IN THE HIGH COURT OF JUSTICE **Claim no**

PLANNING COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

B E T W E E N :

R (RIGHTS COMMUNITY ACTION LTD)

Claimant

and

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendant

and

WEST OXFORDSHIRE DISTRICT COUNCIL

and

GROSVENOR DEVELOPMENTS LTD

Interested Parties

STATEMENT OF FACTS AND GROUNDS

References to [CB:X] mean page x in the core bundle, [SB:X] means pages in the supplementary bundle.

Recommended reading (estimated 2 hrs): - *(1) PAP correspondence [CB:64-89], (2) C's witness statements [CB:90-98], (3) Inspectors' Report [CB:50-63], (4) Written Ministerial Statement [CB:118-123].*

Introduction

1. In a report dated 1 March 2023 and published on 7 March 2023, the examining Inspectors of the Salt Cross Garden Village Area Action Plan ("the AAP") concluded that policies in that plan which set energy efficiency standards that exceed the energy requirements of building regulations were "unsound". By this claim, the Claimant submits that conclusion was erroneous in law.

2. Section 1 of the Planning and Energy Act 2008 (which is an important provision set out further below) provides:

> (1) A local planning authority in England may in their development plan documents… include policies imposing reasonable requirements for–
>
> …
>
> (c) development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.
>
> …
>
> (5) Policies included in development plan documents by virtue of subsection (1) must not be inconsistent with relevant national policies for England.

3. Several Inspectors appointed by the Secretary of State to examine local plans[1] have accepted that policies in local plans setting energy efficiency standards that exceed the energy requirements of the Building Regulations are not inconsistent with relevant national policies for England and are not unsound. However, the examining Inspectors of the Salt Cross Garden Village Area Action Plan ("the AAP") took a different approach to several of their Inspectorate colleagues [CB:58 ff.]. They found that Policy 2 of the AAP, concerning Net Zero Carbon Development, was not consistent with national policy and further held it was not justified: and accordingly that it was "unsound."

4. West Oxfordshire's Local Plan was adopted by West Oxfordshire District Council ("the Council") in 2018. The Local Plan included Policies OS2 and EW1 [SB:72-84], which identified the development of a self-contained settlement based on garden village principles, subsequently known as Salt Cross, to be delivered through an AAP that was to be the subject of separate examination.

5. Policy 2 of the AAP, as submitted to the Inspectorate by the Council, imposed a number of requirements on new development at Salt Cross, including that development should demonstrate net zero credentials through ultra-low energy fabric specification, overheating mitigation requirements, energy efficiency key performance indicators (KPIs), and being fossil fuel-free [CB:162-]. However, following the main modifications required by the Inspectors to make the policy sound, most of these requirements will have

[1] See, e.g. the Report of Inspector Lewis to Bath and North East Somerset Council dated 13 December 2022 [SB:11]; the Report of Inspector Paul Griffiths to Cornwall Council dated 10 January 2023 following examination of the Cornwall Council Climate Emergency Development Plan Document [SB:19]; the Report of Inspectors Matthew Birkinshaw and Clive Coyne regarding the Central Lincolnshire Local Plan Review (28 March 2023) [SB:29].

been removed and accordingly the environmental ambition of Policy 2 as amended is much reduced.

6. By this claim the Claimant contends that, in making their recommendations to the Council regarding (mandatory) modifications of Policy 2, the Inspectors erred in law in the following ways:

   GROUND 1. The Inspectors' recommendations that Policy 2 would be unsound without modification were materially influenced by an erroneous understanding of the 2015 Written Ministerial Statement on Plan Making dated 25 March 2015 ("the WMS") [CB:118].

   GROUND 2. The Inspectors failed to provide a clear reason for departing from the position of several of their Inspectorate colleagues, who concluded that the WMS had in any event been overtaken by events and could be given limited weight.

   GROUND 3. The Inspectors' conclusions on the required Main Modifications were reached in a procedurally unfair manner that did not allow the Council or the Claimant a fair opportunity to address the Inspectors' concerns, in breach of Inspectorate guidance on conducting examinations.

7. This claim is supported by evidence from the Town and Country Planning Association, the oldest charity in the UK concerned with planning, housing and the environment.[2] It is understood that the Council also support this claim.

Aarhus Convention Claim

8. This is an Aarhus Convention claim and the Claimant seeks costs protection under CPR Part 45 (VII). Pursuant to CPR 45.42(b), the Claimant has filed and served with the claim form a schedule of the Claimant's financial resources, including details of the Claimant's significant assets, liabilities, income and expenditure, and financial support (provided or likely) [CB:95].

[2] See the witness statement of Hugh Ellis [CB:99].

Statement of Facts

The Claimant

9. The Claimant is a non-governmental organisation incorporated as a limited company in January 2019 involved in community planning, particularly the formation of local development plans, and which participated in the examination of the AAP. Specifically, on 25 July 2022, the Claimant wrote to the Planning Inspectorate explaining why the approach set out in the Inspectors' interim conclusions was wrong as a matter of law and policy and requested an explanation to allow stakeholders such as itself to understand why the proposed Main Modifications were needed [CB:238]. The Planning Inspectorate responded on 29 July 2022 declining to provide any further reasons [CB:244]. The Claimant submitted a consultation response to the consultation on the Main Modifications in late 2022 (see further below) [CB:257].

The AAP

10. West Oxfordshire's 2018 Local Plan 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 [SB:73]. 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 recent examination [SB:81].

11. Core objective GV3 of the AAP states:

> "To design buildings fit for the future, mitigating the impact of Salt Cross on climate change by achieving zero-carbon development through ultra-low energy fabric and 100% use of low and zero-carbon energy, with no reliance on fossil fuels."

12. Policy 2 as submitted for examination was in the following terms [CB:162]:

> "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."

The examination and the Inspectors' interim response

13. Following submission of the AAP to the Secretary of State, the sole Inspector appointed at that time, Mr D McCreery, issued a list of matters, issues and questions ("MIQs") to be explored during the examination. Matter 7 related to various environmental matters, including net-zero carbon development. In the MIQs the Inspector asked for the sources of evidence to justify the Council's environmental policies, including policy 2.

14. The Council's response referred the Inspector to the evidence base submitted with the AAP, in particular the expert report it had commissioned '*Assessing the trajectory for*

net-zero buildings for the Oxfordshire Cotswolds Garden Village' (EV17), referred to as the "net zero carbon report" in the AAP.

15. During the course of the examination hearing sessions, held between 28 June and 8 July 2021, Policy 2 was discussed. The promoters of the site, the Second Interested Party, Grosvenor Developments Ltd ("GDL"), objected to Policy 2 based on previous representations made. The matters raised by GDL included (inter alia) criticisms on the grounds that the net zero obligations included in Policy 2 were inconsistent with National Policy, and that the evidence as to the deliverability and viability of the requirements was lacking.

16. During and following the hearing sessions, however, no further MIQs were issued by the Inspector as to the sufficiency of the net zero carbon report or the wider evidence base underlying Policy 2. Nor did the Inspector request that further evidence be provided. The only relevant agreed action points following the hearing sessions, was for the Council to "*provide details of other plans that have taken a similar approach to AAP policy 2*" [CB:265].

17. By contrast, on 27 July 2021, the Inspector did pause the examination process to allow the Council to prepare further evidence related to infrastructure phasing and delivery that he considered necessary in order to render the AAP's approach to infrastructure sound.

18. On 26 May 2022, nearly a year after the oral hearings had finished and the examination had been paused, the Inspectors wrote to the Council to confirm that the AAP would progress to the Main Modification and Reporting stage. By this time, a second Inspector has been appointed. For the first time they indicated Policy 2 was not, in their view, sound:

> "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." [CB:234

19. The Inspectors did not explain either why Policy 2 did not accord with Government Policy or why it was not justified.

The consultation

20. In accordance with section 20(7C) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), the Council requested that the Inspectors should recommend any Main Modifications necessary to rectify matters that they considered would otherwise make the AAP unsound and thus incapable of being adopted The draft Main Modifications received by the Inspectors included the requirement to significantly 'dilute' the prescriptive elements of Policy 2 [CB:238].

21. The Council wrote in response on 19 July 2022 to express concerns that the Inspectors had not provided sufficient reasons to enable it to understand why these main modifications to Policy 2 were required, and that interested parties would be unable to respond effectively to the proposed changes if no explanation was given as to why they were necessary [CB:236-237]. The Council requested that the Inspectors explain why the policy as proposed did not accord with national policy and why it was not justified and that this was necessary for consultation on the proposed main modifications to be effective. The Council drew attention to the Inspectorate's own procedural guidance for the main modifications stage. The Council pointed out that the Inspectors had not followed their own guidance which states [SB:64]:

> "6.4. The Inspector will aim to ensure that the LPA has a reasonable understanding of why all the potential main modifications are likely to be needed. Wherever possible the Inspector will seek to communicate this during the hearing sessions, but if there are issues for which this is not possible the Inspector will do so in writing as soon as possible afterwards. However, the Inspector's final recommendations, and the reasons for them, will be set out in the Inspector's report at the end of the examination."

22. On 19 July 2022, the Inspectors replied as follows [CB:236]:

> "Policy 2 was discussed at length during the Hearing sessions, with views heard from a number of parties. The potential need for modification to the policy was also raised by the Inspector and prompted the Council to document an action relating to the policy and the question of whether it was inconsistent with national policy. These actions by the Inspector were sufficient to meet the aim of ensuring that the Council had a reasonable understanding that potential main modification was likely to be needed, in line with the best practice set out in the Procedure Guide.

> It is not usual practice for Inspectors to share more detailed reasoning ahead of Main Modifications being identified and consulted upon. This is because any final conclusions are subject to the outcome of that consultation. However, in this instance, as the Inspectors knew the issue was of particular importance to the Council, as a courtesy they took the step of providing some additional explanation in the letter of 26 May [Insp17].
>
> The consultation on the Main Modifications is on the substance of modifications themselves. It is not on whether parties agree or not with the Inspector's reasoning for saying that a Modification is needed. As such, the full reasoning is not required in order to take part in the consultation. Providing such reasoning would instead pre-empt the outcome of the consultation."

23. The only action identified for the Council to take was to provide examples of similar policies in other plans. This it had done. The Inspectors' position that it was not usual to explain to the Council why they considered main modifications were necessary was contrary to paragraph 6.4 of the guidance which had been drawn to their attention.

24. On 25 July 2022, the Claimant wrote separately to the Inspectorate expressing frustration that the Inspectors had failed to provide any reasonable understanding as to why the tests for soundness had not been met in relation to Policy 2. The letter provided [CB:238]:

> "It is extremely frustrating that you have failed to provide any reasons for your finding that the council's draft of Policy 2 is unsound other than that it is inconsistent with national policy and unjustified. Without further explanation it is impossible for either the council, stakeholders, or members of the public to have a reasonable understanding of whether your analysis of the legal and policy position is correct, and therefore how to respond to any consultation on the MMs. It is particularly disappointing that you have taken this approach when Policy 2 is such a fundamental part of the draft AAP and is being looked closely at by other authorities who are attempting to address the climate emergency in their local plans.
>
> We consider that you have acted in breach of the Planning Inspectorate ("PINS") procedural guide for local plan examinations…"

25. The letter goes on to reference paragraph 6.4 of the Inspectorate guidance [CB:240].

26. The Inspectorate responded to the Claimant on 29 July 2022 enclosing the same response that had been sent to the Council [CB:244].

27. The consultation on the Main Modifications took place from 23 September 2022 to 4 November 2022.

The Inspectors' Report

28. The Inspectors' report dated 1 March 2023 was published on 7 March 2023 [CB:50]. The report explains why, in the Inspectors' view, the recommended Main Modifications are necessary.

29. The Inspectors recommended that the AAP was sound subject to a number of finalised Main Modifications including the following summary:

> "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 (…)" [CB:53]

The modified policy removes the requirement in Policy 2 that the development at Salt Cross will be "required to demonstrate net zero operational carbon on-site" and the detail as to how that will be secured:

> "Proposals for development at [*sic*] will be required to align with the District Council's ambition for achieving net zero carbon at Salt Cross. An ambitious approach must be demonstrated to the use of renewable energy, sustainable design and construction methods, with a high level of energy efficiency in new buildings. An energy statement will be required for all major development, which should demonstrate the following:
>
> • Low energy use – minimising the amount of energy consumed including in relation to building fabric performance. The use of ultra-low energy building fabric, appropriate and measurable targets for space-heating demand and energy use intensity (EUI) targets for different land-uses; West Oxfordshire District Council, Salt Cross Garden Village Area Action Plan, Inspector's Report 1 March 2023
>
> • Thermal comfort – thermal comfort and the risk of overheating in the earliest stages of design, including the use of passive design measures and the use of overheating modelling;
>
> • Low and zero carbon energy supply – maximising the use of onsite renewable energy and minimising the use of fossil fuels to zero;
>
> • Embodied carbon – reducing the impact of construction by minimising the amount of upfront embodied carbon emissions including appropriate embodied carbon targets. A calculation of the expected upfront embodied carbon of buildings and full lifecycle modelling;
>
> • Measurement and verification – appropriate arrangements for measuring and publicly reporting on the 'in-use' energy consumption of the different land-uses at Salt Cross postconstruction (e.g. for a period of 5-years)."

30. Regarding Issue 4, the soundness of Policy 2, the Inspectors' reasoning is at paragraphs 117-146 [CB:58-63]. The key part of their reasoning is that the Policy was unsound because, in going further than the Building Regulations, it was inconsistent with the 2015 WMS. At paragraph 145 they explain:

> "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."

31. The Inspectors also considered the Policy was not justified. The Inspectors' concerns over the evidence base were as follows:

a) The Inspectors considered there is a question over the appropriateness of the selected typologies in the evidence base in terms of whether they satisfactorily demonstrate that the requirements of Policy 2 could be met.

b) The Inspectors considered there is an absence of detailed site-specific consideration in the evidence base to show that delivery and other challenges at Salt Cross have been identified and properly considered in relation to Policy 2, including at the science and technology park where more detailed consideration is required.

c) The Inspectors considered there is a lack of more detailed explanation relating to how the building typologies, KPIs, and other standards were selected in preference to alternatives.

d) The Inspectors considered there is a failure in the evidence base supporting Policy 3 to respond to the specific location and development for which the policies of the AAP will be applied.

e) The Inspectors considered there is a failure in the detailed policy requirements to provide flexibility in the context of the evolving nature of zero carbon building policy, where standards inevitably will change in response to technological and market advancement and nationally set standards.

Applicable law and policy

Examination of development plan documents

32. The procedure by which development plan documents must be prepared and adopted is set out in the 2004 Act and the Town and Country Planning (Local Planning) (England) Regulations 2012 ("the 2012 Regulations") [SB:55].

33. The 2004 Act provides, so far as relevant [SB:38ff]:

> "**19 Preparation of local development documents**
>
> (1A) Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.
>
> ...
>
> (2) In preparing a development plan document or any other local development document the local planning authority must have regard to—
>
> (a) national policies and advice contained in guidance issued by the Secretary of State;
>
> **…**
>
> **20 Independent examination**
>
> (1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.
>
> ...
>
> (4) The examination must be carried out by a person appointed by the Secretary of State.
>
> (5) The purpose of an independent examination is to determine in respect of the development plan document—
>
> (a) whether it satisfies the requirements of s.19 and 24(1), regulations under s.17(7) and any regulations under s.36 relating to the preparation of development plan documents;
>
> (b) whether it is sound; and
>
> (c) whether the local planning authority complied with any duty imposed on the authority by s.33A in relation to its preparation.
>
> (6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.
>
> …
>
> (7B) Subsection (7C) applies where the person appointed to carry out the examination—
>
> (a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

(a) satisfies the requirements mentioned in subsection (5)(a), and

(b) is sound.

(8) The local planning authority must publish the recommendations and the reasons.*"*

34. A development plan document cannot be adopted without the recommended main modifications: s.23(4) of the 2004 Act.

35. The 2004 Act contains no definition of the term "sound". The term is defined in paragraph 35 of the NPPF:

> "Plans are 'sound' if they are:
>
> …
>
> b) **Justified** – an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;
>
> c) **Effective** – deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and
>
> d) **Consistent with national policy** – enabling the delivery of sustainable development in accordance with the policies in this Framework and other statements of national planning policy, where relevant."

<u>Jurisdiction to hear this claim</u>

36. Section 113 of the 2004 Act [SB:48] provides that a development plan document or a revision to it must not be questioned in any legal proceedings except insofar as provided in that section: that is, before the end of a six-week period beginning with the day after the document's adoption (s.113(3B) and (11)(c)).

37. *Manydown Co Ltd v Basingstoke and Deane BC* [2012] JPL 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."

38. In *R. (IM Properties Development Ltd) v Lichfield DC* [2014] PTSR 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.

39. However, as is suggested by the authors of the Planning Encyclopaedia at 2-4598-18, the more detailed reasoning that a challenge such as this may be brought before adoption of the plan in *R (CK Properties (Theydon Bois) Ltd) v Epping Forest DC* [2019] PTSR 183 is to be preferred. 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. 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*." His reasoning was based in part on the fact that s.17(8) of the 2004 Act states that a document is a "*local development document*" only in so far as it is "*adopted by resolution of the local planning authority as a local development document*" or approved by the Secretary of State under s.21 or s.27 of the 2004 Act.

40. It follows that, in accordance with the *CK Properties* case and the analysis in the Planning Encylopaedia, the Court has jurisdiction to hear this claim, as it is not a challenge to an adopted development plan document. That is also the conclusion most conducive to good administration since compelling this challenge to await the Council adopting the AAP with the modifications imposed would add a further period of uncertainty after adoption.

Climate change policies in the NPPF

41. Paragraph 8 of the NPPF provides that achieving sustainable development includes 'an environmental objective', namely *"mitigating and adapting to climate change, including moving to a low carbon economy*." [SB:95]

42. Paragraph 11a) of the NPPF provides that the presumption in favour of sustainable development means, in the context of plan-making, "*all plans should promote a sustainable pattern of development that seeks to: meet the development needs of their area; align growth and infrastructure; improve the environment; mitigate climate change (including by making effective use of land in urban areas) and adapt to its effects*." [SB:96]

43. Paragraph 20 of the NPPF provides that strategic policies should set out an overall strategy for the pattern, scale and design quality of places, and make sufficient provision for "planning measures to address climate change mitigation and adaptation." [SB:97]

44. Paragraph 152 of the NPPF provides that:

> "The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure." [SB:99]

45. Paragraph 153 of the NPPF provides that:

> "Plans should take a proactive approach to mitigating and adapting to climate change, taking into account the long-term implications for flood risk, coastal change, water supply, biodiversity and landscapes, and the risk of overheating from rising temperatures. Policies should support appropriate measures to ensure the future resilience of communities and infrastructure to climate change impacts, such as providing space for physical protection measures, or making provision for the possible future relocation of vulnerable development and infrastructure." [SB:99]

46. Paragraph 154 of the NPPF provides that:

> "New development should be planned for in ways that:
>
> a) avoid increased vulnerability to the range of impacts arising from climate change. When new development is brought forward in areas which are vulnerable, care should be taken to ensure that risks can be managed through suitable adaptation measures, including through the planning of green infrastructure; and
>
> b) can help to reduce greenhouse gas emissions, such as through its location, orientation and design. Any local requirements for the sustainability of buildings should reflect the Government's policy for national technical standards." [SB:99]

The Planning and Energy Act 2008

47. Section 1 of the Planning and Energy Act 2008 provides:

> "**1 Energy policies**
>
> (1) A local planning authority in England may in their development plan documents… 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.
>
> …
>
> (4) The power conferred by subsection (1) has effect subject to subsections (5) to (7) and to—
>
> (a) section 19 of the Planning and Compulsory Purchase Act 2004 (c. 5), in the case of a local planning authority in England;
>
> …
>
> (5) Policies included in development plan documents by virtue of subsection (1) must not be inconsistent with relevant national policies for England.
>
> …
>
> (7) Relevant national policies are—
>
> (a) national policies relating to energy from renewable sources, in the case of policies included by virtue of subsection (1)(a);
>
> (b) national policies relating to low carbon energy, in the case of policies included by virtue of subsection (1)(b);
>
> (c) national policies relating to furthering energy efficiency, in the case of policies included by virtue of subsection (1)(c)." [SB:52]

48. Section 43 of the Deregulation Act 2015 ("the 2015 Act"), had it been brought into force, would have had the effect of disapplying s.1(1)(c) of the Planning and Energy Act 2008

in certain circumstances, namely as it applies to development in England consisting of the construction or adaptation of buildings to provide dwellings, or the carrying out of any work on dwellings. In other words, energy efficiency standards for dwellinghouses would be centrally set, and LPAs would not be able to exceed the energy requirements of the Building Regulations. However, the government has confirmed that these provisions will not be brought into effect.

The WMS and subsequent government policy on energy efficiency

49. The 2015 WMS stated as follows [CB:122]:

> "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 2015.
>
> This is expected to happen alongside the introduction of zero carbon homes policy in late 2016. The government has stated that, from then, the energy performance requirements in Building Regulations will be set at a level equivalent to the (outgoing) Code for Sustainable Homes Level 4. Until the amendment is commenced, we would expect local planning authorities to take this statement of the government's intention into account in applying existing policies and not set conditions with requirements above a Code level 4 equivalent."

50. The above is summarised in the 2019 PPG on Climate Change (Paragraph: 012 Reference ID: 6-012-20190315 Revision date: 15 03 2019) [SB:70] .

51. Both the WMS and paragraph 12 of the PPG pre-date significant policy and legislative changes, including:

a) The government's confirmation that it will not bring s.43 of the 2015 Act into force. In its January 2021 response to the consultation on the Future Homes Standard, the government said the following (emphasis added) [SB:92]]:

> "2.39 All levels of Government have a role to play in meeting the net zero target and local councils have been excellent advocates of the importance of taking action to tackle climate change. Local authorities have a unique combination of powers, assets, access to funding, local knowledge, relationships with key stakeholders and democratic accountability. This enables them to drive local progress towards our national climate change commitments in a way that maximises the benefits to the communities they serve. As part of this, the Government wishes to ensure that we have a planning system in place that enables the creation of beautiful places that will stand the test of time,

protects and enhances our precious environment, and supports our efforts to combat climate change and bring greenhouse gas emissions to net zero by 2050.

2.40 We recognise that there is a need to provide local authorities with a renewed understanding of the role that Government expects local plans to play in creating a greener built environment; and to provide developers with the confidence that they need to invest in the skills and supply chains needed to deliver new homes from 2021 onwards. **To provide some certainty in the immediate term, the Government will not amend the Planning and Energy Act 2008, which means that local planning authorities will retain powers to set local energy efficiency standards for new homes**."

b) The amendment made to s.1(1) of the Climate Change Act 2008 by the Climate Change Act 2008 (2050 Target Amendment) Order 2019, which came into force on 27 June 2019, setting the new "net zero" by 2050 target and the associated Carbon Budget Order setting the sixth carbon budget;

c) Amendments to Part L of the Building Regulations in 2021 which have set energy efficiency standards for homes at a level exceeding Level 4 of the Code for Sustainable Homes;

d) The government's announcement that it intends to introduce a Future Homes Standard by 2025 for new-build homes, in which energy efficiency standards will be increased even further;

e) The government's January 2022 response to the Select Committee report on Local government and the path to net zero, where it said [SB:89] (emphasis added):

"The National Planning Policy Framework (NPPF) is clear that the planning system should support the transition to a low-carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low-carbon energy and associated infrastructure**. The NPPF expects Local Plans to take account of climate change over the longer term; local authorities should adopt proactive strategies to reduce carbon emissions and recognise the objectives and provisions of the Climate Change Act 2008.**

Local authorities have the power to set local energy efficiency standards that go beyond the minimum standards set through the Building Regulations, through the Planning and Energy Act 2008. In January 2021, we clarified in the Future Homes Standard consultation response that in the immediate term we will not amend the Planning and Energy Act 2008, which means that local authorities still retain powers to set local energy efficiency standards that go beyond the minimum standards set through

the Building Regulations. **In addition, there are clear policies in the NPPF on climate change as set out above. The Framework does not set out an exhaustive list of the steps local authorities might take to meet the challenge of climate change and they can go beyond this.**"

Consistency in decision-making

52. The principle of consistency in planning decision-making is well-established. It has been endorsed many times by the senior courts. The classic statement of the principle can be found in the Court of Appeal judgment of Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137 at 145.

53. In summary, while like cases do not have to be decided alike, a departure from a sufficiently similar decision requires a "clear explanation": *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2019] JPL 63 at [74]. Where an Inspector differs from an earlier decision-maker on a crucial issue, he must "grasp the intellectual nettle of the disagreement" and give his reasons for it (see e.g. *R (Angus Bates) v Maldon DC* [2019] EWCA Civ 1272 at 19(viii)). Where an examining Inspector departs from the earlier decision of another Inspector on an issue of critical importance to his conclusions on soundness, he must similarly give reasons for doing so (*Dylon 2 v Bromley LBC* [2019] EWHC 2366 (Admin) ("*Dylon 2*")).

54. As consistency in planning decision-making is important, there will be cases in which it would be unreasonable for a decision-maker not to have regard to a relevant decision bearing on the issues she is considering, even where that decision had not been specifically brought to his attention, so long as the circumstances are such that she should have been aware of the decision and its relevance: *DLA Delivery Limited v Baroness Cumberlege of Newick* [2018] JPL 1268 at [34].

Guidance on conducting examinations

55. The procedure by which local plans will be prepared and adopted is set out in the 2004 Act and the 2012 Regulations. Further procedural guidance as to how an Inspector should conduct an examination is set out in the NPPG, published by the Secretary of State, and the Planning Inspectorate's *Procedure Guide for Local Plan Examinations* ("the Procedure Guide"). This guidance is in place to ensure that the examination process is conducted in a procedurally fair and transparent way.

56. The NPPG provides as follows:

> "What is the role of the examination?
>
> […]
>
> The Inspector will need to work proactively with the local planning authority. Underpinning this is the expectation that:
>
> issues not critical to the plan's soundness or other legal requirements do not cause unnecessary delay to the examination of the plan
>
> Inspectors should identify any fundamental concerns at the earliest possible stage in the examination and will seek to work with the local planning authority to clarify and address these
>
> where these issues cannot be resolved within the examination timetable, the potential of pausing the examination should be fully considered, with the local planning authority having an opportunity to assess the scope and feasibility of any work needed to remedy these issues during the pause, so that this can be fully considered by the Inspector.
>
> […]
>
> Paragraph: 050 Reference ID: 61-050-20190315
>
> Revision date: 15 03 2019"

57. Similarly, the Procedure Guide says the following:

> "5.21. As Section 3 above makes clear, the Inspector will raise any fundamental flaws in the plan or the evidence base with the LPA as soon as possible. In some cases, however, it may not be possible for the Inspector to determine whether or not fundamental problems exist until the evidence has been thoroughly tested at the hearing sessions. It may therefore be necessary, after the hearing sessions have concluded, for the Inspector to write to the LPA asking them to undertake further work on the evidence base…The Inspector will seek to agree a timetable with the LPA for this further work and any necessary SA, HRA and consultation. A pause in the examination (see Section 9 below) will usually be necessary to allow the further work to take place."

58. The Procedure Guide also makes clear that Inspectors should seek to ensure that local planning authorities understand why any Main Modifications have been proposed:

> "6.4. The Inspector will aim to ensure that the LPA has a reasonable understanding of why all the potential main modifications are likely to be needed. Wherever possible the Inspector will seek to communicate this during the hearing sessions, but if there are issues for which this is not possible the Inspector will do so in writing as soon as possible afterwards. However, the Inspector's final recommendations, and the reasons for them, will be set out in the Inspector's report at the end of the examination."

59. The guidance also makes clear that a local planning authority, which will have invested much time and many resources into formulating a plan, is informed as to any deficiencies in its evidence base at the earliest opportunity, and also given every opportunity, at the earliest possible stage, to remedy any such deficiencies, and, where necessary, pausing the examination process to enable such evidence to be obtained.

GROUNDS OF CHALLENGE

Ground 1: Misinterpretation of the Written Ministerial Statement

60. The Inspectors' conclusions on the soundness of the plan proceeded on a flawed interpretation of the WMS.

61. The WMS states that "*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 2015*" [CB:122].

62. The amendments have not commenced, and the government has confirmed that this will remain the case in the immediate term. Thus, far from proscribing local plan policies that exceed the Building Regulations, the WMS actively endorses them. The Inspectors, however, failed to understand that. They held, for example, at paragraph 124 that the WMS and 2019 NPPG meant that:

> "[local] 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."

63. That interpretation of the WMS led to the conclusion at paragraph 125 of the report that:

> "… 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."

The Inspectors' interpretation of the WMS, and therefore of the consistency of the AAP with the WMS is in error.

64. The WMS does provide that, following the then-proposed introduction of zero carbon homes policy in late 2016, the energy performance requirements in Building Regulations would be set at a level equivalent to the (outgoing) Code for Sustainable Homes Level 4 (approximately 20% above the 2013 Buildings Regulations across the build mix): and the government "*would expect*" local planning authorities "*to take this statement of the government's intention into account in applying existing policies and not set conditions with requirements above a Code level 4 equivalent.*" The Inspectors alighted upon this in their discussion at paragraph 124 of their Report [CB:59]. However:

a) This relates to the setting of planning conditions where existing planning policies apply (see the recent 2023 Report of Inspectors Birkinshaw and Coyne, paragraph 174 [SB:34]).

b) This statement only applied "*until amendment is commenced*." The zero carbon homes policy has been abandoned, and the government has confirmed the amendment will not take place.

c) It is not a hard requirement. The WMS only requires this "*intention*" to be taken into account.

d) In any event, as the Inspectors accepted in their report at paragraph 125, the proposals in Policy 2 do not have a direct relationship with the Building Regulations that allows a percentage above the Regulations to be easily generated [CB:59]. Thus it is impossible to say that the requirements in Policy 2 would exceed the existing requirements by 20%, even if that was the test.

65. The Inspectors therefore adopted an incorrect reading of the WMS. They wrongly took the WMS to prohibit requirements in local planning policies that go further than the Building Regulations, which it does not.

66. That was an error which infected their reasoning in relation to:

a) The requirements of s.1 of the Planning and Energy Act 2008: because they wrongly assumed Policy 2 was contrary to the WMS, at paragraph 130 they wrongly concluded that s.1 of the 2008 Act did not apply and could not be relied on.

b) Their interpretation of paragraph 154(b) of the NPPF: which provides that "*Any local requirements for the sustainability of buildings should reflect the Government's policy for national technical standards*." The Government's policy for energy efficiency standards is that local planning authorities are entitled to exceed the requirements of the Building Regulations.

c) Their assessment of the Council's evidence base at paragraph 140 [CB:62]:

> "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."

67. Finally, the Inspectors' interpretation of the WMS must be wrong because, on their view, the effect of the WMS where section 43 of the Deregulation Act 2015 was not brought into force was the same as if it had been brought into force. Although the WMS says in terms that "*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 2015*", on the Inspectors' interpretation of the WMS, the very exceedance of energy performance standards set by the Building Regulations to which Policy 2 is aimed is inconsistent with the WMS and consequently, on the Inspectors' view, section 1(1)(c) of the Planning and Energy Act 2008 did not apply.

Ground 2: Failure to provide clear reasons for inconsistency with the interpretation of the WMS in other examination reports

68. The Inspectors' conclusions on the WMS are inconsistent with:

a) The interpretation set out in the Report of Inspector Lewis to Bath and North East Somerset Council ("BANES") dated 13 December 2022, where he said [CB:17]:

> "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."

b) the Report of Inspector Paul Griffiths to Cornwall Council dated 10 January 2023 following examination of the Cornwall Council Climate Emergency Development Plan Document, where he said [CB:22]:

"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 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."

69. Moreover, while not something that the Inspectors could have taken into account as it post-dated their decision, the unlawful and problematic nature of their position on the WMS is also exhibited by its inconsistency with the Report of Inspectors Matthew Birkinshaw and Clive Coyne regarding the Central Lincolnshire Local Plan Review (28 March 2023) [CB:35]:

> "In summary therefore, we conclude that the approach of Policy S7, which seeks to go above and beyond the requirements of the Building Regulations, is not inconsistent with national planning policy for the purposes of the Planning and Energy Act 2008. When read as a whole, it is also consistent with the Framework which states that the planning system should support the transition to a low carbon future in a changing climate and help shape places in ways that contribute to radical changes in greenhouse gas emissions. Whilst we find conflict with national planning practice guidance, both the PPG and the 2015 WMS have clearly been overtaken by existing and proposed changes to the Building Regulations brought into force in 2022. MMs are therefore not necessary to require the Plan to adhere to Code for Sustainable Homes Level 4 equivalent standards, which are now exceeded by the Building Regulations."

70. The Council expressly drew the BANES and Cornwall Plans to the Inspector's attention during the examination process. The Inspectors in the present case in their examination of Policy 2 were clearly aware that there were at least some other decisions that took a different view to them, as they noted at paragraph 139 of their report [CB:62]:

> "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."

71. However, what that response fails to do is give a "clear reason" why a completely different approach to the *interpretation* and *continuing relevance* of the WMS was taken. Legal questions of the meaning and effect of policy do not turn on case-specific evidence bases. Concerns regarding the evidence base or the prescriptiveness of Policy 2 are different issues that cannot affect the policy starting position, which must be established *before* applying the policy to the facts of a given case.

72. The relevance and status of the WMS 2015 as current national policy and the PPG in assessing whether Policy 2 was or was not consistent with national policy was clearly an issue of critical importance to the soundness of the policy (*Dylon 2*). Notwithstanding this, the Inspectors failed to explain clearly (or at all) why they reached the opposite conclusion to the BANES and Cornwall Inspectors on that question. Nor did the Inspectors explain why, in the circumstances identified by the BANES and Cornwall

Inspectors, s.1(5) of the 2008 Act was engaged so as to prevent the Council exercising its powers under s.1(1) of that Act.

73. This inconsistency has prejudiced the Claimant, who cannot understand how these wildly different conclusions have been reached by different Inspectors. Moreover, local authorities are now faced with a position where some Inspectors consider the WMS to be extant and will give it full weight whereas others do not. This is untenable.

Ground 3: procedural fairness

74. The requirements of procedural fairness will depend on the context in which a decision is taken, its nature, and the seriousness of its consequences (*R (Howard League for Penal Reform) v Lord Chancellor* [2017] 4 WLR 92 at [39]).

75. During the course of the examination, the Inspectors' approach to Policy 2 was procedurally unfair to the Council.

76. The Inspectors clearly had a "*fundamental concern*" (NPPG paragraph 050) as to the adequacy of the evidence base underlying Policy 2. Notwithstanding this, the Inspectors, contrary to their own guidance and contrary to the principles that govern procedural fairness, failed to explain the nature of those concerns to the Council either before, during or after the hearing sessions or at any stage up to the issuing of their report. They only did so when they produced their report, at a stage when it was too late to provide an opportunity to the Council to remedy its evidence base.

77. At no point prior to their report did the Inspectors explain the nature of their concerns despite repeated requests to do so nor did they request that further evidence be produced, either at the hearing sessions or thereafter. The only action required by the Inspectors was for the Council to produce other examples of local plan policies similar to Policy 2 which it did.

78. Even in May 2022 when the Council was first informed of the Inspectors' views that Policy 2 was not justified, they refused to provide any meaningful reasons as to why. This was despite being asked to do so by both the Council, the Claimant, and the TCPA. Instead, the Inspectors waited until production of the Report to explain why they

considered Policy 2 not to be justified when it was too late for the Council to seek to make good the suggested deficiencies.

79. The Inspectors' approach was clearly contrary to the guidance set out in both the NPPG and the Procedure Guide, cited above, which advise that Inspectors should identify significant issues in the evidence base at an early stage; consider pausing examinations in order to allow the production of further evidence where issues do arise; and provide local planning authorities with a reasonable understanding of why proposed main modifications may be needed so that they may seek to remedy identified deficiencies.

Conclusion

80. For the reasons set out above the claim passes the arguability threshold and should proceed to a final hearing.

81. By way of final relief, the Claimant will seek:

    a) An order quashing the Inspectors' report;

    b) Alternatively, a declaration that the report proceeded on an error of law and that accordingly Policy 2 can be adopted unamended,

    c) Costs.

ALEX GOODMAN KC

ALEX SHATTOCK

Landmark Chambers

12.04.2023