CC004-B

IN THE MATTERS OF THE BUILDING REGULATIONS, PART L 2021
AND IN THE MATTERS OF THE PLANNING AND COMPULSORY PURCHASE ACT 2004 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 and to mandate higher building fabric standards than current and proposed Building Regulations on new developments, prior to the adoption of formal local plan policy

---

ADDENDUM TO OPEN ADVICES

INTRODUCTION AND SUMMARY

1. I have previously advised Essex County 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 (Further Updated Open Advice, 6 May 2025, "**Advice A**"), and to mandate higher building fabric standards for new development prior to the adoption of local plan policies making such provision (Open Advice, 31 December 2024, "**Advice B**").[1] In both advices I referred to the Planning and Energy Act 2008 ("**PEA 2008**") and the Written Ministerial Statement titled "Planning – Local Energy Efficiency Standards Update" ("**the 2023 WMS**"), including the litigation concerning its lawfulness and the decision of the High Court in *R (Rights Community Action) v SSLUHC* [2025] PTSR 135.

2. I am asked to advise in relation to two matters which have since arisen. First, on 25 July 2025, the Court of Appeal handed down its decision in *R (Rights: Community:Action) v SSLUHC* [2025] EWCA Civ 990 ("***Rights Community Action***"). I am asked whether the decision changes anything in my advices. For the reasons given below, while there are a few differences of emphasis, the Court of Appeal's decision does not change my advice; rather, it confirms and reinforces key aspects of that advice. In particular, the Court of Appeal's decision confirms:

[1] All advice is on this webpage: Essex Open Legal Advice | Essex Design Guide.

a. The 2023 WMS does not prevent LPAs from adopting local plan policies that require higher energy efficiency standards than Building Regulations, and reminded that national policy such as the 2023 WMS "*is no more than guidance*", and that "*[l]ocal circumstances may justify a departure from national policy…even where national policy is expressed in unqualified terms*" (§24);
b. The 2023 WMS does not override the power conferred by section 1 of the PEA 2008 or distort or displace the statutory scheme (§73);
c. The PEA 2008 gives LPAs the power to choose an energy efficiency standard, falling within the ambit of a standard referred to in regulations or policy made by the Secretary of State, which goes further than Building Regulations (§68).

3. There is one area of difference between my advice and the judgment of the Court of Appeal: the interaction between section 1 of the PEA 2008 and section 19(1A) of the Compulsory Purchase Act 2004 ("**PCPA 2004**"). Given the Court declines to express a view on the matter, my advice remains that LPAs can choose to act under section 19(1A) of the PCPA 2004, rather than under section 1 of the PEA 2008, and that these sections worked together given that 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.

4. Second, on 31 July 2025, the Inspectors examining the Uttlesford Local Plan 2021-2041 published a Post Hearing Note and on 1 August 2025, the Inspector examining the Salt Cross Village Area Action Plan published a Post Hearing Letter following examination of the remitted part of the Plan. Both examinations are considering the soundness of net zero energy efficiency policies which go beyond Buildings Regulations and which include Energy Use Intensity ("**EUI**") limits and space heating demands. In both instances, despite arguments to the contrary based on the PEA 2008 and the 2023 WMS, the Examining Inspectors found the policies generally to be sound. The Salt Cross Inspector provided reasoning, including that the 2023 WMS should be read in the context of wider national policy and legislative considerations.

REASONS

THE COURT OF APPEAL'S DECISION IN *RIGHTS COMMUNITY ACTION*

The 2023 WMS

Plan Making

5. The Court of Appeal's decision confirms that the 2023 WMS does not prevent LPAs from adopting local plan policies that require higher energy efficiency standards than Building Regulations. The Court of Appeal reminded that national policy such as the 2023 WMS "*is no more than guidance*", and that "*[l]ocal circumstances may justify a departure from national policy…even where national policy is expressed in unqualified terms*" (§24), citing *R (West Berkshire DC) v SSCLG* [2016] 1 WLR 3923 at §§21-30, per Laws and Treacy LLJ.

6. This confirms the approach taken in Advice A at §99; §111-113 and Advice B at §§39-41, which also cite *West Berkshire*.

7. The Court of Appeal also confirms that the 2023 WMS does not override the power conferred by section 1 of the PEA 2008 or distort or displace the statutory scheme (§73). This confirms my conclusion in Advice A at §115 and Advice B at §36.

8. In §103 of Advice A, I suggested that the High Court seemed to treat the 2023 WMS as relevant under section 1(2) of the PEA 2008 in "*endorsing*" specific energy efficiency standards. The Court of Appeal explicitly confirmed that the 2023 WMS is a section 1(2) policy, as it endorses the use of the draft Future Homes Standard as an energy efficiency standard which exceeds Building Regulations for the purposes of section 1(1)(c) of the PEA 2008 (§68).

9. I further advised in §104 of Advice A that it would not be correct to treat the 2023 WMS as cutting down LPA's powers via section 1(5) of the PEA 2008. The Court of Appeal's approach confirms that advice, particularly as the Court of Appeal clarified that, read properly, section 1(5) does not duplicate or overlap section 1(1)(c) (§67).

10. Finally, in relation to the Target Emissions Rate ("**TER**") metric, my advice was that LPAs would be justified in bringing forward policies which do not use the TER metric (Advice A §107). The Court of Appeal did not determine which metric would be preferable, as judicial review is not the proper forum to resolve such a question (§75). The Court of Appeal held that the reference to the TER metric in the 2023 WMS was not a reference to a particular energy efficiency standard. Rather, it was one of the criteria provided in the 2023 WMS allowing LPAs to justify energy efficiency standards higher than the draft Future Homes Standard (§77). In light of the Court of Appeal's earlier findings on the circumstances where departure from the 2023 WMS is justified, my advice on such departure through the use of Energy Use Intensity ("**EUI**") metrics still stands (Advice A at §§108-113).

Decision-Taking

11. The Court of Appeal's decision also confirms that the 2023 WMS does not prevent LPAs from making decisions in planning applications in line with their local plans, as the approach in the 2023 WMS is consistent with section 38(6) of the PCPA 2004 (§72, cross-referring to §23).While the Court of Appeal did not address the interaction of the 2023 WMS and additional other material considerations, such as climate change, nothing in the judgment affects the validity of the advice I gave on climate change as a material consideration in decision-taking, whether or not it is addressed in local plan policies (Advice B at §§42-58).

The Planning and Energy Act 2008

12. The Court of Appeal took a different approach to that taken by the High Court, and held that the PEA 2008 was not ambiguous or obscure, meaning that Hansard was not admissible in relation to its interpretation (§§69-71). Accordingly, §§73-82 of Advice A are no longer relevant to interpreting the PEA 2008.

13. The Court of Appeal confirmed that the PEA 2008 gives LPAs the power to choose an energy efficiency standard, falling within the ambit of a standard referred to in regulations or policy made by the Secretary of State, which goes further than Building Regulations (§68). This confirms my advice in §90 of Advice A.

14. In §§85-89 of Advice A, I set out that energy efficiency standards other than TER have been endorsed in the National Design Guide and can be used in the exercise of the section 1(1)(c) PEA 2008 power. The Court of Appeal did not engage with the written submissions before it, in the intervention by the Essex Planning Officers Association, concerning the National Design Guide. However, nothing in the Court of Appeal's judgment undermines my advice.

The Planning and Compulsory Purchase Act 2004

15. There is one area of difference between my advice and the judgment of the Court of Appeal, although given the Court declines to express a view on the matter, my advice remains the same.

16. My advice is that LPAs have the power under section 19(1A) of the PCPA 2004 to include in their draft local plans, and Inspectors to find sound, policies which go beyond current Building Regulations (Advice A at §67). I further advised that LPAs could choose to act under section 19(1A) of the PCPA 2004, rather than under section 1 of the PEA 2008, and that these sections worked together given that "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]" (Advice A at §91).

17. The Court of Appeal expressed the view that, if section 19 "provides the source of power for a LPA to make a local policy setting a more onerous standard than one endorsed by the Secretary of State, such as the draft Future Homes Standard ("**FHS**"), it could be said that a LPA has no need to rely upon s.1 of the PEA 2008 at all and the restraints in that provision upon setting standards that exceed the requirements of building regulations could be circumvented. That would make no sense." (§78). However, the Court of Appeal declined to reach a conclusion on the matter as the "parties did not produce a convincing analysis of the legislation which would resolve the issue." (§80).

18. It may be that the Court of Appeal would have been assisted by looking at the Hansard material on this point. Nevertheless, given the matter was left open by the Court of Appeal, I consider that my advice in Advice A stands. This is

[2] Hansard, 17 October 2008, column 1045.

particularly so given the Court of Appeal never suggests that section 19(1A) of the PCPA would not be capable of providing LPAs with power to put in place the policies which go beyond current Building Regulations.

19. In relation to Advice B, I advised that the PEA 2008 "does not foreclose other legislative routes by which different or more ambitious powers might be given to local planning authorities, which are supported by the more general power flowing from the duty in section 19(1A) of the PCPA" (§38). I consider that this advice also still stands.

LOCAL EXAMINATIONS

Uttlesford

20. Core Policy 22 of the draft Uttlesford Local Plan 2021 – 2041 requires all new buildings (of one or more new dwellings or 100sqm or more non-residential floor space) to be designed and built to be Net Zero Carbon in operation. To achieve this, the new buildings are required to comply with specified energy requirements, which include EUI limits and space heating demands. The draft policy refers to the Essex Design Guide and is supported by the Essex Net Zero Specification document.

21. Various parties at the Local Plan Examination contended that the draft policy was not consistent with national policy because it was inconsistent with the 2023 WMS, including because of the absence of a TER metric. Following hearings in June 2025, the Examining Inspectors provided a post-hearing note (31 July 2025),[3] which recorded their decision not to require any further main modifications in relation to the net zero housing standards beyond those proposed by Uttlesford District Council or discussed at the hearing (focusing on the renewable energy clause, which remained net zero). Their reasoning will be provided in due course in their report.

Salt Cross

22. In §§137-142 of Advice A, I addressed the Salt Cross Garden Area Action Plan ("**AAP**"), brought forward by West Oxfordshire District Council and the legal

[3] Available on the Examination Website.

challenge by Rights Community Action brought to an earlier WMS, as a result of which, "Policy 2 – Net Zero Carbon Development" ("**Policy 2**") of the AAP was remitted for reconsideration at a re-opened examination.

23. Policy 2 was subject to examination on 30 June 2025. It requires all development to achieve net zero operational carbon on site and sets building fabric requirements:
    a. buildings to meet a space heating demand of <15 – 20 kWh/m2.yr through ultra-low energy fabric, verified via predictive energy modelling at the detailed planning stage and monitored post-completion; and
    b. sector-specific EUI targets of <35 kwh/m2.yr for Residential; <70 kwh/m2.yr for Office and <65 kwh/m2.yr for Schools, with other sectors to be discussed with West Oxfordshire District Council as part of any pre-application discussions.[4]

24. Although stating that it supports the transition to Net Zero, Grosvenor argued[5] that the Policy was unsound because it was not consistent with national policy and was prescriptive and unreasonable. Grosvenor relied on:
    a. The PEA 2008, asserting that Policy 2 did not meet its "requirements"; and
    b. The 2023 WMS, asserting that it remains an extant expression of national policy; that West Oxfordshire District Council had failed to meet the five "tests" set out in the 2023 WMS and that West Oxfordshire District Council had not put forward evidenced reasons to justify any deviation from the WMS at Salt Cross.

25. Grosvenor also argued that the West Oxfordshire District Council's costs modelling in the Net Zero Carbon Development Evidence Base was not robust and that the Viability Appraisal was not robust or justified in its methodology. It argued the space heating demand and EUI targets were not justified.

26. Based on Advice A produced for Essex, West Oxfordshire District Council argued[6] the it was empowered to bring forward Policy 2 as this policy proposed energy

4 ED9D Proposed Modifications To Policy 2 And Supporting Text (March 2025).
5 Hearing Statement on behalf of Grosvenor (June 2025).
6 Hearing Statement on behalf of West Oxfordshire District Council (June 2025).

efficiency standards endorsed by the Government via the National Model Design Code. Again based on Advice A, West Oxfordshire District Council also argued that the duty in section 19(1A) of the Planning and Compulsory Purchase Act 2004 gave it the power to bring forward the policy and the Inspector the power to find the policy sound. West Oxfordshire District Council emphasised that Policy 2 addressed both climate mitigation and adaptation.

27. West Oxfordshire District Council further argued that the only departure from the 2023 WMS was in relation to the bullet point regarding TER, and that this was justified as the evidence base demonstrated that the use of TER would result in a distinctly sub-optimal solution, including that it would be more expensive. West Oxfordshire District Council argued that both its net zero and its viability evidence were robust.

28. On 1 August 2025, the Inspector published her Post Hearing Letter. Although the Inspector accepted there was evidence that viability was an issue for the Garden Village development, she concluded that the cost of Policy 2, while putting pressure on the overall viability of the scheme, did not increase its costs such that it would have a notable impact on viability. She considered the additional cost of going beyond the proposed FHS, and concluded, taking a holistic view, that the application of Policy 2 was unlikely to impose a high financial burden on the scheme or have a significant effect on housing supply and affordability.

29. The Inspector turned to the 2023 WMS and TER. She recognised that one of the objectives of the 2023 WMS was to prevent a proliferation of different standards and provide a standardisation of approach. However, she accepted West Oxfordshire District Council's evidence demonstrated the introduction and use of other metrics to measure energy efficiency, including the Government's introduction of the Home Energy Model to assess compliance with the FHS. She accepted that the Net Zero Carbon Development Evidence Base demonstrated that the EUI metric "is suitable and feasible to assess energy use" (§14).

30. On the 2023 WMS, the Inspector concluded:

> "I acknowledge that the WMS is a material consideration, but it should also be read in the context of wider national policy and legislative

considerations. Reducing carbon emissions and supporting the transition to net zero forms a central part of the Framework [Paragraphs 8(c), 161 and 164] in line with the objectives and provisions of the Climate Change Act 2008. However, no matter how energy efficiency is proposed to be measured, the environmental outcome, to mitigate climate change and contribute to meeting the net zero obligation, will remain the same. Based on the evidence before me, I conclude [West Oxfordshire District Council's] approach is consistent with national policy."

31. The Inspector concluded that some modifications would be needed, including to provide an element of flexibility and to clarify the space heating demand, which West Oxfordshire District Council has been invited to prepare.

32. Although the Inspector did not address *Rights Community Action*, her approach and her determination that Policy 2 is in overall compliance with national policy is in line with the Court of Appeal's decision. The Inspector's decision is also an endorsement of the robustness of the Net Zero Carbon Development Evidence Base.

CONCLUSION

33. A summary of my advice is given in §§2-4 above. Please do not hesitate to contact me if anything requires clarification, or if I can be of further assistance.

20 October 2025

ESTELLE DEHON KC

cornerstone barristers

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