

local plans and net-zero objectives



There has been disbelief and despair at the Planning Inspectorate's (PINS's) decision to remove critical climate targets from the proposed West Oxfordshire Area Action Plan (AAP) for a new 'garden village'. This decision is even more extraordinary because the public in West Oxfordshire had backed this ambition. Their views were summarised as:

*'Climate change is the single most important issue for all of us to deal with and this must underpin the development and delivery of the garden village. There should be no reliance on fossil fuels with 100% use of renewable energy. All buildings should be zero-carbon or energy positive...'*¹

The Salt Cross Area Action Plan would have expected all new development to demonstrate net-zero operational carbon on site — 'would' because this ambition has been gutted by the decision of PINS in its notice of major modifications to the plan.²

Local authorities driving innovation on climate action have watched the plan's progress closely as a test case of how net zero can be implemented in Local Plans. The decision on required major modifications was published without the report setting out the detailed reasoning. However, because the decision is so damaging to the drive for net zero, it is worth reflecting on how PINS appears to have failed to properly apply both law and policy in a proportionate manner. It is also vital that the TCPA reassures other local planning authorities that the drive for the 'radical reductions' in carbon emissions is lawful, supported by and consistent with national policy, reflects growing community aspirations, and is, of course, vital to our collective survival.

The facts of the case are simple enough. West Oxfordshire District Council set out a robust policy for a new development in an AAP, and in so doing used the Garden City Principles and policy on the circular economy and climate change. This included an overall requirement, set out in the AAP's 'Policy 2 —

Net Zero Carbon Development',¹ committing the development to net-zero operational emissions on site. PINS's response has been to water down the net-zero policy, removing both the ambition and the detailed policy approach to deliver it. It is no exaggeration to say that PINS has wrecked the plan's overall net-zero approach. The modifications also remove the ambition for 100% renewable energy generation. West Oxfordshire's original Policy 2 proposed that:

'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 monitored post-completion demonstrating alignment with this policy.'

In their explanatory letter for the main modifications the planning inspectors state:

*'... 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.'*³

The TCPA believes that this reasoning is wholly wrong. The National Planning Policy Framework (NPPF) requires (in para. 35(d)) plans to be prepared in accordance with relevant legal requirements and sets out the soundness test for plans, which clearly states that policy must be consistent with relevant national planning policy. The West Oxfordshire policy is, in fact, an exemplar of its kind, based on detailed energy modelling and an effective regime of key performance indicators (KPIs). The modifications will make it vague and ambiguous, which is directly contrary to NPPF policy on plan-making (as set out in para. 16(d)).

The planning inspectors have imposed precisely the kind of ineffective policy that Local Plans should avoid. More importantly, that the planning system should support net zero is clearly government policy,



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not the invention of a single local authority. And the government has placed on record its intention to update national planning policy to fully support the net-zero and energy security strategies.⁴

So what are the key legal and policy arguments in this area? It is useful to begin with some clarity on what might be described as 'low-hanging fruit' in relation to planning for net zero. In terms of the fundamental justification for ambitious plan policies on reducing emissions, addressing climate change and specifically carbon reduction are legal and policy priorities for the planning system. Section 19(1A) of the Planning and Compulsory Purchase Act 2004 makes that crystal clear for plan-making, while paras 152–154 of the NPPF, read together with footnote 53, set out the need for 'radical reductions' in carbon emissions and for plans to take a 'proactive approach' to mitigating and adapting to climate change 'in line' with the objectives and provisions of the Climate Change Act 2008.

This means that plans must be in line with the required 80% carbon emissions reduction by 2035 and net zero by 2050. Carbon emissions reduction requirements in Local Plans have twin statutory anchors in both planning law and in relation to the Climate Change Act, whose carbon budgets are adopted as secondary legislation.

Therefore, as a matter of law and policy a local planning authority is entirely justified, and, in the TCPA's view, required, to set out a net-zero objective in planning policy. What we build today will be with us in 2050 and should wherever possible be fit for zero-carbon living. For the avoidance of doubt, it is also the emphatic view of the TCPA that a local authority

can lawfully set local energy efficiency requirements for new homes above Building Regulations (by 20% or otherwise), provided they are justified by local evidence in the usual way.⁵ The rest of this article sets out the basis for this view, as well as the wider legal and policy requirements that currently apply to planning for climate mitigation.⁶

At the time of writing we do not yet have the West Oxfordshire inspectors' detailed reasoning report, but, from what we do know, their required modifications appear to be based on concerns about the degree to which the AAP was compliant with national policy. Hobbling the plan's net-zero policies on that basis would be a clear departure from applicable law and policy.

In fact, the NPPF tells us that strategic policies should look ahead over a minimum 15-year period from adoption, 'to anticipate and respond to long-term requirements' (para. 22). So, at the very least, plans should be in line with the 80% cut in emissions by 2035 set in the Sixth Carbon Budget. And the NPPF makes clear (again in para. 22) that 'Where larger scale developments such as new settlements or significant extensions to existing villages and towns form part of the strategy for the area, policies should be set within a vision that looks further ahead (at least 30 years)'.

So, at the very least, a plan must reference the relevant carbon budget for the plan period and demonstrate the plan has the means to deliver new development in line with it. Any plan without such a policy cannot, reasonably, pass the NPPF soundness test. As a result, the decision by PINS to gut the net-zero policy is wrong and both irrational and unreasonable in terms of public law principles.

So much is clear from the generality of planning and climate law and policy on carbon emissions reduction. However, much of uncertainty in the minds of local authorities relates to the detail of the specific standards and actions that can be taken by a development plan to achieve the wider net-zero goal. There should be no dispute that local authorities can take a wide range of actions on location, sustainable transport and renewable generation, all of which play a key role in achieving net zero. Neither should there be any dispute that standards can be set for the energy performance of non-domestic buildings. Local authorities also have special powers to make requirements in relation to renewable and low-carbon energy and building performance, as set out in the 2008 Planning and Energy Act. The area of doubt in many local authorities' minds relates to setting energy efficiency standards for homes above Building Regulations requirements.

A 2015 Written Ministerial Statement (WMS)⁷ stated 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.' As explained below, the relevant amendment to the Planning and Energy Act 2008 was not subsequently commenced, and the related zero-carbon homes standard and update to Building Regulations referred to in the WMS was also subsequently abandoned.

The WMS then stated that '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.' Aside from the fact that this 'expectation' is clearly tentative and non-mandatory in nature, it also expressly applies only to development management and the setting of conditions under then-existing policies. It is also now clearly redundant, given that it is predicated on the since-withdrawn zero-carbon homes framework⁸—and, of course, given that the new Part L regulations are now higher than Code 4.

This was then cited in the 2019 update to the national Planning Practice Guidance (PPG), 'Housing: Optional Technical Standards' section, para. 001, as creating a restriction on the extent to which local authorities can impose standards above Building Regulations generally, i.e. including in setting new plan policies. However, as just set out, that is clearly not what the WMS said. And in any event, the courts have confirmed that PPG is not policy (however mandatory its wording is),⁹ and is therefore not part of the soundness test of consistency with national planning policy under para. 35 of the NPPF.¹⁰ And given the most recent statements by government (set out below), the abandonment of the zero-carbon homes standard, the introduction of new Building Regulations at a level higher than Code 4, and PPG's mis-statement of the content of the WMS, this PPG paragraph can reasonably be given no or very limited weight by local authorities in preparing plan policy.

In terms of the NPPF, para 154 (b) tells us that 'Any local requirements for the sustainability of buildings should reflect the Government's policy for national technical standards.'

Optional national technical standards at levels above Building Regulations were introduced following the 2015 WMS. These included national technical standards relating to water efficiency, for example. However, as stated in the 2015 WMS, this framework of national technical standards would not cover energy

efficiency, with local authorities retaining the power to set local energy efficiency standards for new homes.

The same analysis applies to Section 1(5) of the Planning and Energy Act 2008,¹¹ which states that Local Plan policies on renewable and low-carbon energy generation and the energy efficiency of buildings 'must not be inconsistent with relevant national policies' (defined as national policies relating to energy from renewable sources, low-carbon energy, or furthering energy efficiency).¹²

Section 43 of the Deregulation Act 2015 introduced powers to disapply the power to set energy efficiency standards in England in relation to housing development, but this provision has never been commenced. And in last year's response to the Future Homes Standard consultation,¹³ government underlined the contribution that local authorities can make to cutting carbon emissions and confirmed that it would not move to commence Section 43, pending anticipated reforms to the planning system:

'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.'

'2.41 ... Further, as we move to ever higher levels of energy efficiency standards for new homes with the 2021 Part L uplift and Future Homes Standard, it is less likely that local authorities will need to set local energy efficiency standards in order to achieve our shared net zero goal.'

Indeed, the government's response recognises the potential need for local standards to be set to achieve the national net-zero goal, stating only that this need will be 'less likely' as national standards become more stringent.

So, the full powers of the Planning and Energy Act 2008 on renewable and low-carbon energy generation and the energy efficiency of buildings remain available to local authorities.

To be clear, the fact that the WMS is not a sound basis for decision-making cuts both ways. That is to say, it is unsafe to rely on it to set a standard requiring a 20% uplift above the latest revision to Part L. That also would be arbitrary. Any uplift figure must be justified by local evidence and the wider legal and policy requirements set out by the government.

Put simply, local authorities have the power if they can make a sound case.

So, in summary... an overall objective on net zero in planning policy is enabled by the strong Planning and Compulsory Purchase Act 2004 Section 19 duty on climate change; is required by national planning policy which engages the Climate Change Act 2008 target regime; and is supported by the requirements of the net-zero and energy security strategies. The Planning and Energy Act 2008 empowers local authorities to set standards for renewables and low-carbon energy and energy efficiency, as long as they are consistent with national policy on those specific subject areas. There is no national policy which restricts on-site renewable energy generation and no restrictions on energy efficiency standards above Building Regulations for commercial buildings. And the 2015 WMS is out of date, and relying on references to it in PPG to stop local authorities setting ambitious standards is illogical and unreasonable.

The TCPA would strongly encourage local planning authorities to push at this boundary — not least because of the large backlog of consents for new homes that have been approved since 2016 with critically substandard requirements on climate mitigation.

It would be stupid to pretend that the national policy position on energy efficiency is not unhelpfully opaque for those on the front line of plan-making. The principal responsibility for this uncertainty lies with the government, and it must be resolved in the forthcoming update to the NPPF. The failure to properly address net-zero housing development in the aftermath of 2016 has resulted in confusion, not least in the minds of the Planning Inspectorate, which risks compromising the solutions that the nation so desperately needs. In that sense PINS is, as always, caught between a rock and a hard place.

However, in the view of the TCPA the main modifications to the West Oxfordshire Area Action Plan are badly misjudged and unjustified. The plan's net-zero objective is clearly in line with government policy; supported by the Sixth Carbon Budget, which is itself enshrined in law; and entirely consistent with the climate duty in the 2004 Planning and Compulsory Purchase Act and the powerful enabling law in the Planning and Energy Act 2008. Set against this weight of policy and law, PINS will have to produce an extraordinary argument to justify the destruction of West Oxfordshire's exemplary carbon ambitions.

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Notes

- 1 *Salt Cross Garden Village. Pres-submission Draft Area Action Plan.* West Oxfordshire District Council, Aug. 2020. www.westoxon.gov.uk/media/jscjctcl/salt-cross-aap-pre-submission-august-2020.pdf
- 2 *Examination of Salt Cross Garden Village Area Action Plan (AAP): Note Outlining Main Modifications Required.* Planning Inspectorate, May 2022. Available at www.westoxon.gov.uk/media/o4xhtfm0/insp-18-main-modifications-required.pdf
- 3 The inspectors' letter is available at www.westoxon.gov.uk/media/5i3bqjtb/insp-17-letter-to-council-re-main-modifications.pdf
- 4 *Net Zero Strategy: Build Back Greener.* HM Government, Oct. 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033990/net-zero-strategy-beis.pdf
The strategy commits to reviewing the NPPF to deliver on the 2050 target and interim carbon budgets
- 5 Viability testing will be an important aspect of introducing such provisions in plan policy. Where viability testing does take place, requirements for renewable energy and energy efficiency measures have financial costs and benefits, both of which should be recorded in any appraisal
- 6 This view has also been confirmed recently by central government in the context of a pending Local Plan examination — see para. 1.5 of *Note on the Setting of Local Energy Efficiency Standards for New Build Development, Local Plan Partial Update Examination.* Bath and North East Somerset Council. <https://beta.bathnes.gov.uk/sites/default/files/EXAM%2010%20Note%20on%20Local%20Energy%20Efficiency%20Targets%20FINAL.pdf>
- 7 Statement UIN HCWS448, by the Secretary of State for Communities and Local Government, 25 Mar. 2015, available at <https://questions-statements.parliament.uk/written-statements/detail/2015-03-25/HCWS488>
- 8 P Oldfield: 'UK scraps zero carbon homes plan'. *The Guardian*, 10 Jul. 2015. www.theguardian.com/environment/2015/jul/10/uk-scraps-zero-carbon-home-target
- 9 *R (Solo Retail) v Torridge DC* [2019] EWHC 489 (Admin)
- 10 Written Ministerial Statements and Planning Practice Guidance are material considerations in plan preparation and planning decision-making, but the level of weight placed on them will reflect (among other things) the extent to which they are up to date
- 11 Planning and Energy Act 2008. www.legislation.gov.uk/ukpga/2008/21/section/1
- 12 And in terms of the percentage of renewable energy required from on-site generation, there is no possible argument that national policy limits local authorities' power to impose standards, subject to the usual soundness tests
- 13 *The Future Homes Standard: 2019 Consultation on Changes to Part L (Conservation of Fuel and Power) and Part F (Ventilation) of the Building Regulations for New Dwellings. Summary of Responses Received and Government Response.* Ministry of Housing, Communities and Local Government, Jan. 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956094/Government_response_to_Future_Homes_Standard_consultation.pdf