

By email only

The Secretary of State for Housing, Levelling Up and Communities

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Your Ref:

Our Ref: RGA/00293456/5

Date: 30 March 2023

LETTER BEFORE CLAIM **THIS LETTER REQUIRES YOUR URGENT ATTENTION**

Dear Secretary of State for Housing, Levelling Up and Communities

In the proposed matter of R (oao Rights Community Action) v Secretary of State for Housing, Levelling Up and Communities

Introduction

1. By the proposed claim for judicial review the Claimant challenges the Inspector's report dated 1 March 2023 and published on 7 March 2023 concerning the Salt Cross Garden Village Area Action Plan. The Claimant will seek a declaration that the Inspectors' recommendations regarding Policy 2 proceed from an error of law in failing to properly interpret national policy. The Court will be asked to declare that the Council may lawfully adopt its Area Action Plan without the modifications required pursuant to the Inspector's report, alternatively a direction that the Inspectors reconsider their conclusions on Policy 2 in light of the judgment of the Court.

Party Details

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2. In accordance with the Pre-Action Protocol, we confirm the following details:
 - a. Proposed claimant: Rights Community Action Ltd (“RCA”).
 - b. Proposed defendant: The Secretary of State for Housing, Levelling Up and Communities
 - c. Proposed interested parties:
 - West Oxfordshire District Council
 - Grosvenor Developments Ltd
 - d. Our reference: RGA/KLA/00293456/5
 - e. The matter being challenged: The Inspector’s report, as described above.
 - f. Details of claimant’s legal advisers: Leigh Day, Panagram, 27 Goswell Road, London EC1M 7AJ; rgama@leighday.co.uk, kipek@leighday.co.uk
 - g. Counsel: Alex Goodman KC, Landmark Chambers

Jurisdiction

3. *Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 (Admin); [2012] J.P.L. 1188 was a judicial review challenge to a Council’s decision to approve its selection of sites proposed for allocation in its pre-submission draft Core Strategy. Lindblom J held at [86]-[87] that the Court could entertain a claim for judicial review in the run-up to a statutory process (the preclusive provisions of section 113 not applying). He held, “In principle it cannot be wrong to tackle errors that are properly amenable to judicial review, when otherwise they would have to await the adoption of the plan before the court can put them right.”
4. In *R. (IM Properties Development Ltd) v Lichfield DC* [2014] EWHC 2440 (Admin); [2014] P.T.S.R. 1484, Patterson J took a different view, holding that a document becomes a development plan document once submitted for examination and therefore the preclusive provisions of section 113 would not allow the court jurisdiction to hear a challenge until after adoption of the plan by the local authority. While it is acknowledged that this case suggests that the Court may not have jurisdiction at this juncture to hear the claim, our view is that the claim is wrongly decided in light of more recent consideration in *R. (CK Properties (Theydon Bois) Ltd) v Epping Forest DC* [2018] EWHC 1649 (Admin); [2019] P.T.S.R. 183. In that case the Claimant challenged the lawfulness of the Council’s decision to publish a draft local plan in accordance with reg.19 of the Town and Country Planning (Local Planning) (England) Regulations 2012 and thereafter submission to the Secretary of State for examination under s.20 of the 2004 Act.

5. Supperstone J held at [50] that “only a challenge to an adopted local plan is precluded by s.113(2) otherwise than by a challenge made under the provisions of s.113.”
We shall submit that Supperstone J’s approach, that a plan only becomes a “development plan document” on its ultimate adoption by the local planning authority as a local development document or its approval by the Secretary of State under s.21 or s.27 of the 2004 Act is the correct one and that a judicial review at this stage is therefore not precluded.
6. Paterson J’s analysis proceeded from a perceived policy advantage of not allowing “satellite litigation” before the adoption of a plan. However, there is no policy advantage in awaiting the publication of the plan, only for a challenge to delay it at that stage. We therefore support the analysis set out by the learned authors of the Encyclopaedia of Planning that a challenge of this kind is not precluded. That is particularly so in a context where the local planning authority may support an application for judicial review in respect of the inspector’s report prior to deciding whether to adopt the plan with the main modifications required by the inspectors. The view of West Oxfordshire District Council is being sought in this regard.

The Issues

Factual Background

7. The AAP relates to land that lies to the north of the A40, approximately halfway between Witney and Oxford. The area is rural, largely open countryside. The Local Plan was adopted in 2018. It includes Policy OS2, which identifies the development of a self contained settlement based on garden village principles to the north of Eynsham that is to be delivered as part of the overall distribution of housing set out in Policy H1. Policy EW1 sets out more detailed policy for the comprehensive development of a free standing exemplar Garden Village that is to be led by an Area Action Plan, which was the subject of the examination.
8. West Oxfordshire District Council (“WODC”) submitted what it considered to be a sound plan. The Salt Cross Garden Village Pre-Submission Draft Area Action Plan (August 2020) and the Additional Modifications contained in AAP - Schedule of Minor Modifications (February 2021) [CD6] were submitted for examination together in February 2021.

Policy 2

9. Policy 2 as submitted for examination was in the following terms (emphasis added):

“Policy 2 - Net Zero Carbon Development

Proposals for development at Salt Cross will be required to demonstrate net zero operational carbon on-site through ultra-low energy fabric specification, low carbon technologies and on-site renewable energy generation. An energy strategy will be required with outline and detailed planning submissions, reconfirmed pre-commencement, validated pre-occupation and monitoring post-completion demonstrating alignment with this policy.

Building Fabric

Proposals will need to use ultra-low energy fabric to achieve the KPI for space heating demand of <15 kWh/m².yr, demonstrated through predicted energy modelling. This should be carried out as part of any detailed planning submission, reconfirmed pre-commencement, validated pre-occupation and monitored post-completion.

Overheating

Thermal comfort and the risk of overheating should be given full consideration in the earliest stages of design to ensure passive-design measures are prioritised over the use of more energy-intensive alternatives such as mechanical cooling. At outline planning stage, overheating should be mitigated through appropriate orientation and massing and at the detailed planning stage, a modelling sample proportionate to development density will be required to demonstrate full compliance with CIBSE TM59 for residential and TM52 for non-residential development, addressing overheating in units considered at highest-risk. Overheating calculations should be carried out as part of the detailed planning submission and reconfirmed pre-commencement.

Energy Efficiency

Energy budgets (EUI targets) must be demonstrated using predicted energy modelling. The following KPI targets will apply:

- Residential <35 kwh/m².yr*
- Office <55 kwh/m².yr*
- Research labs <55-240 kwh/m².yr**
- Retail <80 kwh/m².yr*
- Community space (e.g. health care) <100 kwh/m².yr - Sports and Leisure <80 kwh/m².yr*
- School <65 kwh/m².yr*

To ensure best practice, an accurate method of predictive energy modelling, agreed in consultation with the District Council, will be required for a cross-section of building typologies (e.g. using Passive House Planning Package - PHPP or CIBSE TM45 or equivalent). This modelling should be carried out with the intention of meeting the target EUIs as part of the detailed planning submission, be reconfirmed pre-commencement, validated pre-occupation and monitored post-completion.

Fossil Fuels

The development will be expected to be fossil-fuel free. Fossil fuels, such as oil and natural gas should not be used to provide space heating, hot water or used for cooking.

Zero Operational Carbon Balance

100% of the energy consumption required by buildings on-site should be generated using on-site renewables, for example through Solar PV. The quantum of proposed renewable energy for the whole site (outline planning) and each phase (detailed planning) should be shown in kWh/yr. The amount of renewable energy should equal or exceed the total energy demand for the development in order to achieve net zero operational carbon as a whole.

The energy strategy should state the total kWh/yr of energy consumption of the buildings on the site and the total kWh/yr of energy generation by renewables to show that the zero-carbon operational balance is met. An explanation should be given as to how these figures have been calculated.

Renewable energy contribution calculations should be carried out as part of the outline and detailed planning submissions, be reconfirmed pre-commencement, validated pre-occupation and monitored post-completion.

A detailed low- and zero-carbon viability assessment should be carried out in support of the energy strategy detailing the selection of on-site low- and zero-carbon energy technologies.

Embodied carbon

Development proposals will need to demonstrate attempts to reduce embodied carbon to meet the following KPI:

< 500 kg CO₂/m² Upfront embodied carbon emissions (Building Life Cycle Stages A1-A5). Includes Substructure, Superstructure, MEP, Facade & Internal Finishes.

As part of the submission of any planning application, a report should be prepared which demonstrates the calculation of the expected upfront embodied carbon of buildings. Full lifecycle modelling is encouraged.

Embodied carbon calculations should be carried out as part of the outline and detailed planning submission, be reconfirmed pre-commencement, and validated pre-occupation.”

10. Following hearings of the examination, on 26 May 2022 the Inspectors Darren McCreery and David Spencer wrote to Mr Hargreaves, the Development Manager at WODC stating inter alia (emphasis added):

“Our conclusions on the issues and the reasons for Main Modifications will be set out fully in our report and we will take account of consultation responses, updated sustainability appraisal and other relevant information before reaching a final conclusion. As such, any detailed reasoning for recommending a specific Main Modification is best left to our report. Notwithstanding this, we anticipate that our conclusions in relation to Policy 2 (Net Zero Carbon Development) will come as a disappointment. As such, we will say at this stage that we are not satisfied that Policy 2 is either consistent with national policy or justified. As such, we are unable to conclude that the policy is sound. Our fuller reasoning on this matter will be set out in our report.”

Rights Community Action Response

11. Responding to the Interim Letter of the Inspectorate, on 25 July 2022, Leigh Day wrote to the Inspectors on behalf of RCA to express RCA's concerns that the Inspectors' approach to Policy 2 was wrong as a matter of law and policy and to request more detailed reasoning from the Inspectors. The Inspectors responded on 29 July 2022 declining to provide more detailed reasoning at that stage. It was only on publication of the Inspector's Report that any further reasons were provided.

Inspector's Report

12. The Inspectors' report dated 1 March 2023 was published on 7 March 2023 following examination involving public hearing sessions and contains the Inspectors' assessment of the Salt Cross Garden Village Area Action Plan (AAP) in accordance with Section 20(5) of the Planning and Compulsory Purchase Act 2004. It considers first whether the AAP's preparation has complied with the duty to co-operate. It then considers whether it is compliant with legal requirements and whether it is sound.
13. In accordance with section 20(7C) of the 2004 Act the Council requested that the Inspectors should recommend any Main Modifications [MM] necessary to rectify matters that make the AAP unsound and thus incapable of being adopted. Their report explains why in the Inspectors' view the recommended MMs are necessary.
14. The Inspectors recommended that the Area Action Plan was sound subject to a number of modifications including:

“Revise Core Objective GV3 and Policy 2 in relation to net zero-carbon development to remove prescriptive detail and enable a more pragmatic approach for the necessary transition to a low carbon future (...)”

15. It is that recommendation which is the subject of the proposed challenge.

Reasoning in The Inspectors' Report Dated 1 March 2023

16. The Inspectors summarised their approach as follows at paragraph 45:

“45. Taking account of all the representations, the written evidence and the discussions that took place at the examination hearings, we have identified 5 main issues upon which the soundness of the AAP depends. This report deals with these main issues and the MMs that arise. It does not respond to every point or issue raised by representors. Nor does it refer to every policy, policy criterion or written justification in the AAP.”

17. The Inspectors noted the importance of the declaration of climate emergency, but required modifications to Policy 1 (these are not challenged), (emphasis added):

“Issue 1 – Whether the scope and purpose of the AAP, and its vision and core themes are justified, effective, and consistent with national and local policy.

56. The Council’s decision to declare a climate emergency in 2019 has also influenced the overarching approach, including putting climate action front and centre of the AAP. The AAP is generally supported by proportionate evidence of the risks associated with climate change, set within an Oxfordshire context, including the Climate Smart Garden Village report [EV19]. The assessment is appropriately fed through the process of sustainability appraisal.

57. As climate resilience and adaptation cuts across much of what the policies in the AAP seek to achieve, there is a question mark over how Policy 1 is to be applied, given its generic nature. There is also a lack of clarity on how a natural capital approach would be demonstrated in practice. To ensure the AAP is effective, MM3 clarifies the universal nature of the matter, notably by confirming that Policy 1 would be met through compliance with all the policies in the AAP taken as a whole.

Conclusion on Issue 1

58. In conclusion on this issue, subject to the MMs identified, the scope and purpose of the AAP, and the vision and core themes are justified, effective, and consistent with national and local policy.” (Emphasis added).

18. Turning to Issue 4, the soundness of Policy 2 (which is the subject of the proposed challenge), the Inspectors reasoned in material part as follows at paragraphs 117-146 (emphases added):

“Issue 4 – Whether the AAP policies relating to net zero carbon development, zero waste, green infrastructure, and protecting and enhancing environmental assets are justified, effective, and consistent with national and local policy.

Net zero carbon development (Policy 2)

117. Policy 2 requires development at Salt Cross to demonstrate net zero operational carbon on site. It identifies a number of detailed standards/key performance indicators (KPIs) relating to building fabric, overheating, energy efficiency, use of fossil fuels, renewable energy, and embodied carbon. The requirements go beyond the approach in Policy EH6 of the Local Plan, which do not set specific standards.

118. The Council’s declaration of a climate emergency and objective for Salt Cross to serve as an exemplar, locally and nationally, in terms of moving towards net zero has heavily influenced the evolution of Policy 2. Taking an ambitious approach to net zero also achieved strong support from community and other groups.

119. Ambition on net zero is consistent with the overarching vision of the AAP, which puts climate action front and centre. Nationally, moving towards a low carbon economy is an objective of the planning system, as set out in Paragraph 8 of the NPPF, which is notably supported by Paragraphs 152 and 153. In the context of plan making, Paragraph 153 says that plans should take a proactive approach to mitigating and adapting to climate change.

120. The Net Zero Strategy sets out the Government’s wider ambition on net zero. It includes an intention to review national planning policy to make sure it contributes to climate change mitigation and adaptation as fully as possible. The outcome of this review has yet to be published. However, zero carbon building policy is clearly adjusting to respond to the challenge of meeting the legal commitment to achieve net zero by 2050 and the move is towards higher standards.

121. In light of the above, taking an ambitious approach to zero carbon building at Salt Cross is aligned with the wish for the development to be seen as an exemplar and the general direction of travel that national policy is taking. Although standards will inevitably change over time as the regulatory framework and technology evolves, ambition is also prudent in the interests of introducing an element of future proofing. This is particularly relevant in light of the delivery time frames associated with Salt Cross, the likely reductions in emissions that will be necessary over that period and the lifetime of the development, and the need to minimise costly and wasteful future retrofitting.

122. Notwithstanding the benefits of including policy on net zero building within the AAP, the detail of Policy 2 raises two soundness issues. The first is whether the building performance standards in Policy 2 are consistent with national policy in terms

of their relationship with the Building Regulations. The second is whether the overall approach taken in Policy 2 is justified on the basis of the available evidence.

Consistency with national policy

123. In relation to the building performance standards in Policy 2 as they would apply to dwellings, there is a question of whether the approach is consistent with national policy. The issue arises by virtue of Paragraph 154(b) of the NPPF and the need for local requirements for the sustainability of buildings to reflect the Government's policy for national technical standards.

124. Although various Government consultations linked to the Future Homes Standard have signalled potential ways forwards, the current national planning policy relating to the endorsement of energy efficiency standards exceeding the Building Regulations remains the Written Ministerial Statement (WMS) on Plan Making dated 25 March 2015. This is supported by the associated NPPG dated from 2019 which explains that the 2015 WMS sets out the Government's expectation that policies should not be used to set conditions on planning permissions with requirements above the equivalent of the energy requirement of Level 4 of the Code for Sustainable Homes (approximately 20% above the 2013 Building Regulations across the build mix). The 2015 WMS remains an extant expression of national policy.

125. The KPIs and wider approach in Policy 2 would amount to additional bespoke standards. The KPIs would sit alongside Part L of the Building Regulations and the Standard Assessment Procedure that is used to demonstrate compliance with it. They do not have a direct relationship with the Building Regulations that allows a percentage above the regulations to be easily generated. However, as the conclusions of the Elementa Report [EV17] indicate, the standards in Policy 2 would amount to a significant uplift on the 2013 Building Regulations. The approach in Policy 2 therefore conflicts with national policy set out in the 2015 WMS.

126. The 2015 WMS predates a number of events, notably in this context the climate emergency declared by the Council and others, publication of more recent carbon budgets that signal the pace of change needed in order to reach net zero by 2050, and delay to the timeline in the WMS for bringing forwards the Future Homes Standard.

127. It also predates the changes to Part L of the Building Regulations which came into effect on 15 June 2022, intended to pave the way for the Future Homes and Buildings Standard in 2025. In relation to residential buildings, the 2022 changes to the Building Regulations exceeds what the NPPG6 endorses only by exception. The WMS7 accompanying the 2022 changes to the Building Regulations is clear there will be no need for policies in development plans to duplicate the new overheating standard (which would be exceeded in the case

of Policy 2).

128. Notwithstanding the passage of time and intervening events, the 2015 WMS remains current national policy on this matter. The future of national planning policy is open to speculation. Nevertheless, it is uncontroversial to observe that higher standards of building performance will be required in order to meet necessary reductions in carbon emissions. What is less clear is the degree to which Government policy will require those standards to be applied as part of a nationally consistent approach utilising the Building Regulations as opposed to locally specific standards applied through the planning system.

129. Section 1 of the Planning and Energy Act 2008 allows local planning authorities to include in their development plan documents reasonable requirements for development to comply with energy efficiency standards that exceed the energy requirements of the Building Regulations. This is subject to requirements being reasonable and also the stipulation at Section 5 that policies must not be inconsistent with relevant national policies.

130. In this respect, there are inconsistencies between the approach set out in Policy 2 of the AAP and the national policy position explained above relating to exceeding the Building Regulations. In light of our conclusions relating to whether the overall approach in Policy 2 is justified, we do not regard the requirements as reasonable. As a result, the Council's ability to rely on Section 1 of the Planning and Energy Act 2008 is not demonstrated.

Whether the overall approach in Policy 2 is justified

131. Taken as a whole, the AAP aims to strike a balance between achieving comprehensive and sustainable development of the site and acknowledging that the precise detail of that development is subject to future master planning and continuing discussion with a range of stakeholders. There are a number of instances in the AAP where specific standards are set, for example in relation to biodiversity net gain and infrastructure. the Policy 2 more terms the and detail the and rigidity.

132. Whether the approach in Policy 2 is an appropriate strategy, and therefore justified is highly reliant on future master planning for Salt Cross being able to accord with the KPIs and other standards that are set out. Although a number of other studies have contributed towards the evolution of the detailed approach in Policy 2 [including EV18 and EV19], the Council identify the Elementa Report [EV17] as a primary source of evidence.

133. The report considers a series of building typologies in order to explore the cost and carbon implications of different scenarios, as well as technical feasibility. As might be expected given the absence of detailed master planning for the site, the typologies explored in the report are generic. However, this brings into question the

appropriateness of the selected typologies in terms of whether they satisfactorily demonstrate how the requirements of Policy 2 could be met when applied to a future master planning exercise.

134. There is a notable absence of detailed site specific consideration to show that delivery and other challenges at Salt Cross have been identified and properly considered as part of a rounded approach. This includes more detailed consideration of the energy needs of the science and technology park and whether the standards could be realistically met by an end user.

135. The ability of the evidence base to demonstrate appropriateness is not assisted by the lack of more detailed explanation relating to how the building typologies, KPIs, and other standards were selected in preference to alternatives.

136. Unlike development plan documents that apply across wider geographical areas with various development sites, the AAP focuses on a specific location and development, with a process of detailed master planning that is to follow. There is little before us to show that the evidence base supporting Policy 2 specifically responds to these circumstances, even on a proportionate level.

137. The detailed requirements also do not reflect the evolving nature of zero carbon building policy, where standards inevitably will change in response to technological and market advancement and more stringent nationally set standards, including within the Building Regulations. Policy 2 contains little flexibility to allow for such changes, or indeed to respond to detailed master planning that will evolve over time. This brings into question whether the evidence that supports the standards justifies the approach as a sound one.

138. We appreciate that Policy 2 provides a high degree of certainty about the standards that will be applied over the lifetime of the development. However, even judged on a proportionate basis, the evidence that underpins the prescriptive requirements lacks the necessary depth and sense of realism to show that Policy 2 represents an appropriate strategy. As such, Policy 2 is not justified.

Conclusion and modification to Policy 2 for soundness

139. There are inconsistencies between the approach in Policy 2 and national policy around exceeding the Building Regulations. We acknowledge that there are examples of plans that impose standards relating to the performance of buildings exceeding Building Regulations beyond the extent set out in the 2015 WMS. Some of these examples have been highlighted by the Council [WODC EXAM 06] and additionally in response to the proposed Main Modifications. Where the highlighted policies have been examined and adopted, they have been found sound on the basis of their own evidence base which, unlike the evidence underpinning Policy 2, was found to be robust. In addition, none of the

examples provided set standards that are as prescriptive as submitted for Policy 2, and with the same degree of inflexibility.

140. Overall, the evidence base does not justify the approach in Policy 2 as an appropriate strategy, even on a proportionate basis. There is also an absence of robustness and credibility to justify departing from national standards, which leads us to conclude that Policy 2 is inconsistent with national policy.

141. In terms of resolving the soundness issues, removing Policy 2 from the AAP altogether would result in a reliance on Policy EH6 of the Local Plan. As EH6 is a reactive policy, such an outcome would not align with Policy EW1 of the Local Plan.

142. Removal of Policy 2 would also not be consistent with the overarching vision of the AAP, which puts climate action front and centre. Nor would it fully reflect the general position of the evidence base, including the Energy Plan [EV18] prepared by Oxfordshire County Council. This evidence justifies taking an ambitious approach to zero carbon building at Salt Cross, notwithstanding our position in terms of whether the specific approach in Policy 2 is justified.

143. Modifying the AAP to remove or adjust specific standards relating to energy performance caught by the 2015 WMS or making a judgement on whether other individual standards in Policy 2 could be adjusted would also not be a sound approach. This is because the standards in Policy 2 are intended to work as a coherent whole.

144. Therefore, MM4 substitutes the wording of Policy 2 to introduce the need for an ambitious approach to the use of renewable energy, sustainable design, construction methods and energy efficiency. This is to be assessed at the planning application stage in response to an energy statement. The modification sets out what should be included within an energy statement, including elements set out in the submitted policy but without the specific, stringent requirements which we have found are neither consistent with national policy nor justified.

145. Following consultation on the MMs, it is necessary to amend the wording of MM4 to reaffirm and make clear that the starting point for development proposals is an alignment with the Council's ambition for net zero carbon at Salt Cross and that an ambitious approach in this regard must be demonstrated. In this context, and in light of representations on the proposed MMs, it is considered that the required content of energy statements for all major development proposals should be made clearer by reference to measurable targets and less qualification by removing phrasing such as "as appropriate" or "wherever possible". In our view, that would result in a policy that would be aspirational, but deliverable, based on the evidence before us and the

parameters of national planning policy. Overall, the amendments to MM4 would not alter the strategic intent of the policy and no one would be prejudiced by them.

146. MM2 makes a consequential adjustment to the Core Objectives of the AAP. “

Proposed Challenge

19. The Inspectors’ views on the soundness of Policy 2 proceed from an analysis of national policy, relying in particular on a contention that the policy conflicts with national policy, by which is meant the WMS. We will submit that misinterprets national policy and the relationship of Policy 2 with it.

Soundness

20. Firstly, the Inspectors misunderstood the WMS itself (primarily at [126]). The WMS set out that:

“For the specific issue of energy performance, local planning authorities will continue to be able to set and apply policies in their Local Plans which require compliance with energy performance standards that exceed the energy requirements of Building Regulations until commencement of amendments to the Planning and Energy Act 2008 in the Deregulation Bill. This is expected to happen alongside the introduction of zero carbon homes policy in late 2016.”

The zero carbon homes policy was abandoned.

21. Second, the Inspectors erred, (a) in regarding the WMS as an expression of national policy without placing that in the context of law and policy that has overtaken it and (b) in regarding it as carrying such authority that the perceived “inconsistency” with the WMS renders Policy 2 unsound.
22. The Inspectors’ approach to the question of whether there was a sound evidence base justifying the policy was infected by their misinterpretation of national policy, holding at [140] (emphasis added):

“140. Overall, the evidence base does not justify the approach in Policy 2 as an appropriate strategy, even on a proportionate basis. There is also an absence of robustness and credibility to justify departing from national standards, which leads us to conclude that Policy 2 is inconsistent with national policy.”
23. The errors in the Inspectors’ reasoning is illustrated by two recent decisions of the Secretary of State which have taken a correct (and therefore contradictory) approach to the question of national policy.

24. In the Report of Inspector Lewis to Bath and North East Somerset Council (“BANES”) dated 13 December 2022 the Inspector advised

“84. The WMS 2015 has clearly been overtaken by events and does not reflect Part L of the Building Regulations, the Future Homes Standard, or the legally binding commitment to bring all greenhouse gas emissions to net zero by 2050.

85. I therefore consider that the relevance of the WMS 2015 to assessing the soundness of the Policy has been reduced significantly, along with the relevant parts of the PPG on Climate Change, given national policy on climate change. The NPPF is clear that mitigating and adapting to climate change, including moving to a low carbon economy, is one of the key elements of sustainable development, and that the planning system should support the transition to a low carbon future in a changing climate. Whilst NPPF154 sets out that any local requirements for the sustainability of buildings should reflect the Government’s policy for national technical standards, for the reasons set out, that whilst I give the WMS 2015 some weight, any inconsistency with it, given that it has been overtaken by events, does not lead me to conclude that Policy SCR6 is unsound, nor inconsistent with relevant national policies.”

25. Similarly in the Report of Inspector Paul Griffiths to Cornwall Council dated 10 January 2023 following examination of the Cornwall Council Climate Emergency Development Plan Document holds in its relevant part, (emphasis added):

“166. Provisions to allow Councils to go beyond the minimum energy efficiency requirements of the Building Regulations are part of the Planning and Energy Act 2008. The WMS of 25 March 2015 says that in terms of energy performance, Councils can set and apply policies which require compliance with energy performance standards beyond the requirements of the Building Regulations until the Deregulation Bill gives effect to amendments to the Planning and Energy Act 2008. These provisions form part of the Deregulation Act 2015, but they have yet to be enacted. Further, the Government has confirmed that the Planning and Energy Act 2008 will not be amended. The result of all this is that Councils are able to set local energy efficiency standards for new homes, without falling foul of Government policy.

167. The WMS of 25 March 2015 has clearly been overtaken by events. Nothing in it reflects Part L of the Building Regulations, the Future Homes Standard, or the Government’s legally binding commitment to bring all greenhouse gas emissions to net zero by 2050. In assessing the Council’s approach to sustainable energy and construction, the WMS of 25 March 2015 is of limited relevance. The Framework makes clear in paragraph 152 that the planning system should support the transition to a low carbon future in a changing climate. Whilst paragraph 154 b) of the Framework requires that any local requirements for the sustainability of buildings should reflect the Government’s national technical standards, for the reasons set out, the WMS of 25 March 2015 has been superseded by subsequent events. While it remains extant, any inconsistency with its provisions does not mean that the approach the Council has

taken lacks justification. In that sense, there is nothing in the Council's approach that raises issues of soundness."

26. We submit that the BANES and Cornwall Inspectors were right in finding that policies which impose higher standards than those that flow from the 2013 Building Regulations (or the perceived effect of the WMS) are sound. Nor are they inconsistent with national policy. It follows that the AAP Inspectors were wrong to treat Policy 2 as being unsound by reason of it requiring a "significant uplift" on or "exceeding" the 2013 Building Regulations.
27. We invite the Inspectorate further to acknowledge the inconsistency between the approaches of its inspectors in relation to the up-to-dateness and consequently the weight to be given to the WMS. On that basis also, we respectfully request that the Inspectors re-open the examination of Policy 2 and reconsider the conclusions on the proposed main modifications to it in light of these decisions and a proper appreciation of the context of national policy.
28. Failing that proposed course, we intend to proceed with a claim for judicial review.

ADR proposals

29. The Secretary of State is asked to agree to reconsider the parts of the report on Policy 2. We are content to engage in ADR.

The details of the action that the defendant is expected to take

- Indicate that it will agree to reconsider the parts of the report on Policy 2;
- Respond to the issues raised in this letter.

The details of any information sought/details of any documents that are considered relevant and necessary

- Confirm the Defendant's view of Government Policy and the weight to be given to the WMS;
- Confirm whether the Defendant (and Interested Parties as the case may be) accepts that the claim is an Aarhus claim for the purposes of a costs cap if the claim is brought.

Address and proposed date for reply

1. You are requested to respond by email to ensure we have your response in a timely manner. Please send your response to Ricardo Gama (rgama@leighday.co.uk) and Klara Ipek (kipek@leighday.co.uk). Please within 14 days in view of the usual six-week timetable for issuing a claim, i.e. by no later than **13 April 2023**.

We look forward to receiving your response.

Yours faithfully,

A handwritten signature in black ink that reads "Leigh Day". The signature is written in a cursive style with a large, sweeping 'L' and a long, trailing 'y'.

Leigh Day