**EAST HAMPSHIRE LOCAL PLAN**

**“PLANNING – LOCAL EFFICIENCY STANDARDS UPDATE”**
**(THE 2023 WRITTEN MINISTERIAL STATEMENT)**

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# OPINION

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## Introduction, Background and Summary of Advice

1. I have been asked to advise East Hampshire District Council (“EHDC”) on the extent to which the Council is free, when bringing forward its new Local Plan, to include policies requiring new development to meet energy efficiency standards which exceed those found in building regulations. In particular, I have been asked to advise on the status and implications of the Written Ministerial Statement dated 13 December 2023 which states that “the Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned building regulations”; and that local plan examiners should reject energy efficiency standards going beyond current or planned building regulations:

> “if they do not have a well-reasoned and robustly costed rationale that ensures:
>
> - The development remains viable, and the impact on housing supply and affordability is considered in accordance with the National Planning Policy Framework.
>
> - The additional requirement is expressed as a percentage uplift of a dwelling’s Target Emission Rate (TER) calculated using a specified version of the Standard Assessment procedure (SAP).”

2. My instructions include a copy of an Opinion by Estelle Dehon KC, dated 25 February 2024, which has been released by Essex County Council, in which Ms Dehon has advised that:

   > "the 2023 WMS cannot be interpreted to prevent from putting forward, and planning inspectors from finding sound, policies which are justified and evidenced and which use metrics other than that specified in the 2023 WMS, and/or do not require calculation by the method specified in the WMS"

   And that

   > "the correct position in law is that LPAs and local plan inspectors should treat the trenchant language in which the 2023 WMS is written with circumspection. LPAs still have and can exercise the statutory power in section 1 of the [Planning and Energy Act 2008]. They are still bound by the duty in section 19(1A) of the [Planning and Compulsory Purchase Act 2004]. Neither the making of the WMS nor its wording can prevent the setting of local energy efficiency standards in development plan documents."

3. I understand that consultation responses to the reg. 18 stage of EHDC's Local Plan review have challenged this advice and provided an alternative interpretation of the relevant legislation. Specifically, EHDC has been alerted to the fact that, while section 1 of the Planning and Energy Act 2008 ("PEA 2008") empowers local planning authorities to incorporate policies for development to adhere to energy efficiency standards exceeding building regulations, section 2 clarifies that "energy efficiency standards" refer to those standards outlined in further regulations (none of which have been established) or those delineated or endorsed in national policies or guidance issued by the relevant national authority.

4. Against this backdrop, I have been asked to advise:

   a. Whether the WMS of 13th December 2023 could be interpreted as setting out standards for furthering energy efficiency as a matter of national policy or

guidance issued by the appropriate national authority, as per s.1(2)(b) PEA 2008.

b. Whether a positive answer to question (a) above would mean that planning policies using metrics other than those specified in the 2023 WMS (i.e. for regulating the energy efficiency of new development) are now beyond the scope of s.1 PEA 2008.

c. What support in legislation remains for planning policies for local energy efficiency standards that depart from the 2023 WMS.

5. In summary, and for the reasons set out in greater detail below, I disagree with Ms Dehon KC's suggestion that the 2023 WMS should be treated with circumspection because it "removes or frustrates the effective operation" of EHDC's powers under s. 1 of the Planning and Energy Act 2008 ("PEA 2008") and/or s. 19(1A) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"). The power under s. 1 PEA 2008 is expressly subject to the requirements that (i) the energy efficiency standards which authorities are allowed to reflect in their development plans are those which are set out or endorsed in national policies or guidance and (ii) the policies included are not inconsistent with relevant national policies. PEA 2008 thus expressly contemplates that the broad discretion conferred by s. 1 can and will be constrained by policy such as the 2023 WMS. The duty under s. 19(1A) PCPA 2004 is broadly stated and must be read alongside the requirement that, in preparing development plan documents, local planning authorities must have regard to national policy. While the 2023 WMS constrains the ways in which an authority can satisfy the s. 19(1A) duty, it does not frustrate that provision.

**Legal Framework**

6. Most of the relevant elements of the legal framework are set out in Ms Dehon's Opinion. I therefore highlight only the main points.

7. First, s. 19(1A) PCPA 2004 states that development plan documents

   > "must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change."

8. Second, s. 19(2)(a) PCPA 2004 states that, in preparing a development plan document, the local planning authority must have regard to national policies and advice contained in guidance issued by the Secretary of State. This requirement is linked to the provisions relating to the independent examination of development plan documents by s. 20(5) PCPA 2004, which states that the purpose of the independent examination of a development plan document is (inter alia) to determine whether the plan satisfies the requirements of s. 19, and whether it is "sound". PCPA 2004 does not define what "sound" means, but that explanation is provided in para 35 of the National Planning Policy Framework ("the NPPF") and includes whether the plan is "consistent with national policy".

9. Third, s. 1(1) PEA 2008 expressly confers on local planning authorities the power to include in their local development plan policies for "development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations". However:

   a. For these purposes, "energy efficiency standards" are defined by s. 1(2) as

      > "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"

   b. The power under s. 1 is subject to the requirement under s. 1(5) that "policies included in development plan documents by virtue of subsection (1) must not

be inconsistent with relevant national policies for England". For these purposes, "relevant national policies" are defined by s. 1(7)(c) as "national policies relating to furthering energy efficiency".

**Analysis**

10. As my instructions note, Ms Dehon's Opinion is grounded in a thorough examination of legislation and evidence. I agree completely with her conclusion that, even before the 2023 WMS, the 2015 WMS had been overtaken and did not prevent the setting of energy efficiency standards at local levels which went beyond national Building Regulation standards.[1] From a purely legal perspective, I also agree with her advice that policy statements and guidance issued by the Secretary of State do not amount to a legal rule, and that local decision-makers are legally free to rely on local or exceptional circumstances as to why a departure from national policy or guidance is considered to be justified. [2] However, I am considerably more cautious about her forceful conclusions on the status of the 2023 WMS, and the ease with which a local planning authority can depart from it. In particular, a significant part of Ms Dehon's reasoning is premised on her inference that application of the WMS would remove or frustrate the effective operation of the power that LPAs have under s. 1(1) PEA 2008, or the duty in s. 19(1A) PPA 2004. I disagree with that, for the following reasons.

11. First, Ms Dehon places considerable reliance on the Court of Appeal's decision in ***R (West Berkshire DC) v. SSCLG*** **[2016] EWCA Civ 441** as authority for the proposition that the Secretary of State is not entitled to seek by his policy to countermand or frustrate the effective operations of s.38(6) and s. 70(2)". That conclusion is undoubtedly correct as far as it goes, but it is important to understand the context within which ***West Berkshire*** was decided.

12. In particular, ***West Berkshire*** was concerned with the way in which local planning authorities should apply existing policies of the development plan when granting

[1] Para 60 of Ms Dehon's Opinion. The 2023 WMS expressly states that it supersedes the relevant section of the 2015 WMS

[2] Para 79 of Ms Dehon's Opinion. See also ***Barratt Development plc v. City of Wakefield MBC*** **[2010] EWCA Civ 897** @ para 11

planning permission, having regard to the statutory duties imposed by s. 70(2) Town and Country Planning Act 1990 and s. 38(6) PCPA 2004. In contrast, the present case concerns the approach to be taken when formulating new development plan policies. Neither s. 70(2) nor s. 38(6) has any bearing on that process. It is therefore necessary to consider the extent to which the statutory provisions which are relevant in the present case are comparable to those in ***West Berkshire***.

13. As to this, it is in my view significant that, whilst s. 70(2) imposes a duty on decision-makers to have regard to the development plan when determining applications for planning permission and s. 38(6) imposes a duty to determine applications in accordance with the development plan, unless there are material considerations which indicated otherwise, s. 1(1) of PEA 2008 simply confers a discretionary power on local planning authorities.

14. In circumstances where s.70(2) and s. 38(6) impose positive duties on local planning authorities, it is entirely understandable that the Court of Appeal concluded that the Secretary of State could not seek, by a policy, to override those duties. However, to the extent that s1(1) confers a discretion, the 2023 WMS does not prevent a local planning authority from exercising that discretion: as Ms Dehon recognises[3], it does not "foreclose the possibility of setting higher standards, so long as the two bullet points are met".

15. It follows that any criticism of the WMS 2023 must focus on the fact that it seeks to limit the circumstances in which, and the way in which, local planning authorities exercise the s.1(1) discretion. However (and as Ms Dehon acknowledges[4]) the requirements that development must remain viable and that the impact on housing supply and affordability must be considered are simply a "restatement of the usual legal ad policy position for this type of local plan policy". Indeed, they are entirely consistent with the requirement imposed by s. 1(1) itself, namely that the requirements must be "reasonable". Consequently, this part of the 2023 WMS cannot be regarded as objectionable or contrary to the s. 1(1) discretion, and it is only the WMS' insistence that additional requirements must be expressed as a percentage uplift of a dwelling's

[3] See para 64 of her Opinion
[4] See para 64 of her Opinion

TER, calculated using a specified version of the SAP, that constrains the options available.

16. Even if viewed in the abstract, I am not convinced that a statement by the Secretary of State as to the manner in which – as a matter of policy – the government considers local planning authorities should exercise the s. 1(1) discretion would give rise to conflict in the same way as an instruction to disapply a statutory duty, so as to engage the ***West Berkshire*** principle. In the case of s. 1(1), however, this point is put beyond doubt by ss. 1(2)(a) and s. 1(5).

17. As to the former, as those instructing me have pointed out, for the purposes of s. 1(1) PEA 2004, the "energy efficiency standards" in respect of which local planning authorities have the power to make provision in their development plans are those which fall within the definition provided by s. 1(2), i.e. they must either be standards set out or referred to in regulations made by the appropriate national authority, or standards set out or endorsed in national policies or guidance issued by the appropriate national authority.

18. In my view, it is inherent in s. 1(2) not only that regulations, national policies and guidance can limit or define the scope of the power of s. 1(1), but (at least arguably) that the power under s. 1(1) only exists to the extent that there are regulations or national policies or guidance which set out, refer to or endorse the kind of energy efficiency standards which a local planning authority may adopt. Either way, it cannot be said that the promulgation of regulations, national policy or guidance which set out the kind of energy efficiency standards which can be included in a local plan is contrary or undermines the discretion in s. 1(1).

19. As my instructions observe, there are no regulations of this kind, but in my view, the 2023 WMS constitutes national policy for these purposes. In particular, the 2023 WMS was made by (or on behalf of) the Secretary of State, who is the "appropriate national authority" in England, and the statement describes its contents as "policy". It follows, in my view, that there is no conflict between the 2023 WMS and s. 1(1).

20. This conclusion is reinforced by s. 1(5) PEA 2008, which states that policies included in development plan documents must not be inconsistent with the relevant national

policies for England. At para 48 of her Opinion, Ms Dehon states that "there is no definition of what the 'relevant national policies for England' comprise", but this is not entirely correct, since s. 1(7) tells us that "relevant national policies" for the purposes of s. 1(1)(c) are "national policies relating to furthering energy efficiency". While it is fair to say that the effect of the 2023 WMS is to limit the powers of local planning authorities to "further energy efficiency", this is premised on the view (set out in the WMS) that:

> "The improvement in standards already in force, alongside the ones which are due in 2025, demonstrates the Government's commitment to ensuring new properties have a much lower impact on the environment in the future."

21. In the circumstances, I consider the 2023 WMS clearly "relates" to "furthering energy efficiency" and is therefore "relevant national policy". As it is explicitly authorised by s. 1(5), it cannot be regarded as an unlawful derogation from or intrusion into the s. 1(1) discretion.

22. At para 73 of her Opinion, Ms Dehon argues that s. 1(5) does not change her analysis, but the reasons she gives for this do not address the point that, since s. 1(5) explicitly recognises that the s. 1(1) discretion can be constrained by policy, it fundamentally undermines the basis for any argument that the 2023 WMS is unlawful or should be treated with circumspection because it "removes or frustrates the effective operation of the power". Instead, the reason she gives for her view on the effect of s. 1(5) is that "other national policies that were promulgated after consultation and within the legislative framework of the 2004 Act" pull against the 2023 WMS.

23. This is an entirely different point to Ms Dehon's view that the 2023 WMS "removes or frustrates" the effective operation of s. 1(1). It is based on an approach which is analogous to that taken to the question of compliance with a development plan for the purposes of s. 38(6) PCPA 2004, namely that the issue has to be addressed by reference to the plan <u>read as a whole</u>. In principle, that approach may well be correct, but I do not agree that there are, in fact, conflicting statements in national policy which leave room for EHDC to argue that an energy efficiency standard which goes beyond

Building Regulations and is not based on the TER calculated using a specified version of the SAP is consistent with national policy when read as a whole. In particular:

a. The 2023 WMS explicitly addresses the uncommenced provisions of the Deregulation Act 2015[5] and describes the changes which have been made to Building Regulations since that date as rendering the 2015 WMS "moot". In this respect it is in my view clear that the 2023 WMS supersedes the various statements made by Government since 2015 concerning the status of s. 43 of the Deregulation Act 2015 which are quoted by Ms Dehon in paras 50-53 of her Opinion.[6] There is no question of these documents "pulling in different directions": each represented the Government's position at a particular point in time, and the 2023 WMS is the latest position.

b. This then leaves the matter of potential conflict with those passages from the NPPF to which Ms Dehon refers in paras 21-22 of her Opinion. However, while the NPPF is supportive of a "proactive approach to mitigating and adapting to climate change" it does not descend to any detail as to the manner in which local planning authorities are expected to do this, or to balance that objective against the need to deliver new housing. That is the issue which is addressed by the 2023 WMS, which is clear and categoric in this respect, in a manner which the NPPF is not. I do not consider the 2023 WMS gives rise to any conflict or tension with national policy. Rather, it simply puts "flesh on the bones" of the NPPF.

c. I note that the 2023 WMS ends with the comment that "Planning Practice Guidance will also be updated to reflect this statement". Although this updating has not yet taken place, it is a clear indication of the status which the government intends the 2023 WMS to have.

24. The position in relation to s. 19(1A) of PCPA 2004 is slightly different, because that sub-section does impose a duty on local planning authorities. However, that duty is

[5] Which would have excluded the construction or adaptation of residential dwellings from the scope of s. 1(c)

[6] i.e. the Government's January 2021 response to consultation on commencement of the amendment, the 2022 policy paper "Local Government and the path to net zero", and the written reply to Bath& North East Somerset Council dated 22 June 2022.

expressed in broad terms: the development plan document taken as a whole must include policies designed to secure that development and the use of land contribute to the mitigation of and adaptation to, climate change. In my view, while the WMS limits the range of policies which are available to local planning authorities for this purpose, it does not prevent them from fulfilling the s. 19(1A) duty. Again, it is relevant that s. 19(2)(a) PCPA explicitly recognise the role and relevance of national policy in the formulation of development plan policies.

25. Critically, there is nothing unusual about this. Although, as a matter of law, local planning authorities have both a broad, general discretion in relation to the preparation and content of their development plans, and certain specific duties,[7] large parts of the NPPF are directed towards telling them how they should go about formulating those plans, and what kind of policies they should and should not include. I am not aware that anyone has ever suggested that national guidance of this kind is ultra vires because it seeks to constrain the discretion of local planning authorities or prevent them from fulfilling their statutory duty, and I do not consider such an argument would have any real prospect of success.

26. For all these reasons, I disagree with the underlying premise of Ms Dehon's argument, namely that the 2023 WMS would frustrate the purposes of ss. 1(1) PEA 2008 and/or 19(1A) PCPA 2004, such that para 22[8] of the Court of Appeal's judgment in ***West Berkshire*** is engaged. However, even if I am wrong about that, it is important to remember what the eventual outcome of ***West Berkshire*** was. Whereas the High Court concluded that the WMS in that case was unlawful, the Court of Appeal expressly disagreed and allowed the Secretary of State's appeal on this basis. In so doing, the Court of Appeal said this:

> "The language of the WMS is in mandatory terms: '… a threshold beneath which affordable housing contributions should not be sought'. Once it is accepted that (as we have put it) the articulation of planning policy in unqualified or absolute terms is not in principle repugnant to the proper operation of s.38(6), this use of language is in our judgment unobjectionable. It

[7] such as the duty under s.39 PCPA 2004 to exercise their functions with the objective of contributing to the achievement of sustainable development
[8] See par 70 of Ms Dehon's Opinion

must be obvious that, as Mr Drabble submitted in reply, the aim or goal of a policy's author is that his policy should be followed. Moreover we should bear in mind that the Secretary of State is concerned not only to make policy in the planning field, but to participate as decision-maker in concrete cases, on appeals from the local planning authority. In that role he may well prefer his own policy to that of the development plan in case of conflict. If all the procedural requirements imposed by statute and by the common law are complied with, he is entitled to do so. More generally it is important to have in mind that the Secretary of State is responsible for national planning guidance and is answerable to Parliament for his discharge of that responsibility…"

27. These observations are important, given the decision in ***Keep Bourne End Green v. Buckinghamshire CC*** **[2020] EWHC 1984**, from which Ms Dehon draws the proposition that guidance from the Secretary of State does not amount to a legal rule, and can be departed from by "local decision-makers" if there are local or exceptional circumstances which justify that departure. This is correct, but is of limited relevance in circumstances where the local planning authority will not itself be the final decision-maker.

28. In the case of local plans, the ability to adopt a plan which departs from national policy will depend on whether the local plan examiner considers the departure is "sound". While there is nothing in law to prevent a finding that a plan which departs from national policy is sound, consistency with national policy is one of the four key tests to be applied in assessing soundness[9] and will therefore be the starting point adopted by any local plan examiner.

29. In my view, there is nothing in the legislative framework relied on by Ms Dehon which supports the conclusion that the Secretary of State is not entitled to give clear (even apparently mandatory) guidance to local plan examiners as to the manner in which – as a matter of policy – they should approach the test of soundness when examining a local plan. This is particularly so, given that one of the matters to which local planning authorities are required by s. 19(2)(a) PCPA 2004 to have regard when preparing their local plans is national policy and guidance. As the above extract from ***West Berkshire***

[9] See para 35 of the NPPF

demonstrates, an Inspector would be fully entitled to conclude that a policy is not sound because it is inconsistent with national policy such as the 2023 WMS,

30. Consequently, while Ms Dehon is strictly correct in saying that neither a local planning authority nor an inspector examining a local plan is <u>bound</u> by national policy, this says nothing about the robustness of the reasons needed in order to justify a departure from national policy, or the prospects of such an argument succeeding in front of an examining Inspector.

31. Finally, Ms Dehon refers to the decisions of previous local plan inspectors and the judgment in ***R (Rights: Community: Action Ltd) v. SSLUHC*** **[2024] EWHC 359 (Admin)**. However, the relevant decisions in all of these cases predated the 2023 WMS, and the judgment in ***Rights: Community: Action*** was concerned with the Local Plan Examiner's approach to the 2015 WMS. In my view, those cases have now been overtaken by the 2023 WMS, which is the most recent statement of government policy. In ***Rights: Community: Action*** Lieven J explicitly declined to express a view on the 2023 WMS, so her judgment does not assist in that respect.

32. For all these reasons, I consider that Ms Dehon's advice overstates the position. Although the 2023 WMS undoubtedly constrains local planning authorities in the manner in which they are able to carry out their duty under s. 19(1A) PCPA 2004 and exercise their discretion under s. 1(1) PEA 2008, it does not prevent them from doing either. Moreover, both statutes explicitly contemplate that the exercise of those powers should have regard to national policy. In my view, the tension between the statutory provisions and the 2023 WMS which lies at the heart of Ms Dehon's advice that the 2023 WMS should be treated with circumspection does not exist.

33. It follows, in my view, that any local planning authority which seeks to bring forward policies which adopt energy efficiency standards which are not based on "a percentage uplift of a dwelling's Target Emission Rate (TER) calculated using a specified version of the Standard Assessment procedure (SAP)" can expect a difficult task at the Local Plan Examination, with a considerable risk that the Inspector will conclude that the policy is not sound.

34. This advice flows from the fact that the 2023 WMS is the most recent statement of government policy. In this regard, I would only add that:

    a. Ms Dehon notes that there are "significant doubts about the lawfulness of the 2023 WMS" and refers to pre-action correspondence which suggests that there may be a legal challenge to it. I understand that a claim has since been lodged by Rights: Community: Action, and that a hearing has been set for 18-19 June 2024. It is beyond the scope of my instructions to comment on whether that claim is likely to succeed, and given that there is likely to be a High Court decision on the matter in the very near future, the sensible course would simply be to await the outcome of those proceedings. In the meantime, the 2023 WMS remains valid unless and until it is set aside, and EHDC should proceed on that basis.

    b. Ms Dehon also notes that the 2023 WMS was published at the same time as two consultations, one of which elates to a new methodology for assessing compliance with the Future Homes Standard. Should that methodology replace the SAP, the 2023 WMS will become out of date.

    c. Although I have seen nothing to indicate that (if elected) a new Labour government would withdraw the 2023 WMS, this again remains a point which should be kept under review.

**Conclusions**

35. Placing the analysis above in the context of the specific questions set out in my instructions, my advice is as follows:

***Q1. Could the WMS of 13th December 2023 be interpreted as setting out standards for furthering energy efficiency as a matter of national policy or guidance issued by the appropriate national authority, as per Section 2(b) of the Planning & Energy Act 2008?***

A1. Yes

***Q2.*** ***Would a positive answer to question 1 mean that planning policies using metrics other than those specified in the 2023 WMS (i.e. for regulating the energy efficiency of new development) are now beyond the scope of Section 1 of the Planning & Energy Act 2008?***

A2. Arguably, yes. However, even if the WMS is not an exclusive list of the energy efficiency standards which can be included in a development plan document, it is in my view relevant national policy for the purposes of s. 1(5). It cannot therefore be dismissed as being inimical to the exercise of the s. 1(1) discretion, and there is no reason why an Inspector examining the EHDC Local Plan should not give it full weight. In those circumstances, even if it is a standard which it is legally possible for EHDC to include in a policy, there is a strong possibility that it would be found unsound.

***Q3.*** ***What support in legislation remains for planning policies for local energy efficiency standards that depart from the 2023 WMS?***

A3. In my view, very little.

36. If there are any questions arising from the above, those instructing should not hesitate to contact me.

**PAUL BROWN K.C.**

**3 July 2024**

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