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6 February 2024

PRE-ACTION PROTOCOL LETTER FOR JUDICIAL REVIEW
LETTER BEFORE CLAIM
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Secretary of State,

Re: The Written Ministerial Statement "Planning – Local Energy Efficiency Standards Update"

Introduction

1. This pre-action letter concerns the Written Ministerial Statement "Planning – Local Energy Efficiency Standards Update" ("**the 2023 WMS**"), made on 13 December 2023 made by Parliamentary Under Secretary of State (Baroness Penn) in the House of Lords (HLWS120) and then by Lee Rowley as Minister of State for Housing (HCWS123).

2. I write on behalf of the proposed Claimants in accordance with the Pre-Action Protocol for Judicial Review setting out the basis on which it is considered that the 2023 WMS is unlawful. For the reasons set out below, the making of the 2023 WMS: (i) unlawfully frustrates the effective operation of various statutes; (ii) was based on an irrational

justification; (iii) was due to serious logical or methodological errors; (iv) predetermined the outcome of consultation on the methodology for calculating energy efficiency; (v) followed an unlawful failure to undertake a consultation, when such a duty existed at common law; and (vi) breached his public sector equality duty ("**PSED**") and (vii) was irrational.

3. Given the contents of this letter, it is copied via e-mail to the Government Legal Department.

4. This letter sets out the factual (to the extent currently known) and legal basis on which any claim likely would be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.

5. Judicial review is a remedy of last resort and this letter is sent in the hope that this matter can be resolved without recourse to legal proceedings. The steps which you are asked to take in order to avoid recourse to the Court are therefore outline at the end of this letter. If a satisfactory response to this letter is not received, an application for judicial review may be made without further reference to you.

Party Details

6. The details of the claim are as follows:
   6.1. **The proposed Claimants:** A coalition of local authorities.
   6.2. **The proposed Defendant:** Secretary of State for Levelling Up, Housing and Communities.
   6.3. **The proposed Claimants' legal advisers:** Estelle Dehon KC
   6.4. **The Decision under Challenge:** the making of the 2023 WMS (HLWS120 and HCWS123).
   6.5. **Date of Decision:** 13 December 2023.
   6.6. **Interested parties**: none has been identified. Please indicate if you take a different view.

Factual Background

7. Section 1 of the Planning and Energy Act 2008 ("**the 2008 Act**") defined "energy efficiency standards" for the purpose of further energy efficiency as set out in regulations or endorsed in national policy or guidance. "Energy requirements" are the requirements of buildings in respect of energy performance or conservation of fuel and power.

8. There are a number of metrics for determining energy efficiency, including the Fabric Energy Efficiency Metric; the Primary Energy Metric and the Space Heating Demand and/or Energy Use Intensity approach.

9. Section 1(1) of the 2008 Act empowers local planning authorities ("**LPAs**"), in their development plan documents, to set higher standards for energy efficiency in their local plan policies than the baseline required by the Building Regulations provided that such policies are: (a) reasonable, (b) not inconsistent with national policies; and (c) compliant with the usual provisions around plan-making found in section 19 of the Planning and Compulsory Purchase Act 2004 ("**the 2004 Act**").

10. Section 1 of the 2008 Act provides:

> "(1) A local planning authority in England may in their development plan documents, corporate joint committee may in their strategic development plan, and a local planning authority in Wales may in their local development plan, 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.
>
> […]
>
> (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."

11. Section 19(1A) of the 2004 Act provides:

> "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."

12. On 25 March 2015, the then Minister of Housing, Communities and Local Government made a Written Ministerial Statement ("**the 2015 WMS**") setting out that, for the specific issue of energy performance, the government had created a new rationalised approach to setting technical standards for new housing. Local planning authorities would continue to be able to set and apply policies in their Local Plans which required compliance with energy performance standards that exceeded the energy requirements of Building Regulations until commencement of amendments to the 2008 Act in the Deregulation Bill 2015. The 2015 WMS set out that the Government's intention was that, from the commencement of the amendment, local plan policies could not be used to set requirements above the equivalent of Level 4 of the Code for Sustainable Homes, which was 19% above the national baseline in the Building Regulations, Part L 2013.

13. Clause 33 of the Deregulation Bill, which become section 43 of the Deregulation Act 2015, would have inserted a new section 1A into the 2008 Act, excluding the construction or adaptation of residential dwellings from the scope of section 1(c) of the 2008 Act. Section 43 of the Deregulation Act 2015 was, however, never brought into force.

14. The then Ministry of Housing, Communities and Local Government, now the Department for Levelling Up, Housing and Communities ("**DLUHC**"), clarified in

January 2021, in its response to Future Homes Standard consultation, that there was no intention to bring the provision into force, or otherwise to amend or repeal the 2008 Act.[1] The consultation had specifically asked when, if at all, the government should commence the amendment to the 2008 Act. The consultation responses showed that an overwhelming majority of respondents were in favour of the government not commencing the amendment. The government's response was:

> "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."

[1] The Future Homes Standard: summary of responses, and government response, January 2021, https://www.gov.uk/government/consultations/the-future-homes-standard-changes-to-part-l-and-part-f-of-the-building-regulations-for-new-dwellings.

15. In June 2022, in correspondence between Bath and North East Somerset Council and DLUHC,[2] the government reconfirmed the position. The written reply, dated 22 June 2022 and from Jonathan Mullard, Minister at the then Department for Business, Energy and Industrial Strategy, who confirmed that he was empowered to speak for DLUHC, stated:

> "- Plan-makers may continue to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish.
> - Local planning authorities have the power to set local energy efficiency standards 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 planning authorities still retain these powers."

16. On 13 December 2023, without any prior consultation, Baroness Penn, Parliamentary Under Secretary of State (Housing and Communities) made the 2023 WMS in the House of Lords. It was then made by Lee Rowley as Minister of State for Housing.

17. Please confirm who the decision-maker was who took the decision to make the 2023 WMS. For the purposes of this letter, it will be assumed that the Minister was the decision-maker.

The 2023 WMS

18. The 2023 WMS states that it supersedes the 2015 WMS and that the Planning Practice Guidance ("**PPG**") will be updated to reflect the 2023 WMS. It is noted that the PPG on Climate Change (paragraph 012 Reference ID: 6-012-20190315) has not yet been amended.

[2] Bath and North East Somerset, Examination Note on Local Energy Efficiency Targets, §1.5, https://beta.bathnes.gov.uk/sites/default/files/EXAM_10_Note_on_Local_Energy_Efficiency_Targets_FINAL.pdf.

19. On plan-making, the 2023 WMS states that "the Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned buildings regulations". The reference to the "planned building regulations" is taken to mean those subject to The Future Homes and Buildings Standards:2023 consultation and the Home Energy Model: Future Homes Standard consultation, which were published on the same day as the 2023 WMS[3] - it would be helpful if this could be confirmed in the PAP response.

20. The 2023 WMS gives guidance to local plan examiners that they should reject energy efficiency standards going beyond "current or planned building regulation", "if they do not have a well-reasoned and robustly costed rationale that ensures:

- That 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 Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP)."

21. On decision-taking, the 2023 WMS states that current policies which apply higher local energy efficiency standards "should be applied flexibly to decisions on planning applications and appeals", where the applicant can demonstrate that "meeting the higher standards is not technically feasible in relation to the availability of appropriate local energy infrastructure (for example adequate existing and planned grid connections) and access to adequate supply chains".

22. The 2023 WMS concludes by reminding decision-makers that the Secretary of State has powers of intervention in respect of local plans and planning decisions, and that the Secretary of State will "closely monitor the implementation of the policy set out in the WMS" and may use the intervention powers "in line with the relevant criteria" for intervening.

[3] https://www.gov.uk/government/consultations/the-future-homes-and-buildings-standards-2023-consultation

23. This makes very clear that the tone of the WMS is that LPAs should not make or apply policies that require local energy efficiency standards higher than national standards, even though the wording of the WMS allows for such higher standards in narrow circumstances.

24. The decision to make the 2023 WMS was taken without consultation and with minimal explanation. The potential Claimants would like to understand what considerations, if any, were taken into account by the Secretary of State (or other decision-maker) in making the decision to make the 2023 WMS.

Potential Grounds of Challenge

25. Each of the potential grounds of challenge is addressed below. Please note that the potential Claimants reserve the right to amend the grounds, or to add/remove grounds of challenge, based on your response and any further matters which come to light, and may do so without further recourse to the potential Defendant.

Potential Ground 1: Frustrating the effective operation of various statutory powers

26. The 2023 WMS addresses two areas of planning which are subject to specific statutory powers and duties. In relation to plan-making, those powers and duties include section 1 of the 2008 Act and section 19(1A) of the 2004 Act. In relation to decision-taking, those powers and duties include section 38(6) of the 2004 Act and section 70(2) of the Town and Country Planning Act 1990 ("**the 1990 Act**").

27. In the case of *R(West Berkshire DC) v SSCLG* [2016] 1 WLR 3923; [2016] EWCA Civ 441 ("***West Berkshire***"), the Court of Appeal considered an appeal against the quashing by the High Court of a WMS on affordable housing which purported to exclude from affordable housing levies and tariff-based contributions developments of ten units or 1,000 m^2 or less. A key reason that the WMS was found by the High Court to be unlawful was that the language constituted "an instruction to planning decision-makers to depart from established local plan policies" (see §14), which was held to conflict with section 38(6) of 2004 Act and section 70(2) of the 1990 Act.

28. The Court of Appeal held that the articulation of planning policy in unqualified or absolute terms is lawful (§21), but that the Secretary of State is "not entitled to seek by his policy to countermand or frustrate the effective operation of sections 38(6) and 70(2)", even though he could express the policy in absolute terms (§22).

29. This applies to the 2023 WMS. It must be applied subject to other relevant statutory obligations within the planning statutory scheme. In relation to decision-making, it cannot seek to countermand or frustrate the effective operation of sections 38(6) and 70(2). It cannot disapply the primacy of development plans which have been adopted. It operates subject to those statutory obligations, and must lawfully be applied subject to them, and also subject to any justifiable local exceptions, rather than in a blanket fashion (see also §30 of *West Berkshire*).

30. In relation to plan-making, the 2023 WMS cannot seek to countermand or frustrate the effective operation of sections 1 of the 2008 Act and 19(1A) of the 2004 Act. Accordingly, the 2023 WMS cannot remove, effectively remove or frustrate the statutory power given to LPAs in the clear wording of section 1 of the 2008 Act: they may in their development plan documents include policies requiring development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations, subject only to the limitations in sections 1(4) and (5) of the 2008 Act.

31. Furthermore, the Courts have emphasised that guidance from the Secretary of State (specifically in the planning context, although the principle applies generally) "does not amount to a legal rule, and that local decision-makers are free to rely on local or exceptional circumstances as to why a departure from that national guidance is considered to be justified": *Keep Bourne End Green v Buckinghamshire CC & SSHCLG* [2020] EWHC 1984 (Admin) at §105.

32. Accordingly, the Secretary of State is invited to confirm, explicitly, in his PAP response that the intention of the 2023 WMS was not to countermand or frustrate the effective operation of the relevant statutory provisions, and that it cannot and

should not be applied in a way that countermands or frustrates section 1 of the 2008 Act and section 19(1A) of the 2004 Act, and/or section 38(6) of the 2004 Act and section 70(2) of the 1990 Act. Furthermore, the Secretary of State is invited to confirm explicitly that local plan inspectors and LPA decision-makers are free to rely on local or exceptional circumstances to depart from the WMS.

33. Absent this confirmation, the WMS is arguably unlawful, for frustrating the effective operation of various statutory powers.

Potential Ground 2: Irrational Justification

34. Although the Minister has wide common-law powers to give guidance on planning matters, that discretion must be exercised rationally. In *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 ("***Law Society***") the Court held that where the justification for, and rationality of, a policy or guidance depends on an assessment which is not rational, then the policy will be unlawful: §99 and §§115-124.

35. The justification for the 2023 WMS, given in the second paragraph, is a purported "long-standing debate within planning about both the best method and body to set energy efficiency and environmental standards." The WMS continues:

> "For a number of years, the plans of some local authorities have sought to go further than national standards in terms of such efficiency for new-build properties. Equally, there is a legitimate consideration for the Government to want to strike the best balance between making progress on improving the efficiency and performance of homes whilst still wanting to ensure housing is built in sufficient numbers to support those who wish to own or rent their own home."

36. This justification is not rational, as there is no "long-standing debate". As set out in §§14-15 above, the government's position has been clear and settled since the at least its response to the Future Homes Standard consultation in January 2021, which was confirmed again in explicit terms in 22 June 2022. The government considered the potential for the setting of local energy efficiency standards in the context of developers having the confidence to make investments necessary to deliver now

homes, and concluded, in order to provide certainty in the immediate term (both to developers and LPAs), that LPAs would retain powers to set local energy efficiency standards for new homes.

37. None of the debate around planning reform which post-date June 2022 have changed this position. Indeed, it is notable that, despite considerable detailed consultation and government decision-making on changes to primary legislation and to national planning policy, none has addressed the issue of LPAs setting and applying local energy efficiency standards.

38. While the WMS refers to the Deregulation Act 2015 and acknowledges that this provision was never brought into force, it omits any reference to the various clear statements by Government that it does not intend, in the immediate term, to bring the provisions into force. It is not clear whether the Minister was aware of this settled position.

39. Accordingly, the 2023 WMS is tainted by unlawfulness, as the justification on which it relies is mistaken and/or not rational.

Potential Ground 3: Serious Logical or Methodological Errors

40. In the *Law Society* case, the Court further held that a policy or guidance may be irrational where its justification and rationale involve a serious logical or methodological error: §99 and §§115-124. The 2023 WMS is unlawful as a result of two serious logical or methodological errors.

41. First, the WMS to require any local policy applying higher energy efficiency to do so as a percentage uplift of a dwelling's Target Emissions Rate. This aspect of the WMS falls foul of a serious logical or methodological error, as, simply put, the Target Emission Rate (TER) is not an energy efficiency metric. The TER is a metric used under the Building Regulations to deal with conservation of fuel and power and is essentially a carbon metric. It is important to appreciate that:

    41.1. The improvement of a dwelling/building against the TER is not only the result of energy efficiency measures but also of the choice of heating and

hot water systems and the amount of, for example, solar PVs being installed to serve the property. Energy efficiency is therefore only one element of the TER. A percentage uplift of a dwelling's TER may in fact be achieved with a poor level of energy efficiency;

41.2. The improvement or a dwelling/building against the TER does not consider the impact of the design of the dwelling (i.e. the building form), which is a key factor in energy efficiency;

41.3. The TER only covers regulated energy uses (i.e. heating, lighting, cooling and hot water) and its use as a metric would therefore prevent local authorities from addressing and setting requirements for unregulated energy uses (i.e. all remaining household energy consumption, including from kitchens) which can represent more than half of the total energy use in a new home.

41.4. The TER cannot be measured post-construction and 'in-use', making it impossible for LPAs to determine whether their policies actually deliver dwellings which are more energy efficient in reality.

42. The use of the TER metric would therefore not enable LPAs to set energy efficiency standards and would restrict their ability to exercise their powers under the 2008 Act. While some LPAs may choose in their local plans to focus on the TER metric (because, for example, their focus is on overall carbon reduction rather than energy efficiency), that does not mean that the TER metric operates as an energy efficiency metric, or that it is suitable for all LPAs and to be used in all local energy efficiency policies.

43. No explanation or justification is given within the WMS for the requirement to express policy as a percentage uplift of a dwelling's TER.

44. Second, the 2023 WMS asserts that multiple local standards "add further costs to building new homes by adding complexity and undermining economies of scale". Again, this is asserted without justification. It is not borne out by the government's own response to the Future Homes Standard in January 2021, where the consultation on bringing into force the amendment to the 2008 Act explicitly raised

question of costs and inefficiencies, for example in supply chains. Nor is it borne out by the experience of LPAs who (a) successfully progressed such policies through local examination on the basis of evidence of their viability; or (b) the work of various LPAs in compiling evidence supporting such local policies.

45. Accordingly, the 2023 WMS is tainted by unlawfulness, as its justification and rationale involve two serious logical or methodological errors.

Potential Ground 4 – Pre-determination and/or Serious Logical or Methodological Errors

46. The 2023 WMS requires any planning policy proposing to set an energy efficiency standard above build regulations to be calculated "using a specified version of the Standard Assessment Procedure (SAP). The government is, however, consulting on the new methodology to replace SAP: the Home Energy Model ("**HEM**"). It must be emphasised that this consultation does not just propose an updated version of SAP. The proposed HEM is a completely new modelling tool designed to allow more accurate calculation of energy use.

47. The decision to make the 2023 WMS in the terms set out above impermissibly predetermines the outcome of the consultation before it has been completed and its conclusions publicly reported. It does so by requiring LPAs to embed the use SAP.

48. Alternatively, it was a serious logical or methodological error to require the use of a specified version of SAP. Mandating SAP knowing that it is likely to be replaced within the next three years prevents LPAs from setting robust and durable policies in their local plans, which have a much longer purview than three years.

Potential Ground 5 – Failure to Consult

49. The Minister unlawfully failed to consult before making the decision to make the 2023 WMS, in circumstances where there was a common law duty to consult.

50. The duty to consult those interested before taking a decision is generated by the common law duty on the Minister to act fairly: *R (Stirling) v Haringey LBC (SC(E))*

[2014] 1 WLR 3947 ("***Stirling***"[4]) at §23; the Divisional Court in *R (Plantagenet Alliance Ltd) v SSJ* [2015] 3 All ER 261 at §97; and the Court of Appeal in *R (Article 39) v SSE* [2021] PTSR 696 at §28.

51. This was plainly a situation where fairness demanded consultation. A number of LPAs are currently going through examination, having compiled evidence bases to support policies that will be affected by the WMS. A number of LPAs have local energy policies that will be affected, which have been found sound after examination. Local energy efficiency policies are at the heart of the work being done by a number of LPAs to achieve net zero and also to address energy cost and to make the cost of living more affordable. Given the impact of the WMS on these local authorities, fairness required the Minister to consult on the WMS.

52. Furthermore, the Government had in fact previously indicated that it would consult. In March 2023, in its *Response to the Independent Review of Net Zero Recommendations*, the Government had indicated that it would, as part of the consultation on the Future Homes Standard promised for 2023, "explore what transitional arrangements are appropriate to make sure that as many homes as possible are built to the new standard as quickly as possible.".[5]

53. The Minister was also under a duty of sufficient inquiry, particularly as regard bullet point two and the requirement to express policies in a particular way, calculated using a version of SAP, but also more generally as to the concerns of the WMS, including the assertion that multiple local standards can add further costs to building new homes and undermining economies of scale. It was not rational for the Minister to conclude that he could decide the impose the requirement in the 2023 WMS without seeking the views, at the very least, of LPAs. However, as the government's own response to the Future Homes Standard in January 2021 demonstrates, certainty on energy efficiency matters is crucial also for the

[4] Also sometimes called *R (Moseley) v Haringey LBC*.

[5] Responding to the Independent Review of Net Zero's Recommendations, March 2023, pg 54, response 108 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147370/responding-to-independent-review-of-net-zero.pdf.

developer community. They should also, at a minimum, have been consulted, as should the various relevant professional bodies.

Potential Ground 6: Failure to comply with the Public Sector Equality Duty

54. It appears that the Minister failed to discharge his public sector equality duty ("**PSED**"), contrary to section 149 of the Equality Act 2010, as it does not appear that any equality assessment was carried out. The importance of the PSED was emphasised by the Court of Appeal in *R(Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058 at §176ff. The Court held that the duty includes a public body taking reasonable steps to obtain information about whether the decision-making would result in direct or indirect discrimination on the basis of protected characteristics.

55. The general principles that must be followed lawfully to discharge the PSED are well-established: see *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at §25. In particular:

    (a) The duty is upon the Minister personally; what matters is what he or she took into account and what he or she knew.

    (b) The duty must be exercised "in substance, with rigour, and with an open mind".

    (c) General regard to issues of equality is not the same as having "specific regard, by way of conscious approach to the statutory criteria".

    (d) The decisionmaker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy, and not merely as a "rearguard action" following a concluded decision.

56. At least two aspects of local energy efficiency standards are relevant to the PSED: they aim to make the cost of living more affordable and to reduce harmful air quality and climate impact. There is evidence that:

(a) More than 3,000 people die every year due to cold, unable to afford warm homes.[6] This particularly affects older people.

(b) Negative air quality impacts are known to harm those who are more vulnerable, in particular, children.

(c) Negative climate impact are known to harm those who are more vulnerable, including older people, and to have a differential impact based on race.

57. It appears that no equality impact assessment was carried out. The pre-action letter would assert that is obvious unlawfulness. If an assessment was carried out, it should be disclosed in order to assess whether it was lawful.

Potential Ground 7: Irrationality

58. The decision to make the 2023 WMS was irrational, in light of the net zero obligation (which, it is notable, is a statutory legal obligation on the Minister, not a "goal", as phrased in the 2023 WMS), the Climate Change Committee's consistent advice on energy efficiency, including on the need for local authorities to act on the issue; and in light of the impact of energy efficiency on energy cost (not a matter mentioned at all in the WMS). Indeed, the failure properly to take into account the impact of energy efficiency on energy costs is exemplified in the requirement to express plan policies as a percentage uplift of a dwelling's TER. The TER is not a proxy for energy costs and cannot be translated into energy costs, a key consideration for LPAs.

59. Accordingly, the decision to make the 2023 WMS was *Wednesbury* irrational.

Actions the Defendant is expected to take

60. The Proposed Claimants ask that the 2023 WMS is immediately withdrawn and that any future decision to make a WMS on local energy efficiency standards be taken after a lawful consideration of the impacts on statutory targets and duties, including carrying out an equality impact assessment ("EqIA"), and public

[6] https://green-alliance.org.uk/wp-content/uploads/2021/11/reinventing_retrofit.pdf

consultation. If the Secretary of State refuses, then the proposed Claimants will be advised to apply for judicial review without further notice to you. In any such claim, the proposed Claimants will ask for: (i) a declaration that the decision to make the 2023 WMS was unlawful; (ii) a quashing of the 2023 WMS; (iii) any other remedy the Court considers appropriate to give effect to its judgment; and (iv) costs.

ADR proposals

61. The proposed Claimants seek to engage constructively with the Secretary of State and welcome any opportunity to resolve these concerns without recourse to the courts. They would welcome any proposals to engage on the substantive issues raised in this letter, so as to resolve or narrow the dispute. In particular, representatives of the proposed Claimants would be willing to meet with representatives of DLUHC to discuss the position. However, it is considered that any ADR would only be worthwhile if: (i) the Secretary of State is genuinely willing to put the 2023 WMS on a lawful footing; and (ii) it does not put any limitation date at risk.

Information and documents sought

62. When you respond, please provide, in addition to the requests set out above, the following:

    62.1. All materials before the decision-maker justifying:

        (a) the assertion in the 2023 WMS that the proliferation of multiple local energy efficiency standards can add further costs to building now homes;

        (b) the requirement that any local policy applying higher energy efficiency to do so as a percentage uplift of a dwelling's TER; and

        (c) the requirement that any planning policy proposing to set an energy efficiency standard above build regulations to be calculated SAP.

    62.2. Confirmation as to whether, prior to taking the decision to make the 2023 WMS, the decision-maker took into account the government's response in January 2021 to the Future Homes Standard consultation and the June 2022 correspondence between DLUCH and Bath and North East Somerset Council;

62.3. Any decision documents relevant to this proposed challenge. In particular, we seek a copy of any ministerial submissions and any Equality Impact Assessment (or any other assessments/analysis) that the decision-maker took into account when making the decision to make the 2023 WMS; and

62.4. Any evidence that the decision-maker took into account to satisfy themselves upon reasonable grounds that the decision to make the 2023 WMS without any consultation was fair.

63. If the Secretary of State fails to disclose a document now, which it later relies on in defence of this claim, then the right to bring this to the Court's attention when it comes to the matter of costs is reserved. Moreover, as a matter of law, a claimant in a judicial review cannot be prejudiced at the permission stage due to an absence of documents, and the existence of such further material, which may be critical to the arguability of the claim, is capable of being a good reason in and of itself to grant permission: *R (Blue Sky Sports & Leisure Ltd v Coventry City Council* [2013] EWHC 3366 (Admin) at §25. The Court must be supplied with all the information necessary, including through pre-action disclosure, in order to determine any permission stage on an accurate footing: *R (HM & others) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin) at §§15-16, and §39.

64. If you refuse to take the above steps, or a satisfactory response to this letter is not received, the proposed Claimants may be advised to make an application for judicial review without further reference to you.

Aarhus Costs

65. As the government has acknowledged, for example in its January 2021 response to the Future Homes Standard consultation, energy efficiency and the setting of energy efficiency standards are key to tackling climate change and the setting of local standards is part of LPAs' unique combination of powers, functions, knowledge, relationships and democratic accountability, which enable them "to drive local progress towards out national climate change commitments" (see §14 above). The proposed Claimants are concerned about the 2023 WMS because of its

unlawful hampering of their efforts to address climate change and achieve the plethora of other environmental benefits that arise from energy efficiency, including air quality benefits and health benefits flowing directly from energy efficiency and indirectly from reduction of energy costs. All these are environmental matters.

66. The proposed claim is thus an environmental claim that falls within the scope of the Aarhus Convention. Please confirm in your response that you will not contest that: (i) the Aarhus Convention applies; (ii) any claim will benefit from the costs capping in CPR r. 45.43; and (iii) the proposed Claimants' costs liability will be varied at a cap of £10,000 inclusive of VAT owing to both the subjective and objective limbs of the prohibitive expense test.

Address for service

67. Please can you confirm that: (i) you will accept electronic service; and, if so (ii) provide a single email address to enable us to effect valid service.

Address and proposed date for reply

68. You are requested to respond by email to ensure your response is received in a timely manner. Please send your response to edehon@cornerstonebarristers.com. Please respond as soon as practicable, but at the latest within 14 days of the date of this letter i.e. **by no later than 20 February 2023.**

Yours faithfully,

Estelle Dehon KC