

# The 13 December 2023 WMS and local plan policy for net zero buildings

## Updated statement from the Town & Country Planning Association

15 July 2024

### Background

On Tuesday 2 July, the High Court dismissed a legal challenge<sup>1</sup> to the 13 December 2023 Written Ministerial Statement (WMS) on 'Planning – Local Energy Efficiency Standards Update'.<sup>2</sup>

This result is disappointing for local authorities that are working to adopt net zero buildings policies through setting targets using energy based metrics. The WMS presents a challenge because it states that the government does not expect local authorities to set energy efficiency standards for buildings that go beyond building regulations, and where they do these should be expressed as a percentage uplift of a dwelling's Target Emissions Rate (TER), a metric aligned with current Building Regulations. However, although the WMS does not 'expect local authorities to set energy efficiency standards for buildings that go beyond building regulations' the WMS does not prohibit local authorities from doing this, as long as an alternative approach is evidenced and justified.

Three local authorities have successfully adopted policies that utilise energy use intensity and space heating demand targets (Bath and North East Somerset, Cornwall and Central Lincolnshire), and many authorities (we think as many as 70 others) have invested considerable expertise and resources to evidence and develop similar policy approaches for their local plans.

The TCPA has long advocated for local authorities to strive for ambitious planning policy responses to the climate challenge, including advocating for energy based metrics policies in our climate guidance for planners. The collaboration and technical expertise that has supported the pathway for local authorities to adopt truly net zero buildings policies (through the [LETI](#) initiative) demonstrates exactly the innovation necessary to tackle the climate crisis.

This statement provides an update on our interpretation of the WMS. This is largely unchanged from [our statement published in January 2024](#), as although the WMS has been found lawful by the High Court, the status of the WMS remains unchanged.

<sup>1</sup> The judgement is available to read online here: <https://www.bailii.org/ew/cases/EWHC/Admin/2024/1693.html>

<sup>2</sup> The Written Ministerial Statement is published here: <https://questions-statements.parliament.uk/written-statements/detail/2023-12-13/hlws120>

This policy area at a national level remains unprecedentedly uncertain. This is because:

- 1) The new government has not yet set out in detail its plans for planning reform in relation to climate change policy,
- 2) The High Court judgement is subject to appeal, and
- 3) The status of the WMS against legal obligations on plan making are yet to be tested at examination.

The TCPA are working with a coalition of organisations in asking the new government to revoke the 13 December 2023 WMS. In this context it is vital that LPAs do not abandon ambitious zero carbon policy until the outcomes of the legal case and forthcoming changes to national policy.

A webpage containing resources on this issue is available on the TCPA website, [here](#).

### **Judgement issued on the judicial review of the 13 December 2023 WMS**

The legal challenge against the WMS was taken by campaign group, Rights Community Action, with support from the Good Law Project, and was made on three grounds:

1. That the minister failed to have due regard to the environmental principles policy statement as required through Section 19 of the Environment Act 2021 when making the policy.
2. The WMS seeks to unlawfully constrain powers conferred to LPAs by statute, specifically: Section 1 of the Planning and Energy Act 2008 which expressly allows LPAs to set energy efficiency requirements that exceed building regulations; Section 19 of the Planning and Compulsory Purchase Act (PCPA) 2004 which requires local plans to contribute to the mitigation of, and adaptation to, climate change; and the statutory presumption in favour of the development plan contained in Section 38 (6) of the PCPA.
3. The WMS also misdirects decision makers in relation to the presumption in favour of the development plan.

Mrs. Justice Lieven dismissed the case on all three grounds. The TCPA are disappointed by the judgement because while the WMS does not prohibit local authorities from implementing net zero policies, it discourages them, which is a logic that is entirely out of step with the NPPF's aim for the planning system 'to achieve radical reductions in greenhouse gas emissions.'<sup>3</sup> I

DLUHC's case and justification of the WMS also relied on the assertion that net zero buildings policies would have an impact on housing delivery. In our view, this claim is wholly un evidenced and has not occurred in local authorities where net zero buildings policies are in place.<sup>4</sup> A blanket restriction on standards is not required as the local plan examination provides a robust mechanism to ensure policies are deliverable and viable.

It is our understanding that the claimant will seek to appeal the judgment.

---

<sup>3</sup> *National Planning Policy Framework*. DLUHC, 2023. (Paragraph 157).

<sup>4</sup> This blog by Bioregional demonstrates that net zero policies are not acting as a constraint on housing delivery: <https://www.bioregional.com/news-and-opinion/net-zero-targets-need-not-hinder-housebuilding>

### How should the WMS be interpreted?

Despite the disappointing outcome of the judicial review, local authorities must continue to develop policy based on robust, carbon literate evidence. The WMS is a material consideration for plan making. However, the WMS cannot be interpreted as an absolute direction on the way that local policies must be expressed if evidence demonstrates and justifies a better approach. This was confirmed in correspondence between a coalition of local authorities and the Secretary of State for Levelling Up, Housing and Communities, who confirmed that:

*“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 TCPA is of the view that, in line with the clarification provided by the Secretary of State, there is room for local authorities to advance ambitious net zero policies based on energy based metrics, as long as these are well evidenced and justified. This is because:

- 1) Local authorities must **continue to form local plan policy informed by robust evidence** on carbon reduction. In many cases, the emissions reductions achieved through net zero buildings policies using energy based metrics form a key component of the plan’s obligation to reduce emissions in line with national carbon budgets.
- 2) **The weight of the WMS should not be exaggerated.** The correspondence between local authorities and the Secretary of State confirms the status of the WMS as a material consideration. This means that it can be set aside if there is an evidential case to support a different approach. The WMS is subservient to primary legislation and cannot be interpreted in a way that undermines legislative requirements placed on local planning authorities. Our previous statement on the WMS outlined two powerful legislative requirements that local authorities should consider in relation to the relative weight to be given to the WMS. Namely, these are Schedule 7 (15C) of the Levelling Up and Regeneration Act 2023 which requires local plans to contribute to the mitigation of, and adaptation to climate change, and the Planning and Energy Act 2008 which gives power to local authorities to set higher energy efficiency standards than Building Regulations.

### Policy options for local authorities

In our previous statement we outlined three potential policy approaches for local authorities that want to accelerate action on energy performance of buildings as compared to building regulations. These are largely unchanged by the High Court judgment, because the status of the WMS gives local authorities space to justify an energy based metrics approach to policy where the evidence supporting such policies is clear and robust in justifying these policies.

To keep up to date with the TCPA’s news on this policy topic, please visit the [resource page](#) on our website or email [celia.davis@tcpa.org.uk](mailto:celia.davis@tcpa.org.uk).