,725 MtCO<sub>2</sub>e, which requires an average of a 57% reduction.

22. 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<sub>2</sub>e for the period 2033–2037, which would equate to a 78% reduction in emissions by 2035, relative to the 1990 baseline.<sup>35</sup>
23. 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<sub>2</sub>e 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.<sup>36</sup>
24. 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.<sup>37</sup>
25. The CCC published its advice on the Seventh Carbon Budget on 26 February 2025. The recommended pathway to meet that budget focuses on 2040, recommending an 87% reduction of GHG emissions by then, compared to 1990 levels.<sup>38</sup> That is a reduction of three-quarters from current levels. Electrification is the key tool for achieving the reductions. Sectorally, the most work will need to be done by surface transport emissions and residential buildings emissions – much more of Carbon Budget 7 relies on progress being made on residential buildings than was previously the case.<sup>39</sup>

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<sup>35</sup> CCC, [The Sixth Carbon Budget – The UK’s path to Net Zero](#), December 2020.

<sup>36</sup> Ibid, pg 432.

<sup>37</sup> Ibid, pgs 24 and 430-433.

<sup>38</sup> Climate Change Committee [The Seventh Carbon Budget](#) pg 12.

<sup>39</sup> Ibid, Figure 2, pg 12.

## Climate Change and Planning Policy

26. The National Planning Policy Framework 2024 (“NPPF”), published in December 2024, recognises that the duties under the CCA 2008 are relevant to planning for climate change. Every iteration of the NPPF since it was first put in place in 2012 has included a footnote making clear that the policy requirement (now in paragraph 162) for plans to “*take a **proactive approach** to mitigating and adapting to climate change*” (emphasis added) must be “*in line with the objectives and provisions of the Climate Change Act 2008*”.<sup>40</sup>
27. The NPPF 2024, for the first time, explicitly refers to the transition “*to net zero by 2050*” (paragraph 161). It requires the “*planning system*” – ie both plan making and decision-taking – to “*support*” that transition, and adds to the requirements of which “*full account*” need to be taken, now referring to “*all climate impacts*” and adding overheating, water scarcity and storm risk to the existing flood risk and coastal change. Paragraph 161 also requires that plan making should help “*to shape places in ways that contribute to **radical reductions in greenhouse gas emissions***” (emphasis added). Energy efficiency policies clearly fall within both the proactive approach to mitigation and making communities and infrastructure more resilient to climate change and the overall requirement for the plan making to support the transition to net zero and help to secure development that contributes to radical reductions in greenhouse gas emissions.
28. This reflects the acknowledgement by the Ministry of Housing, Communities and Local Government, in the consultation on the 2024 updates to the NPPF, that: “*Climate change is one of the greatest challenges facing the world today, and the planning system can play a powerful role in helping to mitigate and adapt to its effects.*”<sup>41</sup>

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<sup>40</sup> This is also reflected in the paragraph 1 of the [Planning Practice Guidance: Climate Change](#) (ID 6-001-20140306).

<sup>41</sup> Consultation, [Proposed reforms to the National Planning Policy Framework and other changes to the planning system](#), Chpt 9 §17. In the 2023 consultation on the previous NPPF update, DHLUC stated that planning “*can make an important contribution to ... the vitally important task of mitigating and adapting to climate change*”. Consultation, [Levelling Up and Regeneration Bill: reforms to national planning policy](#) (22 December 2022), Chpt 2 §5.

29. Paragraph 166 of the NPPF 2024 indicates that the energy consumption of new development ought to be taken into consideration at the decision-taking stage. It provides that:

*“In determining planning applications, **local planning authorities should expect new development** to:*

- a) comply with any development plan policies on local requirements for decentralised energy supply unless it can be demonstrated by the applicant, having regard to the type of development involved and its design, that this is not feasible or viable; and*
- b) take account of landform, layout, building orientation, massing and landscaping **to minimise energy consumption.**” (emphasis added).*

30. It is arguably implicit in paragraph 166(b) that authorities have the power to put in place local policies to guide the expectation that new developments will minimise energy consumption.

31. Paragraph 163 of the NPPF 2024 requires the need to mitigate and adapt to climate change to be considered *“in preparing and assessing planning applications, taking into account the full range of potential climate change impacts.”* The use of the phrase *“preparing and assessing”* makes clear that, in the first instance, those bringing forward planning applications are required to provide information and evidence concerning the climate impacts of the proposed development and measures taken to adapt to climate change. This is considered further below, but reference to *“the full range of potential climate impacts”* means that such information and evidence would include energy efficiency measures, such as space heating demand, energy use intensity and renewable energy generation. The paragraph 163 obligation then shifts to LPAs to take this information into account in their decision-making, against the background of the need to support the transition to net zero by 2050 and to shape places in ways that contribute to radical reductions in greenhouse gas emissions (paragraph 161).

32. Again, it is arguably implicit in paragraph 163 that authorities have the power to put in place local policies to guide the expectation that those bringing forward planning applications are required to provide information and evidence

concerning the full range of climate impacts of the proposed development and measures taken to adapt to climate change and to guide decision-makers as to how to take that information into account.

33. Paragraph 164(b) requires that new development be planned for in ways that “*help to reduce greenhouse gas emissions such as through its location, orientation and design. Any local requirements for the sustainability of buildings in plans **should reflect** the Government’s policy for national technical standards.*” (emphasis added). The flexibility in the second sentence, given by the phrase “*should reflect*”, enables account to be taken of LPAs powers to set local energy efficiency standards that go beyond minimum standards in Building Regulations and to use metrics supported by robust evidence, such as that in the Essex net zero evidence base (see §§13-15 above).

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

34. The UK presently does not have a lawful plan under the CCA 2008 setting out the policies and proposals required to meet the carbon budgets.
35. 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* [2023] 1 WLR 225; [2022] EWHC 1841 (Admin), Holgate J (as he then was) 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.
36. On 30 March 2023, the Government published its revised strategy to deliver its Net Zero obligations.<sup>42</sup> Rather than a single Net Zero Strategy, a suite of 50 documents were published, including 19 policy documents. The most important

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<sup>42</sup> <https://www.gov.uk/government/publications/powering-up-britain>.

of the policy documents is the Carbon Budget Delivery Plan,<sup>43</sup> which was presented to Parliament pursuant to the section 14 of the CCA 2008.

37. The Carbon Budget Delivery Plan set out 191 quantified measures across all sectors of the economy (table 5) and indicated 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<sub>2</sub>e over the budget period (see Table 1 in particular). Table 6 of the Plan listed 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. The Carbon Budget Delivery Plan also made 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.
38. This was subject to further legal challenge and, on 3 May 2024, Sheldon J upheld that challenge in *R (Friends of the Earth) v SSESNZ* [2024] EWHC 995 (Admin), [2024] PTSR 1293 (“**the CBDP judgment**”), finding the CBDP is unlawful and in breach of sections 13 and 14 of the CCA 2008. He held the Secretary of State took an erroneous or unreasonable approach to risk assessment. The Secretary of State had irrationally assumed that all the planned policies and proposals in the CBDP would be delivered in full and that it was reasonable to expect that level of ambition, having regard to delivery risk and the wider context (§§119-125), despite the true factual position being that not all of the proposals and policies would be delivered in full (§§63-64 and 126). The Secretary of State had not been provided with sufficient information as to the obviously material consideration of risk to the individual policies and proposals in the CBDP (§132).
39. Furthermore, the Secretary of State had failed properly to consider the requirement in the CCA 2008 that “*the proposals and policies, taken as a whole, must be such as to contribute to sustainable development*”. Sheldon J held at §146

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<sup>43</sup> <https://www.gov.uk/government/publications/carbon-budget-delivery-plan>.



that “sustainable development” was an “uncontroversial concept”, defined in *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin) at §635 “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”

40. On 29 October 2024, it was announced that the Government had conceded another legal challenge to the lawfulness of the CBDP, on the basis that the abandonment of various policies in September 2023 failed to meet its obligations under section 13 of the CCA 2008 and that the information available to it was insufficient to conclude that its plan, including a 10% shortfall in quantified emissions savings, would enable the carbon budgets to be met.<sup>44</sup>
41. Following the *CBDP* judgement, the court ordered the government to produce an updated climate plan by 3 May 2025. In March 2025, the court granted the government’s request to extend this deadline to 29 October 2025.

### **Progress towards the Net Zero obligation**

42. In short, while the Government is on target to meet the non-Net Zero aligned Fourth and Fifth Carbon Budgets, it is not currently on track to meet any of its Net Zero aligned targets. This has been the case for a number of years.
43. In June 2022, the CCC found in its *Progress Report to Parliament* concerning the previous Net Zero Strategy that significant risks or policy gaps existed in relation to 38% of the emissions reductions required to meet the Sixth Carbon Budget.<sup>45</sup> This was particularly so in relation to land use and the energy efficiency of buildings.<sup>46</sup> 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.”<sup>47</sup>

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<sup>44</sup> <https://www.leighday.co.uk/news/news/2024-news/government-concedes-abandonment-of-green-policies-was-unlawful-following-legal-challenges-by-chris-packham/>.

<sup>45</sup> CCC, [Progress Report](#), June 2022, pg 22,.

<sup>46</sup> Ibid, pg 14.

<sup>47</sup> Ibid, pg 180.

44. 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.<sup>48</sup> This recommendation was not followed in the Carbon Budget Delivery Plan.<sup>49</sup> A similar recommendation made in the independent Net Zero Review, carried out by former energy minister Chris Skidmore MP,<sup>50</sup> was rejected.<sup>51</sup> The Government launched its consultation on the specification in December 2023 (see §60 below) and intended 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.*”<sup>52</sup>
45. 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**”).<sup>53</sup> 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.
46. Focusing on buildings, the 2023 Progress Report recorded that most indicators are off track and that the UK needed significant new policies and programmes to underpin the delivery or, inter alia, energy efficiency.<sup>54</sup> The CCC judged most of the policies in the CBDP and net zero suite of documents to achieve emission

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<sup>48</sup> CCC, [Letter: Reducing energy demand in buildings in response to the energy price crisis](#), November 2022.

<sup>49</sup> Policy 97, pg 78.

<sup>50</sup> [Mission Zero: Independent Review of Net Zero](#), January 2023.

<sup>51</sup> [Responding to the Independent Review of Net Zero’s Recommendations](#), March 2023.

<sup>52</sup> Ibid, pg 54, response 108.

<sup>53</sup> <https://www.theccc.org.uk/publication/2023-progress-report-to-parliament/>.

<sup>54</sup> Ibid, pgs 140-141.

reductions from buildings “to be either at significant risk or with insufficient plans”.<sup>55</sup>

47. The most recent CCC *Progress Report to Parliament*, provided in July 2024 (“**the 2024 Progress Report**”)<sup>56</sup> recorded that the UK is not on track to hit its first net-zero aligned target – the 2030 NDC – despite emissions reductions in 2023. The CCC’s assessment was that credible plans cover only a third of the emissions reductions required to achieve the 2030 target and only a quarter of those needed to meet the Sixth Carbon Budget.<sup>57</sup> In particular, the CCC found that missing or incomplete policies included those on energy efficiency in buildings.<sup>58</sup>
48. Emissions reductions from buildings (from a 2008 baseline) are smaller than the CCC has predicted.<sup>59</sup> The CCC specifically highlighted that the “*spatial planning system continues to cause issues for delivering Net Zero*”.<sup>60</sup> While the CCC praised some improved clarity in the December 2023 NPPF on the weight LPAs should give to energy efficiency and low-carbon heating in existing buildings and on low-carbon energy infrastructure, it raised concerns over the 2023 Written Ministerial Statement on local energy efficiency standards (see §§59 and 91ff below), which it said would be “*likely to cause further confusion and delays around adopting local NetZero policies, which is a setback*.”<sup>61</sup>
49. The CCC emphasised the need for rapid action:
- “Outside the electricity supply sector, the average annual rate of reduction over the previous seven years was only 6.3 MtCO<sub>2e</sub>/year (1.6%). This will need to more than double to 14.3 MtCO<sub>2e</sub>/year (4.6%) over the next seven years if the UK is to meet its 2030 target. This will require substantial increases in the rates of reduction in most sectors outside of electricity supply. ... In industry and buildings, trends over the previous seven years were not sufficient and the recent reductions were mostly not the result of*

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<sup>55</sup> Ibid, pg 151.

<sup>56</sup> CCC, [Progress in reducing emissions 2024 Report to Parliament](#), July 2024.

<sup>57</sup> Ibid, pg 70.

<sup>58</sup> Ibid, pg 71.

<sup>59</sup> Ibid, pg 36.

<sup>60</sup> Ibid, pg 81.

<sup>61</sup> Ibid, pg 81.

*sustained decarbonisation action. These trends will need to speed up, enabled by programmes to roll out low-carbon technologies.”<sup>62</sup>*

50. The Government is also not on track to meet its obligations to adapt to climate change. Sections 58 of the CCA 2008 places a duty on the Secretary of State to lay programmes before Parliament setting out the objectives of the Government in relation to adaptation to climate change and the proposals and policies for meeting those objectives, including time-scales and risks. The UK’s Third National Adaptation Programme (“**NAP3**”) was laid before Parliament on 17 July 2023. On 30 April 2025, the CCC published its Adaptation Progress Report to Parliament, the first to assess the extent to which NAP3 and its implementation are preparing the UK for climate change.<sup>63</sup> It finds, definitely, that the UK’s preparations for climate change are inadequate and the NAP3 falls short of what is required to address the climate change the UK is experiencing today, let alone that coming in future.

### **Action by LPAs**

51. 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.
52. This is bolstered by section 19(1A) of the 2004 Act, which requires that development plan documents must 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 §26ff above, means that both statute and national government policy require LPAs

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<sup>62</sup> <https://www.theccc.org.uk/publication/progress-in-reducing-emissions-2024-report-to-parliament/#publication-downloads>

<sup>63</sup> CCC, [Progress in adapting to climate change 2025 report Parliament](#), April 2025.

to bring forward carbon literate planning policies to secure compliance with the UK's climate obligations.

53. 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.
54. 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 March 2024, analysis by Think Three and Cambridge University, commissioned by Octopus Energy, found that highly energy efficient homes built to zero-bills standards – using technologies like solar panels, battery storage, and heat pumps – can command a substantial green premium. Homes with zero-bills could command sales price premiums of up to 13.2% on average, and as high as 20.2% for new builds. Values varied depending on the valuation of the properties and taking into account regional differences: the highest premiums were found in areas with high market values in the South West, South East and Eastern regions with premiums of 15.5%, 15.1% and 14.7% respectively.
  - b. Analysis by Savills of average values of homes transacted between 2019 and 2021 shows that newer, cleaner, methods of energy do demand a higher price tag. Across England and Wales, homes with heat pumps fitted demand the highest premium compared with the regional average – with buyers paying on average 59% more for the offer of cleaner energy. This premium is most acute in the South East, with homes on average 84% more expensive. 59% of survey respondents said that they would be willing to

pay more for a home if at least 75% of a property's energy was powered by renewable sources.<sup>64</sup>

- c. 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.<sup>65</sup>
- d. 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.<sup>66</sup>
- e. Shakespeare Martineau found that 77% of 500 potential buyers surveyed would consider purchasing a green home, rising to 80% for first time buyers.<sup>67</sup>
- f. 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.<sup>68</sup>

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<sup>64</sup> Savills, "[Buyers paying significantly more for homes with low-carbon technology, as energy prices rise](#)", April 2022.

<sup>65</sup> [Legal & General/YouGov Research](#), July–August 2022.

<sup>66</sup> Santander, [Buying into the Green Homes Revolution](#), October 2022.

<sup>67</sup> Shakespeare Martineau [Green Homes Report](#).

<sup>68</sup> Knight Frank, [The Sustainability Series](#), September 2021.

55. 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.
56. Finally, there is evidence of developers being attracted to areas where there is policy support for net zero development, such as the Octopus Energy and gs8 Carpenters Yard project in Thornwood, Epping, for 113 homes meeting energy efficiency building fabric standards and also addressing embodied carbon.<sup>69</sup>

## **2021 Updates to the Building Regulations**

57. 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.
58. The new measures 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**

59. 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).<sup>70</sup> The 2023 WMS stated that the 2021 Part L amendments effectively rendered the sections of the 2015

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<sup>69</sup> [Sustainability Times](#) (20 February 2025).

<sup>70</sup> <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>

WMS dealing with this issue moot. The 2023 WMS explicitly supersedes the aspects of the 2015 WMS relating to energy efficiency.

60. Also on 13 December 2023, and referred to in the 2023 WMS, 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).<sup>71</sup> It is notable that the consultation contains a specific section on metrics which refers to Energy Use Intensity (“EUI”). The two options for metrics on which the consultation focuses are, however, the least ambitious of the various options which had been presented to the Government in the runup to the consultation, nor does the consultation include various requirements identified by the CCC as necessary in its *UK Housing: Fit for the Future?* report in February 2019.<sup>72</sup>
  - 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**

61. Developments such as the 2023 WMS and the *RCA* judgment have caused LPAs concern as to the extent of their ability to bring forward local plan policies that set higher targets for energy performance standards for development in their area than the national baseline in Building Regulations.

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<sup>71</sup> <https://www.gov.uk/government/consultations/the-future-homes-and-buildings-standards-2023-consultation>.

<sup>72</sup> <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/m<sup>2</sup>/yr (pg 14).



62. In short, despite these apparently confounding factors, LPAs remain under a strong statutory duty to ensure their development plan documents include policies designed to secure that development mitigates climate change impacts, amplified by the requirements in the NPPF that plans must take a proactive approach to mitigating and adapting to climate change and plan making must support the transition to net zero by 2050, including through securing radical reductions in greenhouse gas emissions. In light of this, and given a proper understanding both of the extent of the 2023 WMS and the ability of LPAs and Inspectors to depart from the WMS, LPAs can, with confidence, bring forward draft policies that set higher targets for energy performance standards for development in their area than the national baseline in Building Regulations, including policies that use metrics not specified in the 2023 WMS. Such policies would still, overall, be consistent with national policy.

#### **The Planning and Compulsory Purchase Act 2004**

63. Section 19(2)(a) of the PCPA 2004 provides that, in preparing a development plan document, the local planning authority “*must have regard to ... national policies and advice contained in guidance issued by the Secretary of State*”. This includes guidance in written ministerial statements.
64. Section 19(1A) of the PCPA 2004, which was added by Planning Act 2008 and which has been in force since 6 April 2009, imposes a general requirement that development plan documents must, taken as a whole, “*include policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change*”.
65. Section 20 requires the authority to submit every development plan document to the Secretary of State for independent examination by a person appointed by him. Section 20(5) provides that the purpose of an independent examination is to determine:
- “(a) *whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;*
  - (b) *whether it is sound*”.

66. Accordingly, the obligation in section 19(1A) falls both on the LPAs bringing forward the plans and on the Inspectors examining them. Given the nature of this duty, against the background of the CCA 2008 net zero obligation, local authorities have the power to bring forward local plan policies which secure the mitigation of climate change needed to contribute to meeting the NDC, the carbon budgets and the 2050 target.
67. This gives a firm legislative footing for LPAs to include in their draft local plans, and Inspectors to find sound, policies which go beyond current Building Regulations, either by:
- a. focusing on reducing carbon emissions from regulated energy sources<sup>73</sup> via a percentage reduction in emissions compared to the baseline set by Part L 2021 (using metrics referred to in the 2023 WMS, see §94 below); or
  - b. incorporating a suite of energy-based metrics, addressing emissions from both regulated and unregulated energy sources, and focusing on achieving absolute energy use targets (using metrics not referred to in the 2023 WMS).
68. The lack of progress in reducing emissions from the built environment sector since the section 19(1A) duty came into force in 2009, and the need for significant and swift action, supported by the CCC (see §§43-50 above) and the NPPF (see §§26-32 above), all justify such policies and mean that they would, overall, be in compliance with national policy.
69. The obligation to “*have regard*” to national policy also falls on both LPAs and Inspectors. It is well understood, as a statutory obligation to “*have regard*” to something arises in many different contexts and has been considered by the Courts on a number of occasions. It means that the guidance or policy must be considered when exercising the function or making the decision in question. That does not mean that it must be “*followed*” or “*slavishly obeyed*”; a decision-maker

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<sup>73</sup> “Regulated energy” is energy consumed by a building, associated with fixed installations for heating, hot water, cooling, ventilation, and lighting systems. “Unregulated energy” is energy consumed by a building that is outside of the scope of Building Regulations, e.g. energy associated with equipment such as fridges, washing machines, TVs, computers, lifts, and cooking. See the [LETI Climate Emergency Design Guide](#) pg 24 and the Essex Design Guide [Planning Policy Position for Net Zero Carbon Development Homes and Buildings in Greater Essex](#) pg 5.

may depart from such guidance or policy if there is good reason to do so: *R (London Oratory School) v Schools Adjudicator* [2015] ELR 335 at §58 per Cobb J, cited in *R (Harris) v Environment Agency* [2022] PTSR 1751 at §80 per Johnson J.

70. It is key to give clear reasons for departure from the guidance or policy, but the statutory obligation to have regard to guidance or policy does not “*bind public bodies more tightly to a duty of obedience to guidance to which by statute they are obliged (no more, no less) to have regard*”: *R (Khatun) v Newham LBC* [2005] QB 37 at §47, per Laws LJ. This is addressed further at §§106-112 below in relation to the 2023 WMS.

## **Planning and Energy Act 2008**

71. Section 1 of the PEA 2008 provides as relevant:

- “(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.
- (2) In subsection (1)(c)—
- “energy efficiency standards” means standards for the purpose of furthering energy efficiency that are—
- (a) set out or referred to in regulations made by the appropriate national authority under or by virtue of any other enactment (including an enactment passed after the day on which this Act is passed), or
  - (b) set out or endorsed in national policies or guidance issued by the appropriate national authority;
- “energy requirements”, in relation to building regulations, means requirements of building regulations in respect of energy performance or conservation of fuel and power.
- (3) In subsection (2) “appropriate national authority” means—
- (a) the Secretary of State, in the case of a local planning authority in England;

- [...]
- (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.*
- ...
- (7) *Relevant national policies are—*
    - (a) *national policies relating to energy from renewable sources, in the case of policies included by virtue of subsection (1)(a);*
    - (b) *national policies relating to low carbon energy, in the case of policies included by virtue of subsection (1)(b);*
    - (c) *national policies relating to furthering energy efficiency, in the case of policies included by virtue of subsection (1)(c)."*

72. The PEA 2008 was considered in *R (Rights Community Action) v SSLUHC* [2025] PTSR 135, [2024] EWHC 1693 (Admin) (“**the RCA judgment**”). It is very instructive to note that the Secretary of State submitted to the Court,<sup>74</sup> and Mrs Justice Lieven accepted at §55, that the PEA 2008 is declaratory or confirmatory of local authorities’ powers. This means that local authorities’ powers to adopt local energy efficiency policies that go beyond building standards are not drawn solely from the PEA 2008 (such that the PEA 2008 contains the entire scope of local authorities’ powers); this statute simply confirms pre-existing powers and articulates them in a specific way, to make clear that such powers exist.
73. It is also important to note that the Court, the Secretary of State and the Claimant all considered that the provisions of the PEA 2008 were sufficiently unclear or ambiguous to justify reference to the Parliamentary material when the Bill that was to become the PEA 2008 was being debated (§65). The *RCA* judgment records that the material shows that the Private Members Bill (“**the Bill**”) was introduced to provide a clear statutory framework for what had come to be known as the “Merton Rule”, which was a policy adopted by some local authorities, including the

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<sup>74</sup> See Detailed Grounds of Defence (7 May 2024) §25. *RCA* judgment at §10. The Secretary of State explained that the 2023 WMS and the Future Homes Standards consultation were approached as one package of measures.

London Borough of Merton, to require a percentage of energy in their areas to be sourced from renewable sources (§53).

74. Not mentioned in the judgment, however, is that the Bill had grown out of a previous such bill, promoted by Martin Maton MP, to address difficulties encountered by Cambridge City Council and inconsistencies in local plan decision making:

*“History of the “Caton” Bill*

*As latest figures show, CO2 emissions have risen consistently over the last four years. Energy efficiency is the simplest and most cost effective way to reduce carbon emissions.*

*However the planning system does not make sufficient provisions for energy efficiency. Cambridge City Council was recently required to water down a planning policy requiring large developers to ‘provide evidence of how they have minimized energy consumption, maximized energy efficiency and considered the feasibility of using CHP systems’ as, to quote the government inspector, it was ‘unreasonable to the extent that it imposes more onerous requirements than the Building Regulations’.”<sup>75</sup>*

75. In response, the Association for the Conservation of Energy had supported a bill to clarify that local authorities could include in their local development plan policies energy efficiency standards higher than those required by Building Regulations, along with targets for generating energy from renewable and low carbon sources.<sup>76</sup> That private members bill had had cross-party support, but had not had Parliamentary time to pass. It was redesigned to include protection for the Merton Rule and taken up by Michael Fallon MP.<sup>77</sup>
76. The Bill was amended quite substantially in the single Committee Sitting that took place on 20 February 2008, where clause 1 was substantially overhauled, including the addition of what became sections 1(5) and (6).<sup>78</sup> Mr Fallon MP explained that the provision that new development policies must not be inconsistent with national policies was to prevent inconsistency with affordable

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<sup>75</sup> House of Commons Library Research Paper 08/06 [Planning and Energy Bill \(21 January 2008\)](#), pg 11.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid. The Merton Rule is set out in detail at pgs 15-16.

<sup>78</sup> House of Commons Library Research Paper 08/14 [Planning and Energy Bill: Committee Stage Report \(30 April 2008\)](#), pg 12.

housing requirements and with the right of consumers to choose their energy supply.<sup>79</sup>

77. Indeed, section 1(5) PEA 2008, which provides that policies included in development plan documents by virtue of section 1(1) “*must not be inconsistent with relevant national policies for England*”, simply re-states the usual approach to the requirement of soundness in section 20(5)(b) PCPA 2004 and paragraph 36(d) of the 2024 NPPF.
78. The Parliamentary material shows that the intention behind section 1(5) PEA 2008 was to prevent inconsistency with affordable housing requirements and with the right of consumers to choose their energy supply. It was not to transmute the “*relevant national policies*” into legal obligations which fetter the discretion of decision-makers or from which deviation in the normal way is impermissible. Section 1(5) does not displace the case law referred to in §§69-70 above or §110 below. The PEA 2008 cannot lawfully be read as leading to a situation where conflict with one element of a policy (for example, conflict with a bullet point in the 2023 WMS, see §94ff below) wholly displaces LPA’s powers to bring forward, and Examining Inspectors’ powers to find sound, energy efficiency policies going beyond Building Regulations.
79. The Housing Minister at the time of the committee stage of the Bill explained that the Government had initially opposed the Bill, but supported it because of the positives in clarifying the power in primary legislation: “*In particular, it will reassure local authorities that they can go further, faster than through building regulations and within a national framework. It will mean that there is no place to hide for local authorities who do not want to take up this agenda, a point that has been part of our recent discussions.*”<sup>80</sup>
80. The Minister at the time of the final debate on the Bill, Sadiq Khan MP, then Parliamentary Under-Secretary of State for Communities and Local Government,

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid pg 13.

repeated those comments.<sup>81</sup> Not mentioned in the *RCA* judgment, the Minister went on to say:

*“The important thing is the power of local councils to make policies on local energy requirements for new developments. It demonstrates joined-up government between national Government and local government. It is important to give a sense of ownership so that residents feel that their local council is addressing their concern to have housing fit for the 21st century. I hope to see more and better working together between not only local MPs and local councils, but local government and national Government.”*<sup>82</sup>

81. The only clause of the Bill that was subject to amendment by the House of Lords was clause 1(2)(a), which was clarified when the Bill returned to the House of Commons as a technical amendment to avoid inadvertently and unintentionally giving the Secretary of State new powers to make regulations.<sup>83</sup> Section 1(2) PEA 2008 defines energy efficiency standards by reference to standards set out by the Secretary of State in regulations made under another enactment or “*set out or endorsed in national policies or guidance*” issued by the Secretary of State, and section 1(7) defines these as “*national policies relating to furthering energy efficiency*”. In many ways, this is a light-touch provision, as all that is required for an energy efficiency standard to be open to be used is for it to be “*endorsed*” by the Secretary of State in any type of policy or guidance “*relating to*” furthering energy efficiency. While a specific standard or standards may be set out in the relevant policy or guidance, the standards may also be “*endorsed*” by reference to a methodology that uses those standards, as that would amount to approval or support for the use of those standards.<sup>84</sup>

82. As the Minister stated when the Bill was being debated, where the Secretary of State or the Welsh Ministers regulate to prescribe sustainability standards, “*the resulting sustainability standards in relation to energy efficiency **would be appropriate for local authorities to use** when setting energy efficiency standards*”

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<sup>81</sup> Hansard, 17 October 2008, column 1045.

<sup>82</sup> Hansard, 17 October 2008, column 1050-51.

<sup>83</sup> Hansard, 17 October 2008, column 1050-51.

<sup>84</sup> This, in my view, arises from a plain reading of the provision, otherwise the inclusion of the word “*endorsed*” alongside “*set out*” would be redundant.

*in reliance on the Bill.*" (emphasis added).<sup>85</sup> It is notable that at no time during the Committee Stage or the debates was it suggested that LPA would be obliged only to use such standards. Rather, such standards would plainly be appropriate to use, but other standards could be used if they fall within section 1(2)(b).

83. Turning to section 1(7), the use of the phrase "*relating to*", rather than "*concerning*", indicates that the policy or guidance does not need solely to concern energy efficiency, but that at least part of the policy or guidance must have some relevance to energy efficiency. This is the understanding of "*relating to*" which most closely aligns with the Parliamentary intention<sup>86</sup> of the PEA 2008: "*building into the legislation the powers of local councils to make policies on local energy requirements for new developments [and making] a positive contribution to the clear need for local authorities to take action to tackle climate change locally*".<sup>87</sup>
84. Nevertheless, section 1(2) does limit the nature of the power clarified or declared by section 1 PEA 2008. That power is thus narrower than the power given by section 19(1A) PCPA 2004, as amended. There is no conflict between the statutory regimes (indeed, as set out above, it was anticipated they would work together), and where there are two different, overlapping ways of achieving a local authority's objective, it is open to the authority to choose the power on which it relies.<sup>88</sup> Accordingly, LPAs can choose the power under which they bring forward local energy efficiency policies.

### Endorsement of Energy Efficiency Standards

85. The design of buildings is a key factor in energy efficiency. One of the ten characteristics of well-designed places, set out in Part 2 of National Design Guide,

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<sup>85</sup> Hansard, 17 October 2008, column 1049-50.

<sup>86</sup> The meaning of the phrase "*relating to*" or "*relates to*" in various pieces of legislation has been the subject of much discussion across the case law. The House of Lords in *In re Smalley* [1985] AC 622 at 642 accepted, by reference to other House of Lords and Court of Appeal authority, that the phrase may be given a broad or a narrow interpretation, and that resolution of any uncertainty should be guided by an interpretation that will secure the object of the legislation without creating results that unnecessarily cut across existing legal rights or otherwise creating harsh results.

<sup>87</sup> Hansard, 17 October 2008, column 1046.

<sup>88</sup> *Cusack v Harrow LBC* [2013] 1 WLR 2022 per Lord Carnwath at §§9-12 and 27-28; *R (Sharp) v North Essex Magistrates' Court* [2017] 1 WLR 3789 per Gross LJ at §§30-33.



is Efficient and Resilient Resources.<sup>89</sup> The opening paragraph of that section states:

*“Well-designed places and buildings conserve natural resources including land, water, energy and materials. Their design responds to the impacts of climate change by being energy efficient and minimising carbon emissions to meet net zero by 2050. It identifies measures to achieve:*

- *mitigation, primarily by reducing greenhouse gas emissions and minimising embodied energy; and*
- *adaptation to anticipated events, such as rising temperatures and the increasing risk of flooding.”<sup>90</sup>*

86. The Ministry of Housing, Communities and Local Government put in place the National Model Design Code<sup>91</sup> in order to “*provide detailed guidance on the production of design codes, guides and policies to promote successful design*”.<sup>92</sup> It expands on the ten characteristics of good design set out in the National Design Guide. The Resources section focuses on standards, and provides: “*Standards relating to sustainability are important and can be incorporated into codes **or covered in other policy***”. (emphasis added)<sup>93</sup> The first aspect is “**Energy efficiency standards**: *Local authorities can set policies for higher energy efficiency standards for their area or specific development sites.*” (emphasis in original).<sup>94</sup> The National Model Design Guide does go on to endorse a number of standards, including, in relation to “**Energy Issues**” (emphasis in original), “*Whole life-cycle carbon*”.<sup>95</sup>

87. The National Model Design Code Part 2 Guidance Notes reiterate this under “**R.1.ii Energy Efficiency**” (emphasis in original), referring again to the powers of local authorities to set policies for higher energy efficiency standards for their area in local plans and stating:

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<sup>89</sup> [National Design Guide](#) (January 2021) Part 1 §37; Part 2 §135ff.

<sup>90</sup> *Ibid* §135.

<sup>91</sup> National Model Design Code [Part 1 The Coding Process](#) (January 2021) and [Part 2 Guidance Notes](#) (June 2021).

<sup>92</sup> Part 1 §1.

<sup>93</sup> Part 1 §66.

<sup>94</sup> Part 1 §66(i), with a cross reference to R.1.ii in Part 2.

<sup>95</sup> Part 1 §66(iv).

*“There are multiple ways of reducing energy waste. In developing policies, consideration should be given to improving energy efficiency, which may address the selection of materials for thermal and solar performance, retrofitting existing buildings, design and orientation construction techniques **and assessing whole life costs.**”* (emphasis added)<sup>96</sup>

88. This further endorses energy efficiency standards related to the assessment of whole life costs. Accordingly, in my view, any energy efficiency standard which is recognised as part of an assessment of whole life energy costs or whole life-cycle carbon assessments has been endorsed by the appropriate national authority in a national policy relating to furthering energy efficiency, as required in sections 1(2)(b), 1(3)(a) and 1(7)(c) of the PEA 2008.
89. This is important in relation to the 2023 WMS (addressed in the next section), as I understand that the standard to which it refers – a *“dwelling’s Target Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP)”* – is not generally used for whole-life carbon assessment, because that standard does not focus on achieving absolute energy use targets and excludes emissions from unregulated energy sources. This means energy efficiency standards other than TER have been endorsed and can be used in the exercise of the section 1(1)(c) PEA 2008 power.

#### Conclusion on the PEA 2008

90. In conclusion, the PEA 2008 confirms beyond peradventure that LPAs can bring forward policies that go beyond current Building Regulations standards, and confirms one way in which LPAs’ pre-existing powers can be exercised: it supports authorities bringing forward policies using energy efficiency standards set out or endorsed in national policies or guidance (such as those focused on reducing regulated carbon emissions and any energy efficiency standard recognised as part of an assessment of whole life energy costs or whole life-cycle carbon assessments) that go beyond current Building Regulations standards.

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<sup>96</sup> Part 2 §201.

91. The PEA 2008 is not the only power on which LPAs can rely, nor does it circumscribe other powers or foreclose other legislative routes by which LPAs are obliged or empowered to act (such as those inserted into the PCPA 2004 by the Planning Act 2008). Quite the opposite, as the debate at the time the PEA 2008 was put into place shows, it was always recognised that climate-related legislative amendments might result in provisions providing such powers.<sup>97</sup> Section 1(5) PEA 2008 cannot lawfully be read as giving additional legislative force to national policies in the context of energy efficiency, or as disapplying the usual approach to the weight to be given to national policy as a material consideration and to departing from policy where it is rational so to do.

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

92. There are two reasons that the 2023 WMS does not undermine LPAs' powers to bring forward, in their local plans, policies to set higher targets for energy performance standards for development in their area than the national baseline:
- a. The flexibility in, and limits of, the 2023 WMS. The WMS itself envisages a way this can be done, and it has been held by the High Court not to state the law incorrectly or undermine the purpose of sections 1 of the PEA 2008 and 19 of the PCPA 2004 and not to attenuate or emasculate LPAs' statutory powers; and
  - b. Limited departure from the 2023 WMS: In any event, there are clear circumstances in which policies that use metrics other than those specified in the 2023 WMS, and/or do not require calculation by the method specified in the WMS can be justified and Inspectors can, in the exercise of their planning judgment, find these policies to be sound.

### The Flexibility in, and Limits of, the 2023 WMS

93. 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*

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<sup>97</sup> Hansard, 17 October 2008, column 1045.

*Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned buildings regulations”.*

94. The inclusion of “*planned buildings regulations*” means that local authorities can set local energy efficiency standards at the level of proposed future regulations. The Secretary of State confirmed that the reference to “*planned building regulations*” is “*a reference to the consultation draft of the [Future Homes Standard], as set out in the December consultation document, or as subsequently amended before any final adoption.*”<sup>98</sup>
95. 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.*
  - *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).*”
96. It is important to note immediately that the 2023 WMS does not foreclose the possibility of setting higher standards, so long as the two bullet points are met.
97. Second, it is important to note that the reference in the second bullet point to the use of the SAP procedure has to some extent been overtaken by events. The 2023-2024 consultation “*The Home Energy Model Making the Standard Assessment Procedure fit for a net zero future*”,<sup>99</sup> part of the Future Homes Standard consultation referred to in §93 above, and thus part of the proposed future metrics which the 2023 WMS itself states LPAs can use, seeks to replace SAP with a new

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<sup>98</sup> *RCA* judgment at §10. The Secretary of State explained that the 2023 WMS and the Future Homes Standards consultation were approached as one package of measures.

<sup>99</sup> <https://assets.publishing.service.gov.uk/media/65e1f99a2f2b3b001c7cd879/home-energy-model-consultation.pdf>.

national energy calculation methodology. It appears, therefore, that the 2023 WMS itself justifies departure from the specification of SAP.

98. 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.
99. Although the 2023 WMS is expressed in trenchant language, it cannot be read as directing a specific outcome in a blanket fashion, without any possibility for justifiable local exceptions or rational departure from its apparent strictures: R (West Berkshire DC) v SSCLG [2016] 1 WLR 3923 at §30, per Laws and Treacy LJ. The RCA judgment rejected the contention that the 2023 WMS attenuates or emasculates LPAs’ statutory powers.<sup>100</sup> It is certainly correct that the 2023 WMS does not constrain or delimit the extent of the duty in section 19(1A) of the 2004 Act.
100. Indeed, in evidence before the High Court, the Secretary of State explained that the 2023 WMS was aimed at “*encouraging*” a particular approach (emphasis added),<sup>101</sup> rather than ‘compelling’ or ‘constraining’. The Minister and the Secretary of State were advised as follows:
- “We would still wish to allow local innovation and ambition where viable, particularly where the Future Homes Standard (FHS) is not in force, to not unlawfully prevent LPAs from using their powers, and to avoid being seen to conflict with government’s commitment to ensure planning policy “contributes to climate change mitigation...as fully as possible”.*<sup>102</sup>
101. In the High Court, RCA contended that the result of the 2023 WMS would be that LPAs would be prevented from bringing forward energy efficiency policies based

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<sup>100</sup> Ibid §72. The Judge held that the 2023 WMS does not unlawfully state the law or undermine the purpose of sections 1 of the PEA 2008 and 19 of the PCPA 2004 (§69).

<sup>101</sup> RCA judgment §13; see also §17 of the Secretary of State’s Detailed Grounds of Defence (7 May 2024).

<sup>102</sup> RCA judgment §15.

on the Low Energy Transformation Initiative (“**LETI**”) metrics, focusing on the carbon efficiency of the homes themselves.<sup>103</sup>

102. The Secretary of State rejected the contention that the 2023 WMS sets a “*default instruction*” to inspectors. Instead, the Secretary of State argued that “*the policy is simply setting out guidance on what the Secretary of State considers to be reasonable – i.e. ‘a reasoned and robustly costed rationale’.*”<sup>104</sup>
103. It is important to note that Lieven J did not accept RCA’s evidence that the 2023 WMS would prevent local authorities from using LETI metrics, such as EUI, in their proposed policies. It may be that the Judge considered the 2023 WMS simply to be a policy under section 1(2) of the PEA 2008, in which the Secretary of State “*endorsed*” specific energy efficiency standards, given that in §69 she notes the similarity in purpose between section 1(2) of the PEA 2008 and the 2023 WMS.
104. It is also interesting to note that the Secretary of State did not explicitly argue,<sup>105</sup> nor did Lieven J suggest, that section 1(5) PEA 2008 meant that the 2023 WMS operates to cut down the extent of the primary power clarified in section 1(1) PEA 2008. That must be correct – as set out at §§77-78 above, section 1(5) PEA 2008 simply re-states the usual approach to the requirement of soundness and cannot operate to turn policy guidance into the equivalent of primary legislation.
105. I should, however, caution that the crucial final reasoning in the *RCA* judgment is a little rushed. However, in my view it would not be a fair or proper reading of the *RCA* judgment to treat it as a basis for arguing that the 2023 WMS makes policies with metrics other than those specified in the WMS difficult to justify. The judgment is at pains to emphasise that the 2023 WMS affords flexibility.

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<sup>103</sup> Ibid §12 and §59.

<sup>104</sup> Secretary of State’s Detailed Grounds of Defence (7 May 2024) §71.

<sup>105</sup> The Secretary of State’s argument in §§69-70 of the Detailed Grounds was that the 2023 WMS is consistent with section 1 of the PEA 2008 and that the Claimant did not “*pay due regard to subsection (2) or (5). Read fairly and as a whole, the 2023 WMS does not misdirect but simply provides national policy as to how the provision should operate*”.

106. Accordingly, the 2023 WMS does not change the legislative powers available to LPAs to bring forward policies that go beyond Building Regulations, nor does it prevent such policies from being justified. Policies that comply with the two bullet points, and in particular express any “*additional requirement as a percentage uplift of a dwelling’s Target Emissions Rate (TER)*”, are justified so long as they are supported by “*a well-reasoned and robustly costed rationale*” (which simply echoes the usual requirements for evidence-based policy making). In light of the planned buildings regulations in *The Home Energy Model* element of the Future Homes Standard consultation, use of a method of calculation other than SAP is justified.

#### Limited Departure from the 2023 WMS

107. As set out above, LPAs would also be justified, in light of their primary legislative duty under section 19(1A) PAP 2004, to bring forward policies which do not use the TER metric. The metric has a number of limitations:
- a. It may in fact be achieved with a poor level of energy efficiency, because 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;
  - b. It does not address unregulated emissions, which can represent up to 50% of a building’s operational emissions;
  - c. The TER also cannot be measured post-construction and 'in-use', which makes it unsuitable for use where authorities need to determine whether their policies actually deliver buildings that are more energy efficient.
108. 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.<sup>106</sup> 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

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<sup>106</sup> See, for example, the Report on the Examination of the Central Lincolnshire Local Plan Review 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 at §89 re [Policy SCR7](#); and Cornwall Climate Emergency DPD, Inspector’s Report at §§162-163 and 168-169 re [policy SEC1](#).

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.

109. If LPAs sought to bring forward policies going beyond Building Regulations, using standards other than TER and calculations other than via SAP, that would amount to a departure from one aspect of the 2023 WMS (note it would not, however, be a complete departure, given the overall flexibility of the WMS and the evidence and findings in the RCA judgment of what the 2023 WMS was intended to achieve, despite its trenchant language).
110. In those circumstances, Examining Inspectors faced with such policies are required as a matter of law to consider whether departure from the 2023 WMS is justified, given that such national policy must not be “*slavishly obeyed*” (see §69 above) and may be departed from where there is good reason to do so.
111. The Courts have emphasised that guidance from the Secretary of State, such as that in the 2023 WMS, “*does not amount to a legal rule*” : see, for example, Keep Bourne End Green v Buckinghamshire CC & SSHCLG [2020] EWHC 1984 (Admin) at §105. It is therefore important that the 2023 WMS is flexibly applied. Holgate J (as he then was) made clear “*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*” (§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 framework referred to above) – the “or” is important, as exceptionality is not required.
112. As a matter of general principle, WMSs do not displace the primacy given to statutory duties placed on LPAs and that the weight to be given to conflict or compliance with a WMS “*is a matter of judgment for the decision-maker, a decision with which the court may only intervene on public law grounds*”: Mead Realisations Ltd v SSLUHC [2024] PTSR 1093, [2024] EWHC 279 (Admin) at §§59-60. WMSs such as the 2023 WMS are material considerations and decision-makers (including Examining Inspectors assessing local plans) may give material



considerations little or no weight, provided they do so rationally: Tesco Stores Ltd v SSE [1995] 1 WLR 759 (HL) at 780F–H.

113. Accordingly, so long as there is a robust evidence base – a reasoned and robustly costed rationale – it is open to Examining Inspectors, in the exercise of their planning judgment, to determine that policies using metrics and methods of calculation other than those specified in the 2023 WMS are consistent with national policy on climate change mitigation and the net zero obligation, and, to the extent that there would be deviation from the 2023 WMS, that can be justified on the evidence and does not prevent overall “consistency” of the proposed local plan with national policy.

### **Conclusion**

114. The PEA 2008 confirms one way in which LPAs’ pre-existing powers can be exercised to set higher targets for energy performance standards for development in their area than the national baseline. There are other legislative routes by which LPAs have different or more ambitious powers, such as the general power flowing from the duty in section 19(1A) of the PCPA 2004, that development plan documents must, taken as a whole, “*include policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change*”.
115. This position has not been changed by the 2023 WMS. The correct position in law is that LPAs and 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. Nor can the 2023 WMS be treated as though it is a legal rule. 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, such as the Essex net zero evidence base and model policy. 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

116. Nine 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 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. Three of those case studies post-date the 2023 WMS.
117. 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.
118. 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 passed examination (2019 – 2023)

119. **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.

120. 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.”<sup>107</sup>*

121. 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.<sup>108</sup> 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.<sup>109</sup>

122. 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.”<sup>110</sup>*

123. 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:

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<sup>107</sup> [London Plan 2021](#), pgs 342–343.

<sup>108</sup> London Plan, 2021, p. 342, fn. 152.

<sup>109</sup> [GLA Energy Assessment Guidance](#), June 2022.

<sup>110</sup> [Reading Borough Local Plan 2019](#), pg 82, with guidance at pg 84.

*“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 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.”<sup>111</sup>*

124. 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/m<sup>2</sup>/yr and a total energy consumption of no more than 40kWh/m<sup>2</sup>/yr.<sup>112</sup> These policies also require residual energy requirements to be met from renewable sources. In their reports, the Inspectors referred to the PEA 2008 and the NPPF, and explained why they gave little weight to inconsistency with the then 2015 WMS.<sup>113</sup>
125. 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/m<sup>2</sup>/yr and a site average total energy demand of 35 kWh/m<sup>2</sup>/yr, and Policy S8 requiring non-residential development to achieve space heating and total energy demands of 15-20kWh/m<sup>2</sup>/yr and 70 kWh/m<sup>2</sup>/yr respectively.<sup>114</sup> These policies also require residual energy consumption to be met via onsite

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<sup>111</sup> [South Gloucestershire Policies, Sites and Places Plan 2017](#), pg 19, with guidance at pgs 19–20.

<sup>112</sup> [Bath and North East Somerset Local Plan Partial Update](#), December 2021, policy SCR6; [Cornwall Climate Emergency DPD](#), February 2023, policy SEC1, pg 39.

<sup>113</sup> [Report on the Examination of the Local Plan \(Core Strategy and Placemaking Plan\) Partial Update](#), 13 December 2021, §§80-86; [Cornwall Climate Emergency DPD](#), February 2023. [Report to Cornwall Council](#), 10 January 2023, §§165-169.

<sup>114</sup> [Central Lincolnshire Local Plan](#), April 2023, pgs 30–34.

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.

126. 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.”*

### **Energy efficiency policies which passed examination (2024 – 2025)**

127. The **Tendring Colchester Borders Garden Community DPD**, found to be sound by the Examining Inspector on 31 March 2025, contains Policy 8: Sustainable Infrastructure, Part A of which concerns “*Net Zero Carbon*” and requires that all buildings be “*net zero in operation at occupation or, in exceptional circumstances, have an agreed strategy to achieve net zero within five years of occupation, and achieve net zero operational energy balance onsite across the Garden Community*”. It requires proposals to:

*“demonstrate how new homes will achieve:*

- *Space heating demand less than 30kWh/m<sup>2</sup>/per annum.*
- *Total energy consumption (energy use intensity) of less than 40kWh/m<sup>2</sup>/annum.*
- *Onsite renewable generation to match or exceed the total energy consumption (energy use intensity).<sup>115</sup>*

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<sup>115</sup> [Tendring Colchester Borders Garden Community DPD](#) (consultation version, June 2023) read alongside the [Inspector’s Main Modifications](#) (31 March 2025), pg 19. Note the modifications did not amend the

128. In his Report, the Inspector recognised that this approach was in contrast to the use of the single TER metric, but referred to the work done, and evidence produced in relation to, the Essex Net Zero Policy Study, as well as site specific viability testing.<sup>116</sup> The Inspector addressed the 2023 WMS at §§78-79:

*“78. In reaching this decision I have had regard to the 2023 Written Ministerial Statement (WMS), published after submission of the DPD for examination. However, whilst the WMS is a material consideration of significant weight, the Councils must prepare development plan documents that, in accordance with Section 19(1A) of the 2004 Act, include policies which contribute to the mitigation of, and adaption to, climate change. Additionally, Section 1 of the Planning and Energy Act 2008 states that local planning authorities may in their development plans include policies imposing reasonable requirements for development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.*

*79. Consequently, in this particular case, I am satisfied that GC Policy 8 Part A is appropriate and justified. The policy provides the detail to a new garden community, which has been the aspiration of both Councils through the already adopted development plan, has been tested and demonstrated to be viable and is supported by a lead developer with shared aspirations to deliver an exemplar mixed-use development.”*

129. In my view, this is the correct approach. The 2023 WMS is a material consideration and, even if it is one to which considerable weight should be given, it is lawful to depart from a part of the 2023 WMS where it is reasonable to do so. It is open to Examining Inspectors to find sound, and in overall compliance with national policy, draft policies which do not refer to the TER metric or which refer to a different metric, so long as this is supported by robust viability evidence. Indeed,

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metrics used, but added some flexibility by allowing for exceptional circumstances to be taken into account.

<sup>116</sup> [Report on the Tendring Colchester Borders Garden Community DPD](#) (31 March 2025), §76 pg 19. There was also an agreed Statement of Common Ground with the lead development that that Garden Community shall meet the principles of Net Zero by cutting carbon emissions.

it would be unlawful for Examining Inspectors to apply the 2023 WMS inflexibly or to fail to consider whether departure from the TER bullet point where justified.

130. The **Lancaster Climate Emergency Review DPDs** (adopted 22 January 2025) provides, in policy DM30a, a stepped approach to carbon reduction and the energy efficiency of new homes through the setting of energy performance requirements: a minimum 31% reduction in carbon emissions against Part L of Building Regulations (2013) at adoption of the Plans; a further minimum 75% reduction against Part L of Building Regulations (2013) by January 2025 with reduced energy consumption achieved via a fabric first approach; and net zero carbon to be achieved by January 2028.<sup>117</sup>
131. Care needs to be taken in understanding the main modifications made to policy DM30a, where the Inspector recommended explicit reference be made to TER in order to achieve compliance with the 2023 WMS.<sup>118</sup> This was in the context of policies expressed using carbon metrics, so the Inspector did not need to consider energy metrics (EUI) or whether departure from the single bullet point in the 2023 WMS was justified in light of the LPA's viability evidence. The Inspector appears to have taken a risk averse approach in relation to the carbon metrics in policy DM30a. In my view, explicit reference to TER was not needed for the policy to be sound. Had policies using energy metrics been proposed, the Inspector would have needed to address her mind to whether departure from the single bullet point in the 2023 WMS was justified.
132. The **Merton Local Plan 2024 – 2037/38** (adopted 20 November 2024) includes a suite of policies addressing climate change.<sup>119</sup> Strategic Policy CC2.1 on "*Promoting Sustainable Design to Mitigate and Adapt to Climate Change*" requires, among other things, that all development "*Minimise greenhouse gas emissions and*

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<sup>117</sup> [Climate Emergency Review of the Lancaster District Strategic Policies & Land Allocation Development Plan Document 2020 – 2031 and the Development Management Development Plan Document 2020 – 2031](#) (22 January 2025).

<sup>118</sup> [Report on the Examination of the Climate Emergency Review of the Lancaster District Strategic Policies & Land Allocation Development Plan Document 2020 – 2031 and the Development Management Development Plan Document 2020 – 2031](#) (2 December 2024) §54.

<sup>119</sup> [Merton Local Plan 2024 – 2037/38](#) (20 November 2024) at pgs 30-64.

*support the transition to a low carbon society by maximising energy efficiency, low carbon heat and local renewable energy generation”.*

133. Policy CC2.2 “*Minimising Greenhouse Gas Emission*” requires all development to “*seek to minimise greenhouse gas emissions on site*”. It specifies that all development resulting in the creation of 1 or more dwellings or 500sqm of more non-residential GIA must both:
  - a. demonstrate compliance with the Mayor’s net-zero carbon target; and
  - b. achieve minimum carbon reduction targets set out in a table, including 35% on-site total reduction in CO<sub>2</sub> for residential development of 10 or more dwellings.
134. Policy CC2.3 addresses “*Minimising Energy Use*” specifically, and requires “*all proposed development within the borough to demonstrate that they have made the fullest contribution to minimising energy use through energy efficiency on site.*” It further requires all new build development resulting in the creation of 1 or more dwellings or 500sqm of more non-residential GIA to demonstrate compliance with a table of fabric efficiency targets based on regulated energy use (all new build residential and non-residential development to achieve a space heating demand of 15kWh/m<sup>2</sup>/yr or less by 2025), and to disclose the anticipated EUI as design or pre-occupation stage for both regulated and unregulated energy use.
135. The reasoned justification at §§2.3.14 – 2.3.24 explains the inclusion of EUI in light of the limitations in methodologies that address only regulated emissions and the recognised gap between predicted and actual energy demand. It requires that all Major Developments monitor and report actual operational energy performance for at least five years post-occupancy in line with policy SI 2 in the London Plan 2021. It sets out modelled EUI benchmarks and explains at §2.3.23 that “*all new development to make all reasonable but commercially prudent endeavours to achieve these EUI and space heating demand benchmarks in demonstrating that it has made the fullest contribution to minimising energy use in accordance with Policy CC2.3.*”



136. The Examining Inspectors found the Local plan to be consistent with the 2023 WMS “*insofar as it is supported by a well-reasoned rationale for its approach.*”<sup>120</sup> The Inspectors modified the way in which energy targets were expressed in order to reflect the GLA’s Guidance on how the London Plan’s targets are to be applied.<sup>121</sup>

### **The Salt Cross Decision**

137. 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/m<sup>2</sup>/yr and total energy use requirements for residential development at 35kWh/m<sup>2</sup>/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.
138. The Inspectors’ Report, published on 1 March 2023, set out the bases for their decision that the policy was unsound:
- 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”.<sup>122</sup>
  - 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.<sup>123</sup>
139. 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

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<sup>120</sup> [Report to the Council of the London Borough of Merton](#) (4 October 2024), §44.

<sup>121</sup> Ibid §48.

<sup>122</sup> [Report on the Examination of the Salt Cross Garden Village Area Action Plan](#), 1 March 2023.

<sup>123</sup> Inspectors’ Report, §§131–138.

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).

140. 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.
141. 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).
142. The examination into the Salt Cross Area Action Plan re-opened in April 2024. The proposed policy, which will be subject to examination in June and July 2025, requires buildings to meet a space heating demand of <15 – 20 kWh/m<sup>2</sup>.yr through ultra-low energy fabric, verified via predictive energy modelling at the detailed planning stage and monitored post-completion and specifies sector-specific EUI targets.<sup>124</sup>

## CONCLUSION

143. In light of the above, LPAs should be confident in bringing forward, and Inspectors confident in finding sound, policies which set higher targets for energy performance standards for development than the national baseline in Building Regulations, including policies that use metrics not specified in the 2023 WMS. LPAs remain under the strong statutory duty in section 19(1A) of the PCPA 2004 to ensure their development plan documents include policies designed to secure

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<sup>124</sup> [ED9D Proposed Modifications To Policy 2 And Supporting Text](#) (March 2025).

that development mitigates climate change impacts. This is amplified by the requirements in the NPPF that plans must take a proactive approach to mitigating and adapting to climate change and plan making must support the transition to net zero by 2050, including through securing radical reductions in greenhouse gas emissions.

144. The correct position in law is that LPAs and Inspectors have to treat the trenchant language in which the 2023 WMS is written with circumspection. The WMS itself envisages that policies setting requirements greater than Building Regulations can be adopted, so long as the two requirements in the WMS are met, and the High Court held that the WMS does not undermine the purpose of sections 1 of the PEA 2008 and 19 of the PCPA 2004 and does not attenuate LPAs' statutory powers.
145. In any event, there are clear circumstances in which policies that use metrics other than those specified in the 2023 WMS, and/or do not require calculation by the method specified in the WMS can be justified and Inspectors can, in the exercise of their planning judgment, find these policies to be sound. In light of other national policy requirements, particularly those in the updated 2024 NPPF, the CCC's clear advice on both mitigation and adaptation, and the ever worsening position in terms of the UK's compliance with its net zero aligned obligations, there is a strong basis for departing from the metric-specific bullet point in the 2023 WMS. This is an approach which has already been taken by the Examining Inspector in relation to the Tendring Colchester Borders Garden Community DPD.
146. 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.

6 May 2025

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