**IN THE MATTERS OF THE PLANNING AND ENERGY ACT 2008 AND THE PLANNING AND COMPULSORY PURCHASE ACT 2004**

**Re: Legal basis for planning policies delivering Net Zero Carbon developments**

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**OPEN ADVICE**

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**INTRODUCTION AND SUMMARY**

1. In May 2023, an evidence study to support planning policies which deliver Net Zero Carbon developments, entitled *Delivering Net Zero* ("**the Evidence Study**"), was published. It provides a technical evidence base to inform the policy making process for 18 participating London boroughs. It proposes two policy options, with indicative wording.

2. As a result of the Evidence Study, a number of the boroughs are progressing 'Policy Option 2' local plan policies using the emerging industry definition of Net Zero buildings, energy-based metrics and predictive energy modelling to demonstrate compliance with a net zero carbon standard for new buildings. These policies go beyond the requirements in Part L of the Building Regulations (2021).

3. I am asked by Etude, part of the consultant team that produced the Evidence Study, to advise on the correct legal approach to such policies, in light of the Written Ministerial Statement titled "Planning – Local Energy Efficiency Standards Update" (13 December 2023) ("**the 2023 WMS**") and the obligation to be in general conformity with the London Plan.

4. For the reasons set out in detail below:
    a. Neither section 1(2) of the Planning and Energy Act 2008 ("**PEA 2008**") nor the 2023 WMS prevents local planning authorities from bringing forward policies modelled on either Policy Option 1 or Policy Option 2, nor do they prevent Inspectors from finding such policies to be sound. The PEA 2008 confirms one way in which local planning authorities' pre-existing powers could be exercised, and this route supports policies falling within Policy

Option 1. The PEA 2008 does not, however, foreclose other legislative routes by which different or more ambitious powers might be given to local planning authorities. Policy Option 2 is supported by the more general power flowing from the duty in section 19(1A) of the Planning and Compulsory Purchase Act 2004 ("**PCPA 2004**").

b. The 2023 WMS does not prevent local plan policies based on Policy Option 2 from being brought forward by local planning authorities or being found to be sound in examination. The judgment in *R (Rights Community Action) v SSLUHC* [2024] EWHC 1693 (Admin) rejected the contention that the 2023 WMS emasculated or was incompatible with the powers in section 19 of the PCPA 2004. It is certainly correct that the 2023 WMS does not constrain or delimit the extent of the duty in section 19(1A).

c. 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 based on Policy Option 2 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 (particularly as national policy can pull in different directions).

d. The meaning of the phrase "*in general conformity*" entails sufficient flexibility for both Policy Options 1 and 2 to be found to be in general conformity with the London Plan.

## REASONS

5. This opinion has the following structure:

## BACKGROUND

### The Evidence Study

6. The Evidence Study is an updated report which builds on previous work, considering the significant changes since 2019, including the introduction of Part L 2021 of the building regulations and various climate-related studies and policies. The study assesses two policy options for achieving Net Zero Carbon standards in new developments, providing a detailed analysis of their implications for building performance, energy use, and costs. The report aims to inform local planning policies and decision-making processes regarding energy use and carbon emission reductions in new buildings.

7. Policy Option 1 operates within the framework of Part L 2021, continuing the current practice of focusing on reducing regulated carbon emissions. This option emphasises a single metric: the percentage reduction in carbon emissions compared to the baseline set by Part L 2021. It allows for carbon offsetting to play a significant role in achieving Net Zero status. However, it does not address unregulated emissions (such as those from equipment and appliances) and relies on energy modelling that does not predict actual energy use. This option is seen as a continuation of existing practices but has limitations in its effectiveness and measurability in truly achieving Net Zero Carbon developments.

8. Policy Option 2 proposes a more comprehensive approach by incorporating a suite of energy-based metrics. This option focuses 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. It considers all energy uses within a building and seeks to balance

energy consumption with on-site renewable energy generation. Policy Option 2 is designed to be more transparent, effective, and easier to monitor, as it is based on measurable outcomes rather than theoretical reductions. The study recommends this option as the more robust and forward-thinking approach for London boroughs aiming to translate their climate ambitions into tangible results.

**Climate Change and the Courts**

9. 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).*"

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

11. 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**

12. Section 1(1) of the Climate Change Act 2008 ("**CCA 2008**"), as amended by the Climate Change Act 2008 (2050 Target Amendment) Order 2019, imposes a

statutory obligation to ensure that the net carbon account for the year 2050 is at least 100% lower than the 1990 baseline. The United Kingdom has also committed, via its Nationally Determined Contribution ("**NDC**") under the Paris Agreement, to reduce emissions in 2030 by 68% compared to 1990 levels.

13. 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.

14. There are currently three relevant carbon budgets:

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

    b. The Fifth Carbon Budget (2028-2032), set on the same basis, is 1,725 $MtCO_2e$, which requires an average of a 57% reduction.

    c. The Sixth Carbon Budget (2033-2037) is aligned with net zero and sets a target of 965 $MtCO_2e$, which would equate to a 78% reduction in emissions by 2035, relative to the 1990 baseline.[2]

15. 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. 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.[3]

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

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

3 Ibid, pgs 24 and 430-433.

**Progress towards the Net Zero obligation**

16. The most recent CCC Progress Report to Parliament (July 2024)[4] 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.[5] In particular, the CCC found that missing or incomplete policies included those on energy efficiency in buildings.[6]

17. Emissions reductions from buildings (from a 2008 baseline) are smaller than the CCC has predicted.[7] The CCC specifically highlighted that the "*spatial planning system continues to cause issues for delivering Net Zero*".[8] While the CCC praised some improved clarity in the December 2023 National Planning Policy Framework ("**NPPF**"), on the weight local planning authorities should give to energy efficiency and low-carbon heating in existing buildings and on low-carbon energy infrastructure, it raised concerns over the 2023 WMS, which it said would be "*likely to cause further confusion and delays around adopting local NetZero policies, which is a setback.*" [9]

18. 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 $MtCO_2e$/year (1.6%). This will need to more than double to 14.3 $MtCO_2e$/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*

[4] CCC, *Progress in reducing emissions 2024 Report to Parliament*, July 2024, https://www.theccc.org.uk/publication/progress-in-reducing-emissions-2024-report-to-parliament/#publication-downloads.
[5] Ibid, pg 70.
[6] Ibid, pg 71.
[7] Ibid, pg 36.
[8] Ibid, pg 81.
[9] Ibid, pg 81.

*sustained decarbonisation action. These trends will need to speed up, enabled by programmes to roll out low-carbon technologies.*"[10]

**Climate change and planning policy**

19. The NPPF, published in December 2023, recognises that the duties under the CCA 2008 are relevant to planning for climate change. Paragraph 158, which is unchanged from the September 2023, July 2021, February 2019 and March 2012 versions of the NPPF (in which it was paragraph 153), provides that plans should "*take a proactive approach to mitigating and adapting to climate change*" (emphasis added). Footnote 56 makes clear this must be "*in line with the objectives and provisions of the Climate Change Act 2008*".[11] Policies "*should support appropriate measures to ensure the future resilience of communities and infrastructure to climate change impacts*". Energy efficiency policies clearly fall within the proactive approach to mitigation and making communities and infrastructure more resilient to climate change.

**QUESTION 1: THE 2023 WMS**

**Introduction**

20. 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).[12]

21. Also on 13 December 2023, DLUHC launched 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

[10] https://www.theccc.org.uk/publication/progress-in-reducing-emissions-2024-report-to-parliament/#publication-downloads

[11] This is also reflected in the paragraph 1 of the Planning Practice Guidance: Climate Change (ID 6-001-20140306) https://www.gov.uk/guidance/climate-change. The PPG on Climate Change is addressed further at §56-60 and 98-99 below.

[12] 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

(overheating).[13] It is notable that the consultation contains a specific section on metrics which refers to Energy Use Intensity ("**EUI**").

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

23. 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.*"[14]

24. 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).*"

25. Three important points arise immediately. First, this does not foreclose the possibility of setting higher standards, so long as the two bullet points are met. Second, 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

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

[14] *R (Rights Community Action) v SSLUHC* [2024] EWHC 1693 (Admin) at §10. The Secretary of State explained that the 2023 WMS and the Future Homes Standards consultation were approached as one package of measures.

for justifiable local exceptions: *R (West Berkshire DC) v SSCLG* [2016] 1 WLR 3923 at §30, per Laws and Treacy LLJ. Third, this is further reflected in the fact that there is some flexibility afforded to local authorities and planning inspectors when preparing and examining local plans.

26. 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),[15] 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"*.[16]

**The Planning and Compulsory Purchase Act 2004**

27. 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.

28. 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*".

29. 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:

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[15] Ibid §13; see also §17 of the Secretary of State's Detailed Grounds of Defence (7 May 2024).
[16] Ibid §15.

*"(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*".

30. Accordingly, the obligation in section 19(1A) falls both on the local planning authorities 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.

31. The obligation to "*have regard*" to national policy also falls on both local authorities 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 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.

32. 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.

33. By section 20(7)(b), the task of the local plan Inspector is come to a decision whether "*in all the circumstances, it would be reasonable to conclude … that the document satisfies the requirements [in s20(5)(a)] and is sound*." The PCPA 2004 does not define what it means for a plan to be "*sound*", but guidance is given on the meaning of that term in paragraph 35 of the NPPF, which provides that plans will

be sound if they are positively prepared; justified; effective and consistent with national policy.

34. The requirement for "*consistency with*" national policy means that, overall, the plan must agree or accord in substance of form, or be congruous or compatible with national policy: *R (Lochailort Investments Ltd) v Mendip DC* [2021] 2 P&CR 9 at §10, per Lewison LJ. It must also be born in mind that national policy can sometimes pull in different directions, meaning that planning judgment is required to determine overall consistency. The Courts have emphasised that soundness is a question of planning judgment, unlawful only on the basis for general public law principles: *Clifton Neighbourhood Forum v Calderdale Council* [2024] EWHC 1175 (Admin) at §13 per Fordham J; *Cherwell Development Watch Alliance v Cherwell DC* [2021] EWHC 2190 (Admin) at §20 per Thornton J; *Cooper Estates Strategic Land Limited v Royal Tunbridge Wells Borough Council* [2017] EWHC 224 (Admin) at §24 per Ouseley J.

**The Planning and Energy Act 2008**

35. The short PEA 2008 was introduced as a Private Members Bill by Michael Fallon MP. It provides:

> "*(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*."

36. The PEA 2008 was recently considered by the High Court in <u>*R (Rights Community Action) v SSLUHC*</u> [2024] EWHC 1693 (Admin) ("***the RCA judgment***"). It is very instructive to note that the Secretary of State submitted to the Court,[17] and Mrs Justice Lieven accepted at §55, that the PEA 2008 is <u>declaratory</u> or <u>confirmatory</u> 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.

37. 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 (see §65).

38. The RCA Judgment records that the material shows that the Private Members 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,

[17] See Detailed Grounds of Defence (7 May 2024) §25. <u>*R (Rights Community Action) v SSLUHC*</u> [2024] EWHC 1693 (Admin) at §10. The Secretary of State explained that the 2023 WMS and the Future Homes Standards consultation were approached as one package of measures.

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

39. Not mentioned in the judgment, however, is that the Private Members 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'*."[18]

40. 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.[19] 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.[20]

41. 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).[21] Mr Fallon MP explained that the provision that new development policies must not be inconsistent with national policies was to prevent inconsistency with the right of

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[18] House of Commons Library Research Paper 08/06 *Planning and Energy Bill* (21 January 2008) at pg 11 https://researchbriefings.files.parliament.uk/documents/RP08-06/RP08-06.pdf.
[19] Ibid.
[20] Ibid. The Merton Rule is set out in detail at pgs 15-16.
[21] House of Commons Library Research Paper 08/14 *Planning and Energy Bill: Committee Stage Report* (30 April 2008) at pg 12 https://researchbriefings.files.parliament.uk/documents/RP08-41/RP08-41.pdf.

consumers to choose their energy supply and with affordable housing requirements.[22]

42. 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 35(d) of the NPPF.

43. The Housing Minister at the time of the committee stage 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.*" [23]

44. 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, repeated those comments.[24]

45. He also confirmed that the Bill "*sits neatly with the fundamental measures that the Government are taking to cut emissions and tackle climate change. Those include the Climate Change Bill and the Energy Bill, which are now progressing through this House and the other place respectively, and the Planning Bill… [which] includes a key clause that will place a duty on local councils, when preparing their local plans, to take action on climate change.*" [25]

46. Much of the final debate on the Bill was focused on amendment require to prevent it from being interpreted as giving the Secretary of State regulation-making powers and on whether the Bill should await other legislation, which would cross-

[22] Ibid.
[23] Ibid pg 13.
[24] Hansard, 17 October 2008, column 1045.
[25] Ibid.

refer to the Bill. On the amendment, as cited in the RCA Judgment, the Minister explained the intention of clause 1(2) of the Bill:

> "*The intention was for local authorities, in setting energy efficiency standards, to choose only those standards that have been set out or referred to in regulations made by the Secretary of State, or which are set out or endorsed in national policies or guidance issued by the Secretary of State.*
>
> *That approach was taken with a view to avoiding the fragmentation of building standards, which could lead to different standards applying in different areas of the country. Although supportive of the hon. Gentleman's Bill, that was not an outcome that we wanted to achieve*." (§65)[26]

47. 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.*" [27]

48. Section 1(2) PEA 2008 defines energy efficiency standards by reference to standards set out by the Secretary of State in regulations or "*set out or endorsed in national policies or guidance*" issued by the Secretary of State. 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.

49. 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.

**The *RCA* Judgment**

50. In early 2024, Rights Community Action Ltd ("**RCA**") brought a legal challenge contesting the lawfulness of the 2023 WMS on ground which included that it

[26] Hansard, 17 October 2008, column 1049.
[27] Hansard, 17 October 2008, column 1050-51.

unlawfully restricted the powers of local authorities under the PEA 2008 and misdirected local authorities regarding their statutory duties. RCA contended that the result of the 2023 WMS would be that local planning authorities would be prevented from bringing forward energy efficiency policies based on the London Energy Transformation Initiative ("**LETI**") metrics, focusing on the carbon efficiency of the homes themselves (§12; §59).

51. 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 se□ng out guidance on what the Secretary of State considers to be reasonable – i.e. '*a reasoned and robustly costed rationale*'.*" (§71 Detailed Grounds).

52. The *RCA* judgment concluded that the 2023 WMS is lawful and does not unlawfully state the law or undermine the purpose of sections 1 of the PEA 2008 and 19 of the PCPA 2004 (§69). Lieven J held that the WMS does not attenuate or emasculate local planning authorities' statutory powers (§72), and that it accords with both the purpose of section 1(2) PEA 2008 and the ability of the Government, in section 1(5) PEA 2008, to constrain the setting of standards in development plans through national policies (§69).

53. 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 in their proposed policies.

54. It is plain that Lieven J found the meaning of section 1 PEA 2008 to be ambiguous. It is not particularly clear from §69 of the judgment whether 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 – she merely notes the similarity in purpose between section 1(2) of the PEA 2008 and the 2023 WMS.

55. It is also interesting to note that the Secretary of State did not explicitly argue,[28] 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 §n 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.

56. I should, however, caution that the crucial final reasoning in the *RCA* judgment is a little rushed. As a result, it is likely that those seeking to oppose the promulgation of Policy Option 2 type policies will seek to rely on the judgment and the 2023 WMS as making such policies impossible, or, at the very least, difficult to justify. In my view that would not be a fair or proper reading of the *RCA* judgment.

**Discussion**

57. In my view, neither section 1(2) PEA 2008 nor the 2023 WMS prevents local planning authorities from bringing forward policies modelled on either Policy Option 1 or Policy Option 2, nor do they prevent Inspectors from finding such policies to be sound.

58. The PEA 2008 confirms one way in which local planning authorities' pre-existing powers could be exercised, and this route supports policies falling within Policy Option 1. The PEA 2008 does not, however, foreclose other legislative routes by which different or more ambitious powers might be given to local planning authorities. Quite the opposite, as the debate at the time shows it was always recognised that climate-related legislative amendments might result in provisions providing such powers.

59. Policy Option 2 is supported by the more general power flowing from the duty in section 19(1A) of the PCPA 2004. The lack of progress in reducing emissions from the built environment sector since that duty came into force in 2009, and the need

[28] 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*".

for significant and swift action, supported by the CCC (see §§16-18 above) and the NPPF (see §19 above), all justify the choice of Policy Option 2, pursuant to section 19(1A).

60. The 2023 WMS does not prevent local plan policies based on Policy Option 2 from being brought forward by local planning authorities or being found to be sound in examination. The *RCA* judgment rejected the contention that the 2023 WMS emasculated or was incompatible with the powers in section 19 of the PCPA 2004. It is certainly correct that the 2023 WMS does not constrain or delimit the extent of the duty in section 19(1A). As set out at §§27-34 above, the 2023 WMS is policy guidance to which regard must be had, but from which deviation can be justified in so long as there is clear evidence which provides the reasons for so doing, and which demonstrates the viability of policies based on Policy Option 2.

61. On soundness, 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 based on Policy Option 2 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.

**QUESTION 2: GENERAL CONFORMITY WITH THE LONDON PLAN**

62. The London planning authorities, including the 32 London boroughs and the City of London, are responsible for preparing local plans for their own areas but must ensure that they are in general conformity with the Spatial Development Strategy for Greater London (March 2021) ("**the London Plan**").

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

> *"A Major development should be net zero-carbon. This means reducing greenhouse gas emissions in operation and minimising both annual*

*and peak energy demand in accordance with the following energy hierarchy:*

1) *be lean: use less energy and manage demand during operation*
2) *be clean: exploit local energy resources (such as secondary heat) and supply energy efficiently and cleanly*
3) *be green: maximise opportunities for renewable energy by producing, storing and using renewable energy on-site*
4) *be seen: monitor, verify and report on energy performance.*

*B Major development proposals should include a detailed energy strategy to demonstrate how the zero-carbon target will be met within the framework of the energy hierarchy.*

*C 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. Where it is clearly demonstrated that the zero-carbon target cannot be fully achieved on-site, any shortfall should be provided, in agreement with the borough, either:*

1) *through a cash in lieu contribution to the borough's carbon offset fund, or*
2) *off-site provided that an alternative proposal is identified and delivery is certain*

*D Boroughs must establish and administer a carbon offset fund. Offset fund payments must be ring-fenced to implement projects that deliver carbon reductions. The operation of offset funds should be monitored and reported on annually.*

*E Major development proposals should calculate and minimise carbon emissions from any other part of the development, including plant or equipment, that are not covered by Building Regulations, i.e. unregulated emissions.*

*F Development proposals referable to the Mayor should calculate whole life-cycle carbon emissions through a nationally recognised Whole Life-Cycle Carbon Assessment and demonstrate actions taken to reduce life-cycle carbon emissions."*[29]

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

64. 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.[30] 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.[31]

65. At §9.2.5 of the reasoned justification further addresses updating and the requirement to go beyond current Building Regulations: "*The minimum* ***improvement over the Target Emission Rate*** *(TER) will increase over a period of time in order to achieve the zero-carbon London ambition and reflect the costs of more efficient construction methods. This will be reflected in future updates to the London Plan.*" (emphasis in original)

66. The reasoned justification explains in §9.2.2 that: "***The energy hierarchy*** *(Figure 9.2) should inform the design, construction and operation of new buildings. The priority is to minimise energy demand, and then address how energy will be supplied and renewable technologies incorporated.*" (emphasis in original)

**Legal Background**

67. Part 2 of the PCPA 2004 concerns "Local Development". Sections 17 – 28C concern "Documents". Section 17 imposes the obligations to have in place local development documents and section 19 sets out various matters which are required to be addressed, including section 19(1A) on contributing to the mitigation of and adaptation to climate change.

68. Section 24 of the PCPA 2004 concerns conformity with regional strategies and provides as relevant:

> "*(1) The local development documents must be in general conformity with–*
> *…*
> *(b) the spatial development strategy (if the local planning authority are a London borough … .*
> *(4) A local planning authority which are a London borough … –*

[30] London Plan, 2021, p. 342, fn. 152.
[31] GLA Energy Assessment Guidance, June 2022, https://www.london.gov.uk/sites/default/files/gla_energy_assessment_guidance_june_2022_0.pdf

*(a) must request the opinion in writing of the Mayor of London as to the general conformity of a development plan document with the spatial development strategy;*

*(b) may request the opinion in writing of the Mayor as to the general conformity of any other local development document with the spatial development strategy.*

*(5) Whether or not the local planning authority make a request mentioned in subsection (4), the Mayor may give an opinion as to the general conformity of a local development document with the spatial development strategy. …*

*(7) If in the opinion of the Mayor a document is not in general conformity with the spatial development strategy the Mayor must be taken to have made representations seeking a change to the document.*"

69. The leading case on the meaning of "*in general conformity*" is the Court of Appeal decision in *Persimmon Homes (Thames Valley) Ltd v Stevenage BC* [2005] EWCA Civ 1365; [2006] 1 WLR 334 ("***Persimmon Homes***"), which concerned the previous requirements for "*general conformity*" between local plans and structure plans in the TCPA 1990, although it also referred to the PCPA 2004. The approach taken in *Persimmon Homes* to the meaning of "*in general conformity*" was applied to section 24 PCPA 2004 by *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin); [2013] JPL 940 (QBD (Admin)) ("***University of Bristol***") at §§107-108.[32]

70. All three Court of Appeal judges agreed with Law LJ's analysis of the meaning of "*general conformity*" in §§24-28 of *Persimmon Homes*.[33] He rejected any attempt to elicit an exact meaning of the phrase, but considered the question as to the flexibility of the requirement: is it relatively tight or relatively loose? He held in §28 that it was not enough for policies simply to be "*in character*" with the relevant regional plan, but that the requirement is relatively loose:

*"I consider that on its true construction the requirement may allow considerable room for manoeuvre within the local plan in the measures*

[32] While section 24 has undergone a number of amendments as various approaches have been taken to regional strategies – in particular regional spatial strategies – the provision concerning London Boroughs remains as originally worded when the provision came into force in March 2010.

[33] Lloyd LJ dissented on the very last part of §28, about whether the words were sufficiently wide to encompass reproduction of the regional policy in the local plan, subject to qualification as to justification or timing that none the less contemplates the purpose of the regional policy may be achieved in the plan period: see §§28, 68-71 and 86.

*taken to reflect structure plan policy, so as to meet the various and changing contingencies that can arise."*

71. All three Lord Justices agreed that the phrase leaves scope for some conflict between the two plans (§26; §71; §91), and that the adjective "*general*" indicated as much. The majority concluded that this flexibility included using the wording of a structure plan policy but qualifying its justification or timing.

72. The Court of Appeal recognised that the local plan is there to inform and guide local decisions and is likely to be of considerable significance to local investment and to choices about the pattern of local development and the environment. Accordingly, it "*is desirable in the public interest that the local plan should address relevant issues and do so as accurately and fully as it reasonably can*", and that the local planning authority should be able to balance the need for conformity against the ned for the local plan to take account of and explain the circumstances in which the strategic policy will be given effect (§28)

73. Laws LJ made it plain at §22 that, once the correct meaning is given to the phrase "*in general conformity*", the question of whether there is general conformity between plans is a matter of degree and planning judgment, with review by the courts limited to *Wednesbury* principles: ie matters of planning judgment are for the decision-maker, and will be unlawful only where no reasonable decision-maker could have come to the judgment, including where some mandatory material consideration is left out of account. See also Wall LJ at §92.

74. The consideration of whether the North Somerset Core Strategy was in general conformity with the relevant regional strategy, in §§109-131 of the *University of Bristol* decision, is an example of the flexibility given to local plan inspectors by that phrase.

**The "general conformity" of Policy Options 1 and 2 with the London Plan**

75. In light of the guidance from the case law, my view is that both Policy Options 1 and 2 are in general conformity with the London Plan.

76. Policy Option 1 is aligned more closely to the London Plan Policy SI 2 than is Policy Option 2. However, it is key that:

a. The overarching aim of Policy SI 2 is that major development should be net zero carbon, which is the aim of both policy options;
b. Policy SI 2 C sets a floor rather than a ceiling. On the plain wording, local plan policies can go beyond the minima set out in Policy SI 2 C and still be in general conformity with that policy;
c. Policy SI 2 explicitly refers to minimising both regulated and unregulated carbon emissions;
d. The reasoned justification explains the priority as minimise energy demand, on which Policy Option 2 focuses; and
e. The reference to TER in the reasoned justification is not a binding part of the policy, even if it were read into the policy wording, the flexibility inherent in "*general conformity*" means that other metrics could be used so long as they achieve the aims of Policy SI 2.

77. Taking all these matters into account, and in light of the flexibility inherent in the phrase "*in general conformity*", it is clear in my view that a local plan which included the indicative wording for Policy Option 2 would be in general conformity with the London Plan.

**CONCLUSION**

78. A summary of my advice is given in §3 above. Please do not hesitate to contact me if anything requires clarification, or if I can be of further assistance.

20 September 2024

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