

RE: Energy Efficiency Policies in Development Plan Documents

OPINION

Introduction

1. I am asked by Rights: Community: Action to advise on the implications of the Court of Appeal's judgment in *R (Rights: Community: Action Ltd) v Secretary of State for Housing, Communities and Local Government* [2025] EWCA Civ 990. In particular, I am asked how the judgment impacts on the preparation of policies in development plan documents that seek to impose standards that exceed the requirements of the Building Regulations and/or the draft Future Homes Standard. I am also asked to comment on the remaining scope for using different metrics in development plan documents to those approved by central government, such as Energy Use Intensity (EUI) metrics.
2. In summary, my advice is that notwithstanding the firm wording in national policy, there is nothing in law that prevents local authorities from going beyond current or planned building regulations in their development plan documents or adopting different energy efficiency metrics to those set out in national policy. The Court of Appeal helpfully confirmed as much in *R (Rights: Community: Action Ltd) v Secretary of State for Housing, Communities and Local Government* [2025] EWCA Civ 990.
3. I am also aware that, at the time of writing, there is an outstanding application for permission to appeal to the Supreme Court. This advice is given on the law as it currently stands i.e. on the assumption that permission to appeal is refused or the Supreme Court agrees with the Court of Appeal.

The 2023 WMS

4. The 2023 Written Ministerial Statement ‘Local Energy Efficiency Standards Update’ (“the 2023 WMS”) was introduced on 13 December 2023. The 2023 WMS supersedes the section of the 2015 Written Ministerial Statement on Energy Efficiency entitled ‘Housing standards: streamlining the system’, sub-paragraph ‘Plan making,’ in respect of energy efficiency requirements and standards only.
5. The key elements of the 2023 WMS are as follows:
 - a) *“The Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned buildings regulations.”*
 - b) *“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).-“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).”*
 - c) *“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.”

The Court of Appeal’s judgment

6. Rights: Community: Action alleged in the High Court and the Court of Appeal that the 2023 WMS was unlawful because, among other things, it cut across the statutory power to set energy efficiency standards higher than the Building Regulations in the Planning and Energy Act 2008 (“PEA 2008”). The High Court and Court of Appeal dismissed the claim and found there was no incompatibility between the 2023 WMS and the PEA 2008. Accordingly, the 2023 WMS remains in force.
7. However, the Court of Appeal gave the following useful guidance:
 - a) The Court explained that national policy, including the 2023 WMS, is “no more than guidance” for an Examining Inspector, who must exercise “his or her own independent judgment” during the examination ([24]),
 - b) The Court emphasised that “Local circumstances may justify a departure from national policy in the formulation of local [development plan document] policy, even where the national policy is expressed in unqualified terms” ([24]),
 - c) The Court also emphasised that a “LPA can include in its DPD a local policy which conflicts with national policy, justified, for example, by local circumstances” ([79]), applying *R (West Berkshire District Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] 1 WLR 3923.

Examples of the 2023 WMS being applied during examination

8. Those instructing me have referred to the Examining Inspector's Note with respect to the Winchester District Local Plan 2020-2040, where Inspector R Barrett MRTPI IHBC said this (emphasis added):

“The WMS also requires that any additional energy efficiency requirements be expressed as a percentage uplift of the TER. The Council proposes to deviate from this and use an alternative metric, the Energy Use Intensity. Its sets out a number of advantages of its use, which include that it represents regulated and unregulated energy use, it is based on predictive modelling results and is focussed on minimising energy use in the first place. Overall, it contends that it is a simpler metric, easy to understand by the development industry, residents etc. and can be used as a proxy for energy costs. The WMS is a material consideration but needs to be read in the context of national policy and legislation. Evidence is presented to indicate that achieving net zero using the metric proposed is both technically and financially feasible. I recognise that one of the objectives of the WMS is to prevent the proliferation of varied local standards, which can add to cost and complexity. National applied standards provide clarity and consistency for the development industry to invest and prepare to build energy efficient homes. However, no matter how energy efficiency is proposed to be measured, the environmental outcome, to mitigate climate change and contribute to the net zero obligation, will remain the same and it will meet the over arching aim of national policy. Therefore, based on the evidence before me, I find the Council's approach in policy CN1 and CN3, subject to the MMs proposed consistent with national policy, justified and effective. It is therefore sound.”

9. The policy in question (Policy CN3) provided as follows:

“All new residential development (excluding conversion and change of use) should not burn any fossil fuels on site for space heating, hot water or used for cooking. New residential development will need to be able to demonstrate net-zero operational carbon on site by ensuring:

- i. The predicted space heating demand of the homes based on predicted energy modelling, showing that the target of <15 kWh/M2/year is met.
- ii. The total kWh/yr of energy consumption of the building based on predicted energy modelling tools showing that the target of <35 kWh/M2/year is met.
- iii. The total kWh/yr of energy consumption of the buildings on the site and the total kWh/yr of energy generation by renewables to show that the balance is met.”

10. It applies an EUI based metric that is not endorsed in the 2023 WMS.
11. Similarly, in respect of the Salt Cross Village Area Action Plan in West Oxfordshire,¹ in a letter to the Council dated 1 August 2025, Examining Inspector Helen Hockhurst B.PI MRTPI stated as follows (emphasis added):

“The WMS also requires that any additional energy efficiency requirement be expressed as a percentage uplift of the Target Emission Rate (TER). The Council proposes to deviate from this and use a different metric, Energy Use Intensity (EUI). The Net Zero Carbon Development Evidence Base (ED9B) points out the advantages of EUI, that it represents the total energy needed to run a building over a year ie regulated and non-regulated energy use. In contrast TER only considers regulated energy use ie. heating, lighting, cooling and ventilation.

I recognise that one of the objectives of the WMS is to prevent a proliferation of different standards and provide a standardisation of approach. However, the Council has submitted evidence to demonstrate the introduction and use of other metrics to measure energy efficiency. For example, the Government is introducing the Home Energy Model to assess compliance with the FHS.

The Net Zero Carbon Development Evidence Base (ED9B) assesses a low carbon option aligned to the stipulation of the WMS and also a net zero carbon option. This shows that both options are achievable from a technical and cost viewpoint. This further demonstrates that the EUI metric is suitable and feasible to assess energy use.

I acknowledge that the WMS is a material consideration, but it should also be read in the context of wider national policy and legislative considerations. Reducing carbon emissions and supporting the transition to net zero forms a central part of the Framework in line with the objectives and provisions of the Climate Change Act 2008. However, no matter how energy efficiency is proposed to be measured, the environmental outcome, to mitigate climate change and contribute to meeting the net zero obligation, will remain the same. Based on the evidence before me, I conclude the Council’s approach is consistent with national policy.”

12. I am also aware of the Tendring & Colchester Borders Garden Community DPD which secured approval at examination in June 2025 despite requiring EUI metrics.

¹ Which was subject to a previous successful legal challenge brought by Rights: Community: Action.

Analysis

13. The immediate effect of the Court of Appeal's judgment is that the 2023 WMS remains in force and must be interpreted and applied on its own terms, if and until the Supreme Court reaches a different view on its legality.
14. The purpose of the 2023 WMS is undoubtedly to seek to restrict energy efficiency requirements to the Future Homes Standard or lower, and to mandate the metric used to calculate energy efficiency (TER calculated using a specified version of the SAP) in order to ensure a standardised approach.
15. However, the effect of the 2023 WMS should not be overstated, for the following reasons.
16. Firstly, the 2023 WMS explicitly acknowledges that planning policies can go beyond current or planned building regulations. It therefore leaves open the possibility for this to occur, even on its own terms.
17. Secondly, the requirement that "development remains viable" is an existing common-sense requirement that does not add any new restriction upon local authorities.
18. Thirdly, an additional requirement in the 2023 WMS is that policies which go further than current or planned building regulations "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". This means that, in practice, it will be very difficult for a developer to show that the presence of such a policy in a development plan document prevents development from remaining viable. That is because, insofar as there is any impact on viability, this can be resolved at the decision-making stage by the flexible application of that policy. This raises the question as to whether any such policy, however strict, could ever affect viability in practice, given the need to apply it flexibly where viability issues arise in the case of an individual planning application. I suspect not.

19. Fourthly, on examination, an Examining Inspector must consider whether the policy in question is “sound”, which is defined in the NPPF as, among other things, being in accordance with national policy.
 - a) That includes policies other than the 2023 WMS, such as the NPPF itself, which includes the national policy objective of achieving “radical reductions in greenhouse gas emissions” (NPPF para 161) and the guidance that “Plans should take a proactive approach to mitigating and adapting to climate change” (NPPF para 162).
 - b) Those policy requirements reflect the UK government’s legal obligations to significantly reduce overall emissions in the Climate Change Act 2008. They also reflect local authorities’ separate legal duty under s.19(1A) of the Planning and Compulsory Purchase Act 2004 to include in their development plan documents policies that are designed to secure that the development and use of land in the local authority’s area contribute to the mitigation of, and adaptation to, climate change.
 - c) Planning policies necessarily pull in different directions. It would clearly be a permissible exercise of planning judgment for an Examining Inspector to find that a net zero energy efficiency buildings policy was compliant with national climate change policy as a whole (including e.g. what is set out in the NPPF), notwithstanding any minor conflict with the 2023 WMS.
20. Fifthly, as the Court of Appeal emphasised in *R (Rights: Community: Action Ltd) v Secretary of State for Housing, Communities and Local Government [2025] EWCA Civ 990*, national policy is only guidance to a decision-maker.
 - a) In that regard, during an examination it is a material consideration only. It should not be treated as a legal requirement. It does not need to be slavishly followed. If local circumstances justify a departure from national policy, the

Court of Appeal was explicit that such a departure is permissible, regardless of how prescriptive or unqualified the policy appears to be.

- b) Accordingly, if there is a sufficiently robust local evidence base to justify going further than the Future Homes Standard, or using a different energy efficiency metric to TER such as EUI, there is nothing to stop a local authority making a case for it at examination.

21. It follows that with respect to the Winchester District Local Plan and the Salt Cross Area Action Plan, the Examining Inspectors were both plainly correct to accept that the 2023 WMS does not preclude the endorsement at examination of EUI as a metric in development plan policies. It was entirely open for the Inspectors to find that policies that deviated from the exact requirements of the 2023 WMS were sound.

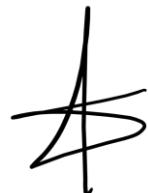
22. It also follows that other local authorities are equally entitled to depart from the exact requirements of the 2023 WMS where, to paraphrase the Court of Appeal, local circumstances justify such a departure. That includes adopting policies that mandate a metric such as EUI, where justified. Given the starting point in the 2023 WMS, local authorities who wish to do this must have a strong evidence base and strong justifications for either going beyond planned building regulations or using a different metric to TER. However, there is nothing to stop them from taking such policies to examination, and there are good reasons why they may be successful in doing so.

Conclusion

23. There is an unfortunate tendency to treat national planning policy as a legal requirement that cannot be departed from. That is however simply not the case as a matter of law. Policy is only guidance, regardless of how firmly it is worded, and it can be departed from with good reason. The Court of Appeal has helpfully confirmed this. Accordingly, notwithstanding the firm statements in the 2023 WMS,

local authorities continue to be able to set energy efficiency standards of their own choosing and which go beyond current or planned building regulations. They are also entitled to use alternative metrics such as EUI in their policies.

24. I advise accordingly. I would be happy to advise further as required.



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