

Furthermore, the lack of clarity cuts across the Planning Inspectorate’s own procedural guidance¹² which advises that “The Inspector will aim to ensure that the LPA has a reasonable understanding of why all the potential main modifications are likely to be needed. Wherever possible the Inspector will seek to communicate this during the hearing sessions, but if there are issues for which this is not possible the Inspector will do so in writing as soon as possible afterwards.” We have asked WODC whether they have been provided with a “reasonable understanding” of why MM4 is required and been advised they have not. It cuts across natural justice that WODC and the affected public are left to wonder why their solidly built policy to deliver a net zero garden village has been nullified.

This sense of unfairness (and unreasonableness) is compounded because as a matter of law and policy a local planning authority is entirely justified, and, in our view required, to set out a net zero objective in planning policy. What we build today will be with us in 2050 and should wherever possible be fit for zero carbon living. For the avoidance of doubt, it is also our emphatic view that a local authority can lawfully set local energy efficiency requirements for new homes above building regulations (by 20% or otherwise), provided it is justified by evidence in the usual way. Our full reasoning is set out in a briefing note we prepared on this matter, and which is appended to this response.

The same view has also been confirmed by central government in the context of the recent examination of the Bath & North East Somerset (B&NES) local plan.¹³ In seeking clarity on this issue, B&NES wrote to the Department for Levelling Up, Housing and Communities (DLUHC) and the response (dated 22 June 2022) included the text below (see paragraph 1.5 of the B&NES examination document EX10):

- *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.*

It is worth noting that policies setting ambitious net zero targets have recently been through examination in the Cornwall Council Climate Emergency DPD¹⁴ and the B&NES Local Plan Partial Update¹⁵. In neither case have the Inspectors required main modifications to these exemplar policies.

¹² <https://www.gov.uk/government/publications/examining-local-plans-procedural-practice/procedure-guide-for-local-plan-examinations#section-6-main-modifications-to-the-plan>

¹³ <https://beta.bathnes.gov.uk/sites/default/files/EXAM%2010%20Note%20on%20Local%20Energy%20Efficiency%20Targets%20FINAL.pdf>

¹⁴ See <https://www.cornwall.gov.uk/planning-and-building-control/planning-policy/adopted-plans/climate-emergency-development-plan-document/#examination>

¹⁵ <https://beta.bathnes.gov.uk/local-plan-partial-update-lppu-public-examination>

When we turn to other aspects of the submitted policy, and speculate again what was in the inspectors' minds, the sense of frustration is deepened. Why, for example, modify the approach to embodied carbon emissions? Government is clear that, in addition to the supply change decarbonising, the "choice of materials, and the way we design and construct buildings will also need to change to reduce their embodied carbon."¹⁶ The National Model Design Code encourages local councils to set design standards, develop policies that consider the assessment of whole life costs and implement sustainable construction. It also sets a baseline standard of quality and practice which local planning authorities are expected to take into account when developing local design codes and guides and in determining planning applications. The standard includes reducing embodied energy and embedding circular economy principles¹⁷. The AAP anticipates this route map in setting out the design standards for the garden village and its approach should have been welcomed, not re-written.

Ultimately, chasing shadows and trying to guess what lay behind MM4 is futile. Two matters, however, stand out. First, government is clear that design codes can specify a range of different things including the environmental performance of places and buildings and their contribution to net zero targets. This includes maximising the use of onsite renewable energy sources and adopting a 'fabric first' approach.¹⁸ If this specification is appropriate in a design code why not in the AAP? As WODC say in the introduction to the AAP, it "has been put in place to guide the future delivery of 'Salt Cross' – a proposed new garden village".

Second, if the inspectors had concerns about aspects of the detail in, or standards set by, the submitted Policy 2, and we have no way of knowing if this was in their thinking, then there was a more appropriate course. This would have been to frame the policy so as to set the performance factors to be addressed and the mechanism (an energy statement) for setting out how that performance would be delivered but leaving in place the policy's intended outcome (i.e. net zero operational carbon on-site through ultra-low energy fabric specification, low carbon technologies and on-site renewable energy generation). There is no justification, either locally or nationally, for the approach taken in MM4.

There is comment in the Sustainability Appraisal Addendum¹⁹ that MM4 "results in less onerous requirements in relation to the design of development to support energy efficiency. This change should help to prevent viability issues but will also be less likely

¹⁶ Building to net zero: costing carbon in construction: Government Response to the Committee's First Report. <https://cached.offlinehpl.hbpl.co.uk/NewsAttachments/RLP/download.pdf>

¹⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009793/NMDC_Part_1_The_Coding_Process.pdf (Resources, page 34) and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009795/NMDC_Part_2_Guidance_Notes.pdf (Sustainable Construction, page 80).

¹⁸ Ibid

¹⁹ <https://www.westoxon.gov.uk/media/4cthguh/aap-sa-addendum-report-main-modifications-salt-cross-sept-2022.pdf>- page 17

to support the delivery of homes that are designed to have reduced energy requirements.”

We agree that the modified policy would make it less likely that homes with reduced energy requirements would be delivered. However, the remark that MM4 “should help to prevent viability issues” is speculative, not rooted in published comment from the inspectors and at odds with the evidence the council provided for the examination. If there is further, unpublished, material or subsequent conversations between LUC (the authors of the Sustainability Appraisal Addendum) and the inspectors and / or WODC this / these should be made available publicly. We also find the phrasing “results in less onerous requirements” to be strange, not least because it does not reflect the lawful context provided by the Climate Change Act 2008. The requirements in submitted Policy 2, onerous or otherwise, were advanced to deliver a net zero development consistent with national policy and law.

We would also underline that viability should be assessed in the round²⁰ and both financial costs and benefits should be recorded in any appraisal. There are ongoing costs to occupiers from avoidable energy consumption and likely consequences for the taxpayer arising from retrofit when homes are not designed for optimal energy efficiency. In the real world beyond that of viability balance sheets, there will be crushing societal, economic and environmental costs if we fail to act comprehensively to tackle climate change.

Conclusion

For the reasons set out above MM4 is both unnecessary and, contrary to the inspectors’ stated intention, leads to conflict with national policy on a number of counts. The TCPA remains open to continuing dialogue with WODC on this important matter.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁰ Paragraph: 001 Reference ID: 10-001-20190509 in <https://www.gov.uk/guidance/viability#viability-and-plan-making>



Proposed Main Modifications Salt Cross Area Action Plan (AAP) Consultation Response Form

REF:

(For Official Use Only)

Please return to West Oxfordshire District Council by 5PM on Friday 4 November 2022

By Post: Planning Policy,
West Oxfordshire District Council,
Elmfield,
New Yatt Road,
Witney,
Oxon.
OX28 1PB

Or by Email:
planning.consultation@westoxon.gov.uk

This form has three parts:

PART A – Personal Details (note: you only need to complete Part A of the form once)

PART B – Your representation(s) on the proposed Main Modifications (MMs)

PART C – Your representation(s) on the Sustainability Appraisal Addendum Report OR the Habitat Regulations Assessment Addendum Report

PART A – PERSONAL DETAILS

1. Personal Details

2. Agent's Details (If applicable)

Title		
First Name		
Last Name		
Job Title		
Organisation		
Address Line 1		
Line 2		
Line 3		
Line 4		
Post Code		
Telephone Number		
Email Address		



REF:

(For Official Use Only)

PART B – Representations on Proposed Main Modifications (please complete a separate Part B form for each representation you wish to make)

Name of Organisation:

1. To which proposed Main Modification (MM) to the submission draft Salt Cross Area Action Plan does this representation relate?

Proposed Main Modification
Reference Number (e.g. MM1)

2. Do you consider the proposed Main Modification is legally compliant and sound? (Please refer to the separate guidance note on completing this form for further explanation on these requirements)

- | | | | | | |
|-----|-------------------|-----|--------------------------|----|-------------------------------------|
| (1) | Legally Compliant | Yes | <input type="checkbox"/> | No | <input checked="" type="checkbox"/> |
| (2) | Sound | Yes | <input type="checkbox"/> | No | <input checked="" type="checkbox"/> |

3. Please give details of why you consider the proposed Main Modification is not legally compliant or is unsound. Please be as precise as possible. If you wish to support the legal compliance or soundness of the proposed Main Modification, please also use this box to set out your comments.



REF:

(For Official Use Only)

4. Please set out what change(s) you consider necessary to make the proposed Main Modification legally compliant or sound, having regard to the test you have identified at 2 above where this relates to soundness. You will need to say why this change will make the proposed Main Modification legally compliant or sound. It will be helpful if you are able to put forward your suggested revised wording of any policy or text. Please be as precise as possible.

Please see attached statement and appendix 1.

Please note your representation should cover succinctly all the information, evidence and supporting information necessary to support/justify the representation and the suggested change.



REF:

(For Official Use Only)

PART C – Representations on Sustainability Appraisal (SA) Addendum Report and Habitat Regulation Assessment (HRA) Addendum Report

Name of Organisation:

1. To which Section of the SA Addendum Report or HRA Addendum Report does this representation relate?

Sustainability Appraisal (SA)
Addendum Report Section:

HRA Addendum Report Section:

2. Please set out your comments below.



REF:
(For Official Use Only)

Please indicate whether you wish to be informed of any of the following by ticking the appropriate box:

1. The publication of the recommendations of the person appointed to carry out an independent examination of the Area Action Plan under Section 20 of the Act
2. The adoption of the Area Action Plan

Signature	<input type="text" value="██████████"/>	Date	<input type="text" value="1 November 2022"/>
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The application of net zero in local plan policy

A statement from the Town and Country Planning Association
July 2022

There has been disbelief and despair at the Planning Inspectorate's (PINS') decision to remove critical climate targets from the proposed West Oxfordshire Area Action Plan for a new garden village. This decision is even more extraordinary because the public in West Oxfordshire had backed this ambition. Their views were summarised as:

'Climate change is the single most important issue for all of us to deal with and this must underpin the development and delivery of the garden village. There should be no reliance on fossil fuels with 100% use of renewable energy. All buildings should be zero-carbon or energy positive'....'

And what they said was heard. The Salt Cross Area Action Plan *would* have expected all new development to demonstrate net zero operational carbon on-site. *Would* because this ambition has been gutted by the decision of PINS in their notice of major modifications to the plan.

Local authorities driving innovation on climate action have watched the plan's progress closely as a test case of how net zero can be implemented in local plans. The decision on the major modifications was published without the report setting out the detailed reasoning. However, because the decision is so damaging to the drive for net zero it is worth reflecting on how the Planning Inspectorate appears to have failed to apply both law and policy in a proportionate manner properly. It is also vital that the TCPA reassures other local planning authorities that the drive for the 'radical reductions' in carbon emissions is lawful, supported by and consistent with national policy, reflects growing community aspirations and is of course vital to our collective survival.

The facts of the case are simple enough. West Oxfordshire District Council set out a robust policy for a new development in an Area Action Plan including using the Garden City Principles and policy on the circular economy and climate change. This included an overall requirement, in Policy 2², committing the development to net zero operational emissions on-site. The PINS' response has been to water down the net zero policy removing both the ambition and the detailed policy approach which delivered it. It is no exaggeration to say PINS has wrecked the

¹<https://www.westoxon.gov.uk/media/jsccjtcl/salt-cross-aap-pre-submission-august-2020.pdf>

² <https://www.westoxon.gov.uk/media/jsccjtcl/salt-cross-aap-pre-submission-august-2020.pdf>

overall net zero approach. The modifications also remove the ambition to rely on 100% renewable energy generation. The original policy proposed by West Oxfordshire states in the first paragraph that:

Policy 2 – Net Zero Carbon Development. Proposals for development at Salt Cross will be required to demonstrate net zero operational carbon on-site through ultra-low energy fabric specification, low carbon technologies and on-site renewable energy generation. An energy strategy will be required with outline and detailed planning submissions, reconfirmed pre-commencement, validated pre-occupation and monitored post-completion demonstrating alignment with this policy.

The planning inspectors in their explanatory letter for the main modifications state:

‘...we anticipate that our conclusions in relation to Policy 2 (Net Zero Carbon Development) will come as a disappointment. As such, we will say at this stage that we are not satisfied that Policy 2 is either consistent with national policy or justified. As such, we are unable to conclude that the policy is sound. Our fuller reasoning on this matter will be set out in our report.’

The TCPA believes this reasoning is wholly wrong. The National Planning Policy Framework (NPPF) requires plans to be prepared in accordance with relevant legal requirements and sets out the soundness test for plans, which clearly states that policy must be consistent with relevant national planning policy³. The West Oxfordshire policy is in fact an exemplar of its kind based on detailed energy modelling and an effective regime of Key Performance Indicators (KPIs). The modifications will make it vague and ambiguous, which is directly contrary to NPPF policy on plan making⁴. The planning inspector has imposed precisely the kind of ineffective policy that local plans should avoid. More importantly, the planning system supporting net zero is clearly government policy not the invention of a single local authority. We also know that government has placed on record its intention to update national planning policy to fully support the net zero and energy security strategies⁵. So, what are the key legal and policy arguments in this debate?

It is useful to begin with some clarity over what might be described as the ‘low hanging fruit’ in relation to planning for net zero. In terms of the fundamental justification for ambitious plan policies on reducing emissions, climate change and specifically carbon reduction are legal and policy priorities for the planning system. Section 19(1A) of the Planning and Compulsory Purchase Act 2004 (the 2004 Planning Act) makes that crystal clear for plan-making, while paragraphs 152 to 154 of the NPPF, read with footnote 53, set out the need for ‘radical reductions’ in carbon emissions and for plans to take a ‘proactive approach’ to mitigating and adapting to climate change ‘in line’ with the objectives and provisions of the Climate Change Act 2008 (the Climate Act). This means that plans must be in line with the required 80% carbon reduction by 2035 and net zero by 2050. Carbon reduction requirements in local plans have

³ See Para 35 (d) of the NPPF

⁴ See Para 16 (d) of the NPPF

⁵ The Net Zero Strategy commits to reviewing the NPPF to deliver on the 2050 target and interim carbon budgets. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033990/net-zero-strategy-beis.pdf

twin statutory anchors in both planning law and in relation to the Climate Act whose carbon budgets are adopted as secondary legislation

As a matter of law and policy therefore a local planning authority is entirely justified, and, in the TCPA's view required, to set out a net zero objective in planning policy. What we build today will be with us in 2050 and should wherever possible be fit for zero carbon living. For the avoidance of doubt it is also the emphatic view of the TCPA that a local authority can lawfully set local energy efficiency requirements for new homes above Building Regulations (by 20% or otherwise), provided it is justified by the local evidence in the usual way.⁶ The rest of this paper sets out the basis for this view as well as the wider legal and policy requirements which currently apply to planning for climate mitigation.⁷

We do not yet have the West Oxford inspectors' report, but from what we know their proposed modifications appear to be based on concerns about the degree to which the Area Action Plan was compliant with national policy. Hobbling the plan's net zero policies on that basis would be a clear departure from the applicable law and policy.

In fact, the NPPF tells us strategic policies should look ahead over a minimum 15-year period from adoption, 'to anticipate and respond to long-term requirements'. Plans should, therefore, be at least in line with the 80% cut in emissions by 2035 set in the Sixth Carbon Budget. And the NPPF makes clear that 'Where larger scale developments such as new settlements or significant extensions to existing villages and towns form part of the strategy for the area, policies should be set within a vision that looks further ahead (at least 30 years)'.

So, at the very least, a plan must reference the relevant carbon budget for the plan period and demonstrate the plan has the means to deliver new development in line with this. Any plan which does not have such a policy cannot, reasonably, pass the NPPF soundness test. As a result, the decision by PINS to gut the net zero policy is plainly wrong and both irrational and unreasonable in terms of public law principles.

So much is clear from the generality of planning and climate law and policy on carbon reduction. However, much of uncertainty in the minds of LPA's relates to the detail of the specific standards and actions that can be taken by a development plan to achieve the wider net zero goal. There should be no dispute that local authorities can take a wide range of actions on the location, sustainable transport and renewable generation which will all play a key role in achieving net zero. Neither should there be any dispute that standards can be set for the energy performance of non-domestic buildings. Local authorities also have special powers to make requirements in relation to renewable and low carbon energy and building performance set out in the Planning and Energy Act 2008 (the Energy Act). The area of doubt in many local authorities' minds relates to setting energy efficiency standards for homes above building regulations.

⁶ Viability testing will be an important aspect of introducing such provisions in plan policy. Where viability testing does take place requirements for renewable energy and energy efficiency measures have both financial costs and benefits both of which should be recorded in any appraisal.

⁷ This view has also been confirmed recently by central government in the context of a pending local plan examination – see para 1.5 of the following paper:
<https://beta.bathnes.gov.uk/sites/default/files/EXAM%2010%20Note%20on%20Local%20Energy%20Efficiency%20Targets%20FINAL.pdf>.

A 2015 Written Ministerial Statement (WMS)⁸ stated that:

‘For the specific issue of energy performance, local planning authorities will continue to be able to set and apply policies in their Local Plans which require compliance with energy performance standards that exceed the energy requirements of Building Regulations until commencement of amendments to the Planning and Energy Act 2008 in the Deregulation Bill.’

As explained below, the relevant amendment to the Energy Act was not subsequently commenced and the related zero carbon homes standard and update to Building Regulations referred to in the WMS was also subsequently abandoned.

The WMS then stated that:

‘Until the amendment is commenced, we would expect local planning authorities to take this statement of the Government’s intention into account in applying existing policies and not set conditions with requirements above a Code level 4 equivalent.’

Aside from the fact that this ‘expectation’ is clearly tentative and non-mandatory in nature, it also expressly only applies to development management and the setting of conditions under then-existing policies. It is also now clearly redundant given that it is predicated on the since-withdrawn zero carbon homes framework⁹ – and of course given that the new Part L regulations are now higher than Code 4.

This was then cited in the 2019 update to the National Planning Practice Guidance (NPPG) as creating a restriction on the extent to which local authorities can impose standards above building regulations generally, i.e. including in setting new plan policies. However, as just set out, that is clearly not what the WMS said. And in any event, the courts have confirmed that NPPG is not policy (however mandatory its wording is),¹⁰ and is therefore not part of the soundness test of consistency with national planning policy under paragraph 35 of the NPPF.¹¹ And given the most recent statements by government (set out below), the abandonment of the zero carbon homes standard, the introduction of new Building Regulations at a level higher than Code 4, and that the practice guidance misstates the content of the WMS, this paragraph of the NPPG can also reasonably be given no or very limited weight by local authorities in preparing plan policy.

In terms of the NPPF, para 154(b) tells us that *‘Any local requirements for the sustainability of buildings should reflect the Government’s policy for national technical standards.’*

Optional national technical standards at levels above Building Regulations were introduced following the 2015 WMS. These included national technical standards relating to water efficiency for example. However, as stated in the 2015 WMS, this framework of national

⁸ <https://questions-statements.parliament.uk/written-statements/detail/2015-03-25/HCWS488>.

⁹ <https://www.theguardian.com/environment/2015/jul/10/uk-scraps-zero-carbon-home-target>.

¹⁰ *R (Solo Retail) v Torridge DC* [2019] EWHC 489 (Admin) [33]-[34].

¹¹ Written Ministerial Statements and the NPPG are material considerations in plan preparation and planning decisions, but the level of weight placed on them will reflect (among other things) the extent to which they are up-to-date.

technical standards would not cover energy efficiency, with local authorities retaining the power to set local energy efficiency standards for new homes.

The same analysis applies to section 1(5) of the Energy Act,¹² which states that local plan policies on renewable and low carbon energy generation and the energy efficiency of buildings should not be *'inconsistent with relevant national policies'* (defined as national policies relating to energy from renewable sources, low carbon energy or furthering energy efficiency).¹³

Section 43 of the Deregulation Act 2015 introduced powers to disapply the power to set energy efficiency standards in England in relation to housing development, but this provision has never been commenced. And in last year's response to the Future Homes Standard consultation¹⁴ the Government underlined the contribution local authorities can make to cutting carbon and confirmed that it would not move to commence section 43 pending anticipated reforms to the planning system:

'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.'

2.41 Further, as we move to ever higher levels of energy efficiency standards for new homes with the 2021 Part L uplift and Future Homes Standard, it is less likely that local authorities will need to set local energy efficiency standards in order to achieve our shared net zero goal.'

Indeed, the Government's response recognises the potential need for local standards to be set to achieve the national net zero goal, stating only that this need will be 'less likely' as national standards become more stringent.

So, the full powers of the Energy Act on renewable and low carbon energy generation and the energy efficiency of buildings remain available to local authorities.

To be clear, the fact that the WMS is not a sound basis for decision making cuts both ways. That is to say, it is unsafe to rely on it to set a standard requiring a 20% uplift above the latest revision to Part L. That also would be arbitrary. Any up-lift figure must be justified by local evidence and the wider legal and policy requirements set out by the Government. Put simply, you have the power if you can make a sound case.

So far, we have seen that far from outlandish an overall objective on net zero in planning policy is enabled by the strong section 19 duty on climate change, is required by national planning

¹² <https://www.legislation.gov.uk/ukpga/2008/21/section/1>.

¹³ And in terms of the percentage of renewable energy required from on-site generation, there is no possible argument that national policy limits local authorities' power to impose standards, subject to the usual soundness tests.

¹⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956094/Government_response_to_Future_Homes_Standard_consultation.pdf

policy which engages the Climate Act target regime and is supported by the requirements of the net zero and energy security strategies. We have noted that the Energy Act empowers local authorities to set standards for renewables and low carbon energy and energy efficiency so long as they are consistent with national policy on those specific subject areas. We have noted that there is no national policy which restricts on site renewable energy generation and no restrictions on the energy efficiency standards above building regulations for commercial buildings. We have also demonstrated that the 2015 WMS is out of date and relying on it in practice guidance to stop local authorities setting ambitious standards is illogical and unreasonable.

The TCPA would strongly encourage local planning authorities to push at this boundary not least because of the large backlog of consents for new homes which have been approved since 2016 with critically substandard requirements on climate mitigation.

Conclusion

It would be stupid to pretend that the national policy position on energy efficiency is not unhelpfully opaque for those on the front line of plan making. The principal responsibility for this uncertainty lies with the government and must be resolved in forthcoming update to the NPPF. The failure to properly address net zero housing development in the aftermath of 2016 has resulted in confusion, not least in the minds of the Planning Inspectorate, which risks compromising the solutions the nation so desperately needs. In that sense the Planning Inspectorate is, as always, caught between a rock and a hard place. However, in the view of the TCPA the main modifications to the West Oxfordshire Area Action Plan are badly misjudged and unjustified. The plan's net zero objective is clearly in line with government policy, supported by the Sixth Carbon Budget which is itself enshrined in law and entirely consistent with the climate duty in the 2004 Planning Act and the powerful enabling law in the Energy Act. Set against this weight of policy and law the Inspectorate will have to produce an extraordinary argument to justify the destruction of West Oxfordshire's exemplary carbon reduction ambitions.

Dr Hugh Ellis, Director of Policy

Acknowledgements

The TCPA is extremely grateful for the expert input from Peter Ellis, Sam Hunter Jones from Client Earth and the advice commissioned by Rights Community Action. Without them this statement would not have been possible.
