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Dear Ms Dehon

Pre-action Response to Proposed Judicial Review of Written Ministerial Statement: Planning – Local Energy Efficiency Standards Update

We write in response to your pre-action letter of 6 February 2024 (“the PAP Letter”). We are grateful for your agreement to an extension for our response under the pre-action protocol.

Proposed Claimant

1. You have not identified properly the proposed Claimant, save to say “a coalition of local authorities”. We would be grateful, as per our request by letter dated 14 February 2024, if you could confirm the identify of these local authorities.

Proposed Defendant

2. The proposed defendant is the Secretary of State for Levelling Up, Housing and Communities (“the Secretary of State”).

Reference details

3. The Government Legal Department is instructed to act for the Secretary of State. Our contact details are at the header of this letter and please quote the above reference number in any correspondence.

Details of the matter being challenged

4. The proposed challenge is to the Written Ministerial Statement: Planning – Local Energy Efficiency Standards Update dated 13 December 2023 (“the 2023 WMS”). We



confirm in response to paragraph 17 of the PAP Letter that the decision maker was Baroness Penn.

Response to the proposed claim

5. Much of the relevant factual and legal background is set out in the PAP Letter and we do not rehearse it here.¹ Instead, we focus on responding to the proposed grounds of claim and in doing so refer to the factual and legal background as necessary.

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

6. You say that the 2023 WMS – without certain assurances – is potentially unlawful in that it is said it may conflict with, first, section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) and/ or, secondly, with section 1 of the Planning and Energy Act 2008 (“the 2008 Act”). We address each in turn.
7. The 2023 WMS:

“As a Government, we continue to make progress towards the net zero goal set out in legislation in 2019, including by improving the energy efficiency of homes and moving to cleaner technologies and sources of power within the homes and building sector.

There has been a long-standing debate within planning about both the best method and body to set energy efficiency and environmental standards. 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.

In 2015, in reference to an uncommenced provision in the Deregulation Act 2015 which amended the Planning and Energy Act 2008, a written ministerial statement (WMS) (HC Deb, 25 March 2015, vol 584, cols 131-138WS) stated that until that amendment was commenced, local plan policies exceeding minimum energy efficiency standards should not go beyond level 4 of the Code for Sustainable Homes. Since then, the introduction of the 2021 Part L uplift to the Building Regulations set national minimum energy efficiency standards that are higher than those referenced in the 2015 WMS rendering it effectively moot. A further change to energy efficiency building regulations is planned for 2025 meaning that homes built to that standard will be net zero ready and should need no significant work to ensure that they have zero carbon emissions as the grid continue to decarbonise. Compared to varied local standards, these nationally applied standards provide much-needed clarity and consistency for businesses, large and small, to invest and prepare to build net-zero ready homes.

¹ We confirm in response to paragraph 19 of the PAP Letter that the reference to “planned building regulations” contemplates the Future Homes Standard and the updates to the Building Regulations and associated guidance that are intended to come into force in 2025. These proposals are currently being consulted on in The Future Homes and Buildings Standard Consultation 2023. We also note you state that the 2023 WMS states that it supersedes the 2015 WMS. That is not quite right. It states it supersedes a specific identified section of the 2015 WMS.

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. In this context, the Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned buildings regulations. The proliferation of multiple, local standards by local authority area can add further costs to building new homes by adding complexity and undermining economies of scale. Any planning policies that propose local energy efficiency standards for buildings that go beyond current or planned buildings regulation should be rejected at examination 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).*

Where plan policies go beyond current or planned building regulations, those policies 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.

To be sound, local plans must be consistent with national policy – enabling the delivery of sustainable development in accordance with the policies in the National Planning Policy Framework and other statements of national planning policy, including this one.

The Secretary of State will closely monitor the implementation of the policy set out in this WMS and has intervention powers provided by Parliament that may be used in respect to policies in plans or development management decisions, in line with the relevant criteria for such intervention powers.

The above supersedes the section of the 25 March 2015 WMS entitled 'Housing standards: streamlining the system', sub-paragraph 'Plan making' in respect of energy efficiency requirements and standards only. Planning Practice Guidance will also be updated to reflect this statement." (our emphasis).

8. As you recognise (paragraph 23 of the PAP Letter), the underlined passages in the WMS make it clear that the starting point of the policy is a recognition that local planning authorities are empowered to go beyond current or planned building regulations.

Section 38(6) of the 2004 Act

9. The 2023 WMS does not misdirect decision-makers in relation to section 38(6). First, it starts on the correct assumptions that development plan policies must be applied.

Secondly, section 38(6) allows for material considerations to be taken into account in the application of development plan policies. The 2023 WMS is simply that: a material consideration that the decision maker can consider and apply as he or she sees fit in the particular circumstances of a case. The 2023 WMS fits appropriately into the structure of section 38(6) decision making.

Section 1 of the 2008 Act

10. Section 1 of the 2008 Act is set out in paragraph 10 of the PAP Letter. This section allows local planning authorities to include policies in their development plans which impose reasonable requirements for development in their area to comply with energy efficiency standards that exceed the energy requirements of Building Regulations.
11. We note that this is a broad discretion subject to two points: (i) the requirements being reasonable (which would include, by way of example, considerations as to the impact of the requirement on the viability of schemes); and (ii) policies must not be inconsistent with relevant national policies (subsection (5)).
12. Section 1, therefore, does not create an unfettered discretion. Moreover, it expressly contemplates, through subsection (5), that relevant national policies may be set. That is a necessary implication of the reference to national policies.
13. The 2023 WMS fits within and does not conflict with the section 1 power. As you yourself recognise (paragraph 23 of the PAP Letter), the 2023 WMS does not purport to prevent local authorities from exercising their power to prescribe policies which go beyond the Building Regulations under section 1 of the 2008 Act.
14. Read fairly and as a whole, the 2023 WMS does not conflict with either section 38(6) of the 2004 Act or section 1 of the 2008 Act at all. It does not restrain local planning authorities from applying development plan policies or exercising their section 1 powers. It 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. In the context of decision making, the 2023 WMS is a material consideration and does not purport to be any more than that.

Potential Ground 2: irrational justification

15. On analysis is that this is not a legal ground of claim.
16. First, a disagreement about whether or not there has been a long-standing debate on the issue the 2023 WMS addresses, is a factual dispute of no legal significance, in particular, because the 2023 WMS is not changing local planning authorities' powers to go further than the Building Regulations.
17. Secondly, in fact there plainly has been a long-standing debate illustrated by the Deregulation Act powers placed on the statute book but not used, the Government's continuing efforts to augment national standards (Future Homes Standard) and, for example, the Salt Cross litigation.
18. Thirdly and in any event, the justification is plainly not contingent on there having been a "long-standing debate". The justification behind the 2023 WMS is the requirement to balance the need for high energy efficiency standards alongside delivering much needed housing.

Potential Ground 3: serious logical or methodological errors

Potential Ground 3(i)

19. There is no logical flaw in requiring any local policy applying a higher energy efficiency rate to express that uplift as a percentage uplift of a dwelling's Target Emissions Rate ("TER"). The Government is seeking to introduce consistency in the way plan-makers set standards that go beyond the Building Regulations. The most transparent and consistent way of doing this is to use a measure already used in the Building Regulations, as TER is. The issues you raise with TER appear, in reality, to be a complaint about standards used in the Building Regulations. That is not a matter for any challenge to the WMS. There is clearly merit in using an existing Building Regulations measure in this context.

Potential Ground 3(ii)

20. This potential ground also alleges that the statement that multiple local standards "*add further costs to building new homes by adding complexity and undermining economies of scale*" in the 2023 WMS is assertion without justification and conflicts with paragraphs 2.39 and 2.40 of the Government's response to the Future Homes Standard consultation in 2021.
21. With respect, it is obvious that multiple local standards add to costs and complexity for national house builders, no particular evidence is required to demonstrate the obvious. However, the consultation responses to the Future Homes Standards 2019 consultation did reveal a theme of concern with regards complexity across the responses.
22. Moreover, the response to the Future Homes Standards 2019 consultation is quite clear that whilst the Government decided not to amend section 1 of the 2008 Act to provide certainty in the "immediate term", the Government set out clearly the path to the Future Homes Standard (see Question 5 and the response). The Future Homes Standard is both to increase energy efficiency standards nationally and to provide a single standard in the interests of efficiency and transparency. Albeit, section 1 of the 2008 Act still allows local planning authorities to set their own standards. In light of which reliance on paragraphs 2.39 and 2.40 alone, presents a misleading picture of the Government's position.

Potential Ground 4: serious logical or methodological errors

23. The reference to the Standard Assessment Procedure is entirely lawful. It is an extant methodology. That it might be replaced cannot make the 2023 WMS unlawful. Nor could the Government possibly pre-determine the consultation on the Home Energy Model. That is entirely separate from the 2023 WMS and the Government is in no way bound by the 2023 WMS in its response to the Home Energy Model consultation. In the event that the Home Energy Model is adopted, the Secretary of State can consider updating the 2023 WMS.

Potential Ground 5: failure to consult

24. There has been no unlawful failure to consult.
25. The law on the duty to consult was set out in R (oao Hough) v Secretary of State for the Home Department [2022] EWHC 1635 (Admin) at [84] and [85]. Mrs Justice Lieven said:

“84...As is well known, there is no general duty to consult in public law. Further, in circumstances where there is a detailed regulatory scheme in which many decisions are subject to statutory duties to consult, such as within the EIA process, the Court should be slow to import a further duty to consult into that statutory process. In order for a duty to consult to arise, there must be particular circumstances which give rise to conspicuous unfairness.

85. The phrase “conspicuous unfairness” is one open to a wide range of interpretations. I adopt the terminology used in the Court of Appeal in Bhatt Murphy that the unfairness must amount to an abuse of process. In Article 39 this test was met, particularly because of the statutory role of the Children’s Commissioner and the apparent decision to specifically exclude her from consultation. However, in the present case there is no such abuse of process or conspicuous unfairness.”

26. You raise no point that could possibly amount to an abuse of process. There is no inherent unfairness in promulgating policy that may be relevant to ongoing local plan examinations without consultation. It will be for the inspectors and participants to determine how to take into account any new policies. This sort of event is to be expected and occurs regularly with no unfairness. Were it otherwise, there would be an effective bar on policy making by the Secretary of State whilst local plans were being developed, which is, across the country as a whole, the great majority, if not all, the time.
27. Your suggestion that there was a promise to consult is misplaced (paragraph 52 of the PAP Letter). The reference in the *Response to the Independent Review of Net Zero Recommendations* to “transitional arrangements” are a reference to changes to the Building Regulations. The transitional arrangements will set how long, after the new Building Regulations and Associated Guidance comes into force, industry has to adjust. These transitional arrangements are being consulted upon in the 2023 Future Homes and Buildings Standards consultation.

Potential Ground 6: public sector equalities duty (“PSED”)

28. No specific equalities impact assessment was undertaken with regards the publication of the 2023 WMS.
29. However, it was not necessary to do so. The Government carries out an equalities impact assessment each time the Building Regulations and associated guidance is updated and has regard to the PSED in light of those assessments. The 2023 WMS does not change the Building Regulations and associated guidance. These form the baseline from which LPAs can set higher standards. If local planning authorities want to go further, then it will be for them to carry out an equalities impact assessment on that decision/ have regard to their PSED. Nonetheless, to avoid any further ambiguity arising out of this issue, the SSLUHC has carried out a fresh PSED assessment in respect of the 2023 WMS, which we attach with this letter.
30. In our view, litigation on this point would be disproportionate.

Potential Ground 7: irrationality

31. Lastly, it is alleged that the 2023 WMS is irrational in that it fails to take account of the mandatory targets in section 1 of the Climate Change Act 2008 (“the CCA 2008”) and

the extant carbon budgets which seek to achieve net zero by 2050. Section 1 of the CCA and the carbon budgets are not a mandatory material consideration in the current circumstances. In any event, the 2023 WMS is directed towards and to be understood in the context of the Government's proposals for the Future Homes Standard which will ensure dwellings are net zero ready. The responsibility for meeting net zero rests with the Secretary of State for Energy Security and Net Zero. She has published policies and proposals with the purpose of meeting the CCA 2008 targets and these include the Future Homes Standard as a quantified policy in the Carbon Budget and Delivery Plan. Accordingly, the Secretary of State for Energy Security and Net Zero is not relying on section 1 of the 2008 Act to meet her obligations under the CCA 2008.

Details of any other Interested Parties

32. We agree that there are no other interested parties to this proposed claim.

Response to requests for information and documents

33. We are aware of the duty of candour and will comply with it. As set out above, we have carried on a PSSED assessment and attach it to this letter. As to your specific requests for information.
- a. Paragraph 62.1: no specific materials or evidence on these points were placed before the decision maker.
 - b. Paragraph 62.2: the 2021 FHS Government Response and June 2022 correspondence with B&NES Council were not before the decision maker.
 - c. Paragraph 62.3: the submission document does not add to the factual matrix above and for that reason we do not propose to provide it. However, we attach the Environmental Principles Policy Statement (EPPS) analysis carried out in respect of the 2023 WMS for your information.
 - d. Paragraph 62.4: there is no evidence on this matter. We have addressed the consultation point above.

Costs

34. Whilst we confirm we accept that this is an Aarhus claim, we cannot take a position on the appropriate level of cap without knowing who the proposed Claimants are.

Address for further correspondence and service of court documents

If despite the above you decide to continue with proceedings then they may be served upon this office by email: please see <https://www.gov.uk/government/organisations/government-legal-department>.

Yours faithfully


For the Treasury Solicitor