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10 May 2024

Dear Ms Morris

**Re: Pre-action correspondence concerning the Written Ministerial Statement
“Planning – Local Energy Efficiency Standards Update” (“the 2023 WMS”)**

Introduction

1. Thank you for your pre-action response and accompanying disclosure, received on 19 March 2024, in response to the pre-action letter on behalf of a coalition of local authorities, dated and received on 6 February 2024.
2. I write formally to confirm that the coalition of authorities has decided not to take further action by way of bringing judicial review proceedings. This is for three reasons:
 - 2.1. The confirmation given on behalf of the Secretary of State that the 2023 WMS does not change local planning authorities’ powers to go further than Building Regulations (§16) and that it “does not restrain local planning authorities from applying development plan policies or exercising their section 1 powers”, amounting only to a material consideration (§14);

- 2.2. The confirmation that the 2023 WMS amounts to national policy on “how to create policies that go beyond current or planned Building Regulations which would in the Government’s view meet the reasonable requirement included in section 1 of the 2008 Act”; and
- 2.3. The grant of permission to bring a judicial review claim in *R(Rights Community Action Ltd) v SSLUHC (AC-2024-LON-00062)*, which challenges the lawfulness of the 2023 WMS. Given the potentially significant cost of bringing judicial review proceedings, and the stretched nature of local authority finances, the coalition of local authorities does not consider that it could justify that outlay in circumstances where a challenge is already underway.

Lawfulness of the 2023 WMS

3. The coalition of local authorities thanks the Secretary of State for the clarification set out at §§2.1 – 2.2 above. If the 2023 WMS is understood and applied in light of these clarifications (but only if it is so understood and applied), then that avoids the potential unlawfulness arising from the 2023 WMS countermanding or frustrating the effective operation of the powers and duties in section 1 of the Planning and Energy Act 2008, section 19(1A) and 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990.
4. It is noted, however, that the language in which the 2023 WMS is expressed may potentially lead local authority decision-makers and/or Planning Inspectors to consider that the 2023 WMS is more than just a material consideration and does restrain local authorities from applying development plan policies or exercising their statutory powers or complying with their statutory duties.
5. The coalition of authorities therefore invites the Secretary of State to clarify more formally that the 2023 WMS does not restrain local planning authorities from applying development plan policies or exercising their statutory powers and complying with their statutory duties, amounting only to a material consideration in plan-making and decision-taking. Such clarification could take the form of an update or amendment to the 2023 WMS.

Material before the Secretary of State

6. The coalition notes the Secretary of State's clarification through the PAP Response that the main justification for making the 2023 WMS "the requirement to balance the need for high energy efficiency standards alongside delivering much needed housing", against the background of the assertion that "it is obvious that multiple local standards add to costs and complexity for national house builders", but that no specific materials or evidence were placed before the Secretary of State evidencing that the proliferation of multiple local energy efficiency standards can add further costs to building new homes (§33(a)). The PAP response also confirms that key documents, including the government's January 2021 response to the Future Homes Standard consultation and the correspondence with B&NES Council, were not before the Secretary of State (§33).

7. It is understood from documents disclosed with the PAP Response – the Environmental Principles Assessment dated February 2024 and the Public Sector Equality Duty Assessment dated 22 February 2024 – that these documents were not before the Secretary of State when he made his decision to make the 2023 WMS on 13 December 2023. It would be most helpful if that could be confirmed.

Other Matters

8. For the avoidance of doubt, the coalition considers that the responses given on potential grounds 2-7 in the PAP letter either do not address the unlawfulness highlighted, or raise further concerns. Nevertheless, in light of the matters set out at §2 above, the coalition of authorities has decided not to go forward with a judicial review challenge.

Yours faithfully,



Estelle Dehon KC