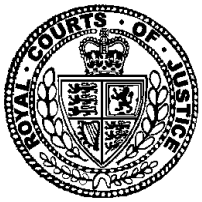

Neutral Citation Number: [2024] EWHC 359 (Admin)

Case No: AC-2023-LON-001146
CO/1308/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE KING
(on the application of RIGHTS COMMUNITY ACTION LTD)

Claimant

and

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendant

and

(1) WEST OXFORDSHIRE DISTRICT COUNCIL
(2) GROSVENOR DEVELOPMENTS LTD

Interested Parties

- -
- -

Mr Alex Goodman KC and Mr Alex Shattock (instructed by **Leigh Day Solicitors**) for the **Claimant**
Mr Mark Westmoreland Smith (instructed by **Government Legal Department**) for the **Defendant**
The First Interested Party was not represented
Mr Charles Banner KC (instructed by **West Oxfordshire District Council Legal Services**) for the **Second Interested Party**

Hearing dates: **14 November 2023**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is an application for judicial review of the Inspectors' Report into the Salt Cross Garden Village Area Action Plan ("AAP"). The Claimant is a Non-Governmental Organisation ("NGO") involved in community planning, particularly in relation to the formulation of local development plans. The Defendant is the Secretary of State for Communities and Local Government ("SoS") on whose behalf the Inspectors report. The First Interested Party is the Local Planning Authority ("LPA") responsible for the AAP. The Second Interested Party is the developer of the Salt Cross development area.

2. The Claimant was represented by Alex Goodman KC and Alex Shattock, the Defendant was represented by Mark Westmoreland Smith, the First Interested Party was not represented, and the Second Interested Party was represented by Charles Banner KC.

3. The case concerns whether the Inspectors erred in law in their treatment of a Written Ministerial Statement ("WMS") dated 2015, which purported to control how energy performance requirements in new housing development would relate to the Building Regulations and the Code for Sustainable Homes. There is some inconsistency in the documentation between whether the Inspectors should be called "the Examiners" and whether their report is an Inspectors' Report or an Examiners' Report. For the purposes of consistency, I describe them throughout as the Inspectors and refer to the Inspectors' Report ("IR").

4. The case raises the following issues:

    a. The Claimant's standing to bring the case;

    b. Whether there is a justiciable decision;

    c. The Grounds:

        i. Whether the Inspectors erred in law in respect of their approach to the WMS?

        ii. Whether the IR failed to lawfully deal with the inconsistency of approach with other Inspector's reports dealing with the same WMS?

        iii. Whether there was procedural unfairness.

<u>The Planning and Energy Act 2008 and the Written Ministerial Statement 2015</u>

5. The legislative framework for the scope of energy policies in Local Authority development plan documents is set out in section 1 of the Planning and Energy Act 2008 ("PEA") which provides:

> *"**1 Energy policies***
>
> *(1) A local planning authority in England may in their development plan documents, a corporate joint committee may in their strategic development plan, and a local planning authority in Wales may in their*

local development plan, include policies imposing reasonable requirements for—

(a) a proportion of energy used in development in their area to be energy from renewable sources in the locality of the development;

(b) a proportion of energy used in development in their area to be low carbon energy from sources in the locality of the development;

(c) development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.

(2) In subsection (1)(c)—

"energy efficiency standards" means standards for the purpose of furthering energy efficiency that are—

(a) set out or referred to in regulations made by the appropriate national authority under or by virtue of any other enactment (including an enactment passed after the day on which this Act is passed), or

(b) set out or endorsed in national policies or guidance issued by the appropriate national authority;

"energy requirements", in relation to building regulations, means requirements of building regulations in respect of energy performance or conservation of fuel and power.

(3) In subsection (2) "appropriate national authority" means—

(a) the Secretary of State, in the case of a local planning authority in England;

…

(4) The power conferred by subsection (1) has effect subject to subsections (5) to (7) and to—

(a) section 19 of the Planning and Compulsory Purchase Act 2004 (c. 5), in the case of a local planning authority in England;

…

(5) Policies included in development plan documents by virtue of subsection (1) must not be inconsistent with relevant national policies for England.

…

(7) Relevant national policies are—

> *(a) national policies relating to energy from renewable sources, in the case of policies included by virtue of subsection (1)(a);*
>
> *(b) national policies relating to low carbon energy, in the case of policies included by virtue of subsection (1)(b);*
>
> *(c) national policies relating to furthering energy efficiency, in the case of policies included by virtue of subsection (1)(c).”*
>
> [emphasis added]

6. The issue at the centre of the case is the interpretation of, and approach to, a WMS issued by the then SoS, Eric Pickles MP, in 2015. The WMS covered a series of disparate town planning issues and included a heading “Housing Standards Streamlining the system”. There was then a sub-heading “Plan making”. This included the following:

> *“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. This is expected to happen alongside the introduction of zero carbon homes policy in late 2016. The Government has stated that, from then, the energy performance requirements in Building Regulations will be set at a level equivalent to the (outgoing) Code for Sustainable Homes Level 4. 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. This statement does not modify the National Planning Policy Framework policy allowing the connection of new housing development to low carbon infrastructure such as district heating networks.”*
>
> [emphasis added]

7. A summary version of the WMS was inserted into the National Planning Policy Guidance (“NPPG”) on 15 March 2019. This states:

> *“The Written Ministerial Statement on Plan Making dated 25 March 2015 clarified the use of plan policies and conditions on energy performance standards for new housing developments. The statement sets out the government’s expectation that such policies should not be used to set conditions on planning permissions with requirements above the equivalent of the energy requirement of Level 4 of the Code for Sustainable Homes (this is approximately 20% above current Building Regulations across the build mix).”*

8. Subsequent to the WMS, various things happened which materially impacted upon the policy set out therein.

9. Firstly, the Deregulation Act 2015 gained Royal Assent and therefore became an Act and not a Bill. However, the amendments to the PEA which were contained in the Deregulation Act 2015, and referred to in the WMS, have not been commenced.

10. Secondly, in a statement made in January 2021 the Government stated that "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."** [emphasis added].

11. Thirdly, amendments to Part L of the Building Regulations in 2021, set energy standards for homes at a level exceeding Level 4 of the Code for Sustainable Homes. Therefore the current standards in the Building Regulations are above those that the WMS told local authorities not to exceed.

12. Fourthly the Government's January 2022 response to the Select Committee report on Local Government and the path to net zero, where it said:

> *"The National Planning Policy Framework (NPPF) is clear that the planning system should support the transition to a low-carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low-carbon energy and associated infrastructure.* ***The NPPF expects Local Plans to take account of climate change over the longer term; local authorities should adopt proactive strategies to reduce carbon emissions and recognise the objectives and provisions of the Climate Change Act 2008. Local authorities have the power to set local energy efficiency standards that go beyond the minimum standards set through the Building Regulations, 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 authorities still retain powers to set local energy efficiency standards that go beyond the minimum standards set through the Building Regulations. In addition, there are clear policies in the NPPF on climate change as set out above. The Framework does not set out an exhaustive list of the steps local authorities might take to meet the challenge of climate change and they can go beyond this."***
>
> [emphasis added]

13. It can be seen from this statement that the most recent Government statement is that local authorities can go beyond the Building Regulations, although the WMS was not referred to in this document and had not at this point been withdrawn.

The Area Action Plan and Policy 2

14. West Oxfordshire's 2018 Local Plan includes Policy OS2 which identifies the development of a self-contained settlement based on garden village principles to the

north of Eynsham, that is to be delivered as part of the overall distribution of housing set out in Policy H1. Policy EW1 sets out more detailed policy for the comprehensive development of a free-standing development of an exemplar Garden Village that is to be led by an Area Action Plan (AAP), which was the subject of the recent examination.

15. The AAP for Salt Cross was submitted to the SoS pursuant to the process in the Planning and Compulsory Purchase Act 2004 ("PCPA 2004").

16. The core objective of the AAP is set out at GV3:

> *"To design buildings fit for the future, mitigating the impact of Salt Cross on climate change by achieving zero-carbon development through ultra-low energy fabric and 100% use of low and zero-carbon energy, with no reliance on fossil fuels."*

17. Policy 2 sets out very detailed requirements as to how net-zero is to be achieved:

> *"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 monitoring post-completion demonstrating alignment with this policy.*
>
> *Building Fabric*
>
> *Proposals will need to use ultra-low energy fabric to achieve the KPI for space heating demand of <15 kWh/m2.yr, demonstrated through predicted energy modelling. This should be carried out as part of any detailed planning submission, reconfirmed pre-commencement, validated pre-occupation and monitored post-completion.*
>
> *Overheating*
>
> *Thermal comfort and the risk of overheating should be given full consideration in the earliest stages of design to ensure passive-design measures are prioritised over the use of more energy-intensive alternatives such as mechanical cooling. At outline planning stage, overheating should be mitigated through appropriate orientation and massing and at the detailed planning stage, a modelling sample proportionate to development density will be required to demonstrate full compliance with CIBSE TM59 for residential and TM52 for non residential development, addressing overheating in units considered at highest-risk.*
>
> *Overheating calculations should be carried out as part of the detailed planning submission and reconfirmed pre-commencement.*

Energy Efficiency

Energy budgets (EUI targets) must be demonstrated using predicted energy modelling. The following KPI targets will apply:

- Residential <35 kwh/m2.yr

- Office <55 kwh/m2.yr

*- Research labs <55-240 kwh/m2.yr**

- Retail <80 kwh/m2.yr

- Community space (e.g. health care) <100 kwh/m2.yr

- Sports and Leisure <80 kwh/m2.yr

- School <65 kwh/m2.yr

To ensure best practice, an accurate method of predictive energy modelling, agreed in consultation with the District Council, will be required for a cross-section of building typologies (e.g. using Passive House Planning Package - PHPP or CIBSE TM45 or equivalent). This modelling should be carried out with the intention of meeting the target EUIs as part of the detailed planning submission, be reconfirmed pre-commencement, validated pre-occupation and monitored post-completion.

Fossil Fuels

The development will be expected to be fossil-fuel free. Fossil fuels, such as oil and natural gas should not be used to provide space heating, hot water or used for cooking.

Zero Operational Carbon Balance

100% of the energy consumption required by buildings on-site should be generated using on site renewables, for example through Solar PV. The quantum of proposed renewable energy for the whole site (outline planning) and each phase (detailed planning) should be shown in kWh/yr. The amount of renewable energy should equal or exceed the total energy demand for the development in order to achieve net zero operational carbon as a whole.

The energy strategy should state 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 zero-carbon operational balance is met. An explanation should be given as to how these figures have been calculated.

Renewable energy contribution calculations should be carried out as part of the outline and detailed planning submissions, be reconfirmed pre-

> *commencement, validated pre-occupation and monitored post-completion.*
>
> *A detailed low- and zero-carbon viability assessment should be carried out in support of the energy strategy detailing the selection of on-site low- and zero-carbon energy technologies.*
>
> *Embodied carbon*
>
> *Development proposals will need to demonstrate attempts to reduce embodied carbon to meet the following KPI:*
>
> *< 500 kg CO2/m2 Upfront embodied carbon emissions (Building Life Cycle Stages A1- A5). Includes Substructure, Superstructure, MEP, Facade & Internal Finishes.*
>
> *As part of the submission of any planning application, a report should be prepared which demonstrates the calculation of the expected upfront embodied carbon of buildings. Full lifecycle modelling is encouraged.*
>
> *Embodied carbon calculations should be carried out as part of the outline and detailed planning submission, be reconfirmed pre-commencement, and validated preoccupation."*

18. Following submission of the AAP to the SoS, the Inspector (Mr McCreery) issued a list of matters, issues and questions to be explored during the examination. Matter 7 related to environmental issues including net zero policy. The Local Authority's response referred to an expert net zero carbon report which it had commissioned.

19. During the course of the examination hearing sessions, held between 28 June and 8 July 2021, Policy 2 was discussed. The promoters of the site, the Second Interested Party, Grosvenor Developments Ltd ("IP2"), objected to Policy 2 based on previous representations made. The matters raised by IP2 included (inter alia) criticisms on the grounds that the net zero obligations included in Policy 2 were inconsistent with national policy, and that the evidence as to the deliverability and viability of the requirements was lacking.

20. During and following the hearing sessions, no further Matters, Issues and Questions ("MIQs") were issued by the Inspector as to the sufficiency of the net zero carbon report or the wider evidence base underlying Policy 2. The Inspector did not request that further evidence be provided. The only relevant agreed action points following the hearing sessions, was for the Council to *"provide details of other plans that have taken a similar approach to AAP policy 2."*

21. On 26 May 2022, nearly a year after the oral hearings had finished and the examination had been paused, the Inspectors wrote to the Council to confirm that the AAP would progress to the Main Modification and Reporting stage. By this time, a second Inspector has been appointed. Following this appointment, the Inspectors indicated that Policy 2 was not, in their view, sound:

> *"Our conclusions on the issues and the reasons for Main Modifications will be set out fully in our report and we will take account of consultation responses, updated sustainability appraisal and other relevant information before reaching a final conclusion. As such, any detailed reasoning for recommending a specific Main Modification is best left to our report. Notwithstanding this, 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 Consultation

22. In accordance with section 20(7C) of the PCPA 2004, the Council requested that the Inspectors should recommend any Main Modifications ("MMs") necessary to rectify matters that they considered would otherwise make the AAP unsound and thus incapable of being adopted. The draft MMs recommended by the Inspectors included the requirement to significantly 'dilute' the prescriptive elements of Policy 2.

23. The Council wrote in response on 19 July 2022 to express concerns that the Inspectors had not provided sufficient reasons to enable it to understand why these MMs to Policy 2 were required, and that interested parties would be unable to respond effectively to the proposed changes if no explanation was given as to why they were necessary. The Council requested that the Inspectors explain why the policy as proposed did not accord with national policy and why it was not justified and that this was necessary for consultation on the proposed MMs to be effective. The Council drew attention to the Inspectorate's own procedural guidance for the MMs stage. The Council pointed out that the Inspectors had not followed their own guidance which states:

> *"6.4. 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. However, the Inspector's final recommendations, and the reasons for them, will be set out in the Inspector's report at the end of the examination."*

24. On 19 July 2022, the Inspectors replied as follows:

> *"Policy 2 was discussed at length during the Hearing sessions, with views heard from a number of parties. The potential need for modification to the policy was also raised by the Inspector and prompted the Council to document an action relating to the policy and the question of whether it was inconsistent with national policy. These actions by the Inspector were sufficient to meet the aim of ensuring that the Council had a reasonable understanding that potential main modification was likely to be needed, in line with the best practice set out in the Procedure Guide.*

> *It is not usual practice for Inspectors to share more detailed reasoning ahead of Main Modifications being identified and consulted upon. This is because any final conclusions are subject to the outcome of that consultation. However, in this instance, as the Inspectors knew the issue was of particular importance to the Council, as a courtesy they took the step of providing some additional explanation in the letter of 26 May.*
>
> *The consultation on the Main Modifications is on the substance of modifications themselves. It is not on whether parties agree or not with the Inspector's reasoning for saying that a Modification is needed. As such, the full reasoning is not required in order to take part in the consultation. Providing such reasoning would instead*

25. On 25 July 2022, the Claimant wrote separately to the Inspectorate expressing its view that the Inspectors had not provided any reasonable explanation why the tests for soundness had not been met in relation to Policy 2. The letter provided:

> *"It is extremely frustrating that you have failed to provide any reasons for your finding that the council's draft of Policy 2 is unsound other than that it is inconsistent with national policy and unjustified. Without further explanation it is impossible for either the council, stakeholders, or members of the public to have a reasonable understanding of whether your analysis of the legal and policy position is correct, and therefore how to respond to any consultation on the MMs. It is particularly disappointing that you have taken this approach when Policy 2 is such a fundamental part of the draft AAP and is being looked closely at by other authorities who are attempting to address the climate emergency in their local plans.*
>
> *We consider that you have acted in breach of the Planning Inspectorate ("PINS") procedural guide for local plan examinations…"*

26. The letter goes on to reference paragraph 6.4 of the Inspectorate guidance.

27. The Inspectorate responded to the Claimant on 29 July 2022 enclosing the same response that had been sent to the Council.

28. The consultation on the MMs took place from 23 September 2022 to 4 November 2022. The Council took the unusual step of responding to its own consultation, emphasising its interpretation of the applicable national policy (which accords with the Claimant's), and highlighting a recent government response to an enquiry from Somerset and Bath Council: *"Plan-makers may continue to set energy efficiency standards at the local level which go beyond national Building Regulations standards if they wish".*

The Inspectors' Report

29. The Inspectors produced their Report on 1 March 2023. They dealt with Policy 2 under Issue 4. The Report at IR121 acknowledges that Salt Cross is intended to be seen as an exemplar and supports the principle of taking an *"ambitious approach to zero carbon building at Salt Cross".* They raise two soundness issues, consistency with national policy and whether the overall approach is justified. It is necessary to set out the entirety of the section on the first issue:

"Consistency with national policy

123. In relation to the building performance standards in Policy 2 as they would apply to dwellings, there is a question of whether the approach is consistent with national policy. The issue arises by virtue of Paragraph 154(b) of the NPPF and the need for local requirements for the sustainability of buildings to reflect the Government's policy for national technical standards.

124. Although various Government consultations linked to the Future Homes Standard have signalled potential ways forwards, the current national planning policy relating to the endorsement of energy efficiency standards exceeding the Building Regulations remains the Written Ministerial Statement (WMS) on Plan Making dated 25 March 2015. This is supported by the associated NPPG dated from 2019 which explains that the 2015 WMS sets out the Government's expectation that policies should not be used to set conditions on planning expectation that policies should not be used to set conditions on planning permissions with requirements above the equivalent of the energy requirement of Level 4 of the Code for Sustainable Homes (approximately 20% above the 2013 Building Regulations across the building mix). The 2015 WMS remains an extant expression of national policy.

125. The KPIs and wider approach in Policy 2 would amount to additional bespoke standards. The KPIs would sit alongside Part L of the Building Regulations and the Standard Assessment Procedure that is used to demonstrate compliance with it. They do not have a direct relationship with the Building Regulations that allows a percentage above the regulations to be easily generated. However, as the conclusions of the Elementa Report indicate, the standards in Policy 2 would amount to a significant uplift on the 2013 Building Regulations. The approach in Policy 2 therefore conflicts with national policy set out in the 2015 WMS.

126. The 2015 WMS predates a number of events, notably in this context the climate emergency declared by the Council and others, publication of more recent carbon budgets that signal the pace of change needed in order to reach net zero 2050, and delay to the timeline in the WMS for bringing forwards the Future Homes Standards.

127. It also predates the changes to Part L of the Building Regulations which came into effect on 15 June 2022, intended to pave the way for the Future Homes and Building Standards in 2025. In relation to residential buildings, the 2022 changes to the Building Regulations exceeds what the NPPG endorses only be exception. The WMS accompanying the 2022 changes to the Building Regulations is clear there will be no need for policies in development plans to duplicate the new overheating standard (which would be exceeded in the case of Policy 2).

128. Notwithstanding the passage of time and intervening events, the 2015 WMS remains current national policy on this matter. The future of national planning policy is open to speculation. Nevertheless, it is

> *uncontroversial to observe that higher standards of building performance will be required in order to meet necessary reductions in carbon emissions. What is less clear is the degree to which Government policy will require those standards to be applied as part of a nationally consistent approach utilising the Building Regulations as opposed to locally specific standards applied through the planning system.*
>
> *129. Section 1 of the Planning and Energy Act 2008 allows local planning authorities to include in their development plan documents reasonable requirements for development to comply with energy efficiency standards that exceed the energy requirements of the Building Regulations. This is subject to requirements being reasonable and also the stipulation at Section 5 that policies must not be inconsistent with relevant national policies.*
>
> *130. In this respect, there are inconsistencies between the approach set out in Policy 2 of the AAP and the national policy position explained above relating to exceeding the Building Regulations. In light of our conclusions relating to whether the overall approach in Policy 2 is justified, we do not regard the requirements as reasonable. As a result, the Council's ability to rely on Section 1 of the Planning and Energy Act 2008 is not demonstrated."*

30. The Inspectors then consider the question of factual justification and refer to the Council's supporting report, the Elementa Report. IR134 says that there is an absence of detailed site-specific consideration to show whether their standards could be realistically met by an end user. IR135-6 refers to the lack of a detailed evidence base.

31. IR137 -8 states:

> *"137. The detailed requirements also do not reflect the evolving nature of zero carbon building policy, where standards inevitably will change in response to technological and market advancement and more stringent nationally set standards, including within the Building Regulations. Policy 2 contains little flexibility to allow for such changes, or indeed to respond to detailed master planning that will evolve over time. This brings into question whether the evidence that supports the standards justifies the approach as a sound one.*
>
> *138. We appreciate that Policy 2 provides a high degree of certainty about the standards that will be applied over the lifetime of the development. However, even judged on a proportionate basis, the evidence that underpins the prescriptive requirements lacks the necessary depth and sense of realism to show that Policy 2 represents an appropriate strategy. As such, Policy 2 is not justified."*

32. The Inspectors' conclusions are set out at IR139-144:

> *"139. There are inconsistencies between the approach in Policy 2 and national policy around exceeding the Building Regulations. We acknowledge that there are examples of plans that impose standards*

> *relating to the performance of buildings exceeding Building Regulations beyond the extent set out in the 2015 WMS. Some of these examples have been highlighted by the Council [WODC EXAM 06] and additionally in response to the proposed Main Modifications. Where the highlighted policies have been examined and adopted, they have been found sound on the basis of their own evidence base which, unlike the evidence underpinning Policy 2, was found to be robust. In addition, none of the examples provided set standards that are as prescriptive as submitted for Policy 2, and with the same degree as inflexibility.*
>
> *140. Overall, the evidence base does not justify the approach in Policy 2 as an appropriate strategy, even on a proportionate basis. There is also an absence of robustness and credibility to justify departing from national standards, which leads us to conclude that Policy 2 is inconsistent with national policy.*
>
> *141. In terms of resolving the soundness issues, removing Policy 2 from AAP altogether would result in a reliance on Policy EH6 of the Local Plan. As EH6 is a reactive policy, such an outcome would not align with Policy EW1 of the Local Plan.*
>
> *142. Removal of Policy 2 would also not be consistent with the overarching vision of the AAP, which puts climate action front and centre. Nor would it fully reflect the general position of the evidence base, including the Energy Plan [EV18] prepared by Oxfordshire County Council. This evidence justifies taking an ambitious approach to zero carbon building at Salt Cross, notwithstanding our position in terms of whether the specific approach in Policy 2 is justified.*
>
> *143. Modifying the AAP to remove or adjust specific standards relating to energy performance caught by the 2015 WMS or making a judgement on whether other individual standards in Policy 2 could be adjusted would also not be a sound approach. This is because the standards in Policy 2 are intended to work as a coherent whole.*
>
> *144. Therefore, MM4 substitutes the wording of Policy 2 to introduce the need for an ambitious approach to the use of renewable energy, sustainable design, construction methods and energy efficiency. This is to be assessed at the planning application stage in response to an energy statement. The modification sets out what should be included within an energy statement, including elements set out in the submitted policy but without the specific, stringent requirements which we have found are neither consistent with national policy nor justified."*

Other Inspectors' reports

33. A number of other Inspectors have addressed the same issue as arises in this case. The Claimant relies on the reports of two different Inspectors into Development Plans which addressed the same issue of compatibility of those Plans with the WMS 2015, and which were drawn to the attention of the current Inspectors. The Claimant submits that

the Inspector's approach in the present case is inconsistent with those other reports, and insufficient explanation for the inconsistency has been given:

34. The first report is that of Inspector Lewis to Bath and North East Somerset Council dated 13 December 2022, when he said:

> *"84. The WMS 2015 has clearly been overtaken by events and does not reflect Part L of the Building Regulations, the Future Homes Standard, or the legally binding commitment to bring all greenhouse gas emissions to net zero by 2050.*
>
> *85. I therefore consider that the relevance of the WMS 2015 to assessing the soundness of the Policy has been reduced significantly, along with the relevant parts of the PPG on Climate Change, given national policy on climate change. The NPPF is clear that mitigating and adapting to climate change, including moving to a low carbon economy, is one of the key elements of sustainable development, and that the planning system should support the transition to a low carbon future in a changing climate. Whilst NPPF154 sets out that any local requirements for the sustainability of buildings should reflect the Government's policy for national technical standards, for the reasons set out, that whilst I give the WMS 2015 some weight, any inconsistency with it, given that it has been overtaken by events, does not lead me to conclude that Policy SCR6 is unsound, nor inconsistent with relevant national policies."*

35. The second report is that of Inspector Paul Griffiths to Cornwall Council dated 10 January 2023 following examination of the Cornwall Council Climate Emergency Development Plan Document, where he said:

> *"166. Provisions to allow Councils to go beyond the minimum energy efficiency requirements of the Building Regulations are part of the Planning and Energy Act 2008. The WMS of 25 March 2015 says that in terms of energy performance, Councils can set and apply policies which require compliance with energy performance standards beyond the requirements of the Building Regulations until the Deregulation Bill gives effect to amendments to the Planning and Energy Act 2008. These provisions form part of the Deregulation Act 2015, but they have yet to be enacted. Further, the Government has confirmed that the Planning and Energy Act will not be amended. The result of all this is that Councils are able to set local energy efficiency standards for new homes, without falling foul of Government policy.*
>
> *167. The WMS of 25 March 2015 has clearly been overtaken by events. Nothing in it reflects Part L of the Building Regulations, the Future Homes Standard, or the Government's legally binding commitment to bring all greenhouse gas emissions to net zero by 2050. In assessing the Council's approach to sustainable energy and construction, the WMS of 25 March 2015 is of limited relevance. The Framework makes clear in paragraph 152 that the planning system should support the transition to a low carbon future in a changing climate. Whilst paragraph 154b) of the Framework requires that any local requirements for the sustainability of buildings*

> *should reflect the Government's national technical standards, for the reasons set out, the WMS of 25 March 2015 has been superseded by subsequent events. While it remains extant, any inconsistency with its provisions does not mean that the approach the Council has taken lacks justification. In that sense, there is nothing in the Council's approach that raises issues of soundness."*

36. I have also been referred to a third report in respect of the Central Lincolnshire Local Plan, however as this post-dated the Inspector's recommendation, it is of limited relevance.

Submissions and Conclusions

Jurisdiction

37. The Defendant and the Interested Party submit that the challenge is premature and there is no decision at present which is amenable to judicial review. They do not actually rely on the ouster clause in section 113 of the PCPA 2004, but they refer to it as being relevant to the approach to challenges under the Act. Fundamentally, they submit that the Inspectors under the PCPA have only made a "recommendation" and not a "decision", and therefore there is no justiciable decision.

38. The answer to this issue lies in the statutory scheme under the PCPA, which is quite different from that for a planning decision under s.77 Town and Country Planning Act 1989 ("TCPA"), and recommendations of a planning inspector made thereunder.

39. Under the PCPA 2004 the LPA submits the Plan to the Defendant who then carries out an examination:

> *"**20 Independent examination***
>
> *(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.*
>
> *(2) But the authority must not submit such a document unless—*
>
> *(a) they have complied with any relevant requirements contained in regulations under this Part, and*
>
> *(b) they think the document is ready for independent examination.*
>
> *(3) The authority must also send to the Secretary of State (in addition to the development plan document) such other documents (or copies of documents) and such information as is prescribed.*
>
> *(4) The examination must be carried out by a person appointed by the Secretary of State.*
>
> *(5) The purpose of an independent examination is to determine in respect of the development plan document—*

(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound; and

(c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

(6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

(6A) The Secretary of State may by notice to the person appointed to carry out the examination—

(a) direct the person not to take any step, or any further step, in connection with the examination of the development plan document, or of a specified part of it, until a specified time or until the direction is withdrawn;

(b) require the person—

(i) to consider any specified matters;

(ii) to give an opportunity, or further opportunity, to specified persons to appear before and be heard by the person;

(iii) to take any specified procedural step in connection with the examination. In this subsection "specified" means specified in the notice.

(7) Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) considers that, in all the circumstances, it would be reasonable to conclude—

(i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and

(ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation, the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination—

(a) has carried it out, and

(b) is not required by subsection (7) to recommend that the document is adopted, the person must recommend non-adoption of the document and give reasons for the recommendation.

(7B) Subsection (7C) applies where the person appointed to carry out the examination—

(a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

(a) satisfies the requirements mentioned in subsection (5)(a), and

(b) is sound.

(8) The local planning authority must publish the recommendations and the reasons."

40. The LPA's powers to adopt the Plan are set out in s.23:

*"**23 Adoption of local development documents***

(1) The local planning authority may adopt a local development document (other than a development plan document) either as originally prepared or as modified to take account of—

(a) any representations made in relation to the document;

(b) any other matter they think is relevant.

(2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document—

(a) as it is, or

(b) with modifications that (taken together) do not materially affect the policies set out in it.

(2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—

(a) recommends non-adoption, and

> *(b) under section 20(7C) recommends modifications ("the main modifications").*
>
> *(3) The authority may adopt the document—*
>
> *(a) with the main modifications, or*
>
> *(b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.*
>
> *(4) The authority must not adopt a development plan document unless they do so in accordance with subsection (2) or (3).*
>
> *(5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority."*

41. It can be seen from these provisions that if the Inspector recommends non-adoption, or modifications, then the LPA cannot adopt the Plan, unless the recommended modifications are made, see s.23(3) and (4).

42. The Claimant submits that although the language of the PCPA 2004 is that the Inspector makes a "recommendation", in reality this binds the LPA as to its future formal decision making. It has a binary choice as to whether to accept the recommendations or to abandon the Plan. There is no option to reject or depart from the recommendation, as is generally the position in other parts of the Town Planning statutory scheme. As such, the recommendation of the Inspector is a justiciable decision because it has direct (and unavoidable) legal and practical consequences.

43. The Claimant also submits that there are strong practical reasons why a challenge should be allowed at the recommendation stage. To have to wait until the formal decision of the LPA would be to build in delay and further cost for the LPA who would have to go through the formal adoption process (or abandon the Plan) and then would have to judicially review their own decision. This is both administratively cumbersome and wasteful of resources. Mr Goodman relies on the comments of Lord Carnwath in *R (Champion) v North Norfolk DC* [2015] UKSC 52 at [63] and *R (Burkett) v LB of Hammersmith and Fulham* [2002] UKHL 23 at [38]:

> *"Leaving to one side for the moment the application of Ord 53, r 4(1) on the running of time against a judicial review applicant, it can readily be accepted that for substantive judicial review purposes the decision challenged does not have to be absolutely final. In a context where there is a statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights. Town planning provides a classic case of this flexibility. Thus it is in principle possible to apply for judicial review in respect of a resolution to grant outline permission and for prohibition even in advance of it: see generally Wade & Forsyth, Administrative Laws, 8th ed, p 600; Craig, Administrative Law, 4th ed, pp 724–725; Fordham, Judicial Review Handbook, 3rd ed (2001), para*

> *4.8.2. It is clear therefore that if Mrs Burkett had acted in time, she could have challenged the resolution. These propositions do not, however, solve the concrete problem before the House which is whether in respect of a challenge to a final planning decision time runs under Ord 53, r 4(1) from the date of the resolution or from the date of the grant of planning permission. It does not follow from the fact if Mrs Burkett had acted in time and challenged the resolution that she could not have waited until planning permission was granted and then challenged the grant."*

44. The caselaw shows that the court's jurisdiction to consider a judicial review depends very much on the particular statutory scheme, and the particular facts. One example is *R v SSE ex p Burch* (1985) 50 P&CR 53, where the Court quashed an opinion of the Secretary of State as to what sort of development would be granted permission under a Circular, on the basis that the practical effect was to constrain the LPA on the use of its powers. Therefore the approach of the Court has been to look at the substantive nature of the matter under challenge, rather than the nomenclature used in the statutory scheme.

45. Mr Westmoreland Smith, supported by Mr Banner, submits that to allow this challenge would *"revolutionise the way the planning system works both with regard to the plan-making process under the 2004 Act but in other systems too…".* He is, it appears, referring to the fact that "recommendations" arise in s.77 TCPA cases and other decision making processes and to make these justiciable would be a very significant change to the way planning challenges are currently brought. For the reasons I explain below I consider this analogy is plainly wrong on the face of the two statutes, and the *in terrorem* argument Mr Westmoreland Smith raises is not correct.

46. All parties referred me to the line of cases from *Manydown Co Ltd v Basingstoke BC* [2012] JPL 1188, through to *R (CK Properties) v Epping Forest DC* [2019] PTSR 183, in respect of the scope of the ouster clause in s. 113 PCPA. However, neither Defendant nor Interested Party submitted that the ouster provision applied to this stage of the statutory process. Therefore I do not need to consider these cases further.

47. In my view, the Defendant's argument fails to engage with the reality, rather than the nomenclature, of the PCPA. The reality is that the Inspector's report in this regard is not actually a "recommendation" at all, in the sense that it does not leave the LPA with a free discretion. In the s.77 TCPA situation, the SoS has complete discretion as to whether he accepts the recommendation or not, subject to normal principles of public law. That is what is commonly understood by the word "recommendation". But in contrast under s.23 PCPA, the LPA's discretion is fundamentally curtailed. It can choose not to accept the recommendations for modifications, but then the entire Plan falls.

48. In practice under the statutory scheme, the critical moment if the Inspector recommends main modifications, is that of that recommendation. The LPA's hands are at that point tied and their discretion to act removed. In my view there is no benefit, and significant disbenefit, in making any challenger, whether it be the LPA or another, wait until the LPA has decided whether to adopt the Plan with the modifications or to allow the whole Plan to lapse. The delay is itself inimical to good planning, see *Champion*. But further it will involve the LPA in the cost and administrative burden of not merely adopting the

Plan, that in a large part it objects to, but then potentially having to judicially review itself for having so adopted. That is hardly conducive to good administration.

49. For these reasons I conclude that the subject matter of this challenge is justiciable.

Standing

50. The Defendant and IP2, led on this point by Mr Banner, submit that the Claimant has no standing to bring the challenge. The test for standing in a judicial review was recently considered in *R (Good Law Project) v Runneymede Trust* [2022] EWHC 298 (Admin) at [16]-[29]. There are two parts of those passages which are particularly relevant in this context. Firstly, that in deciding standing it is necessary to have regard to the entire nexus of the case, including the substance and the merits, see [19]. Secondly, that the Court should be looking to exclude the mere busybody, but that will again depend on the context, see [25]:

> *"Lord Reed returned to this theme in Walton v Scottish Ministers [2012] UKSC 44; 2013 SC 67, at paragraphs 89 and following. At paragraph 92, Lord Reed said:*
>
> *"As is clear from that passage, a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words 'directly affected', upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has no legitimate concern. The circumstances which justify the conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another, depending upon the particular context and the grounds of the application. As Lord Hope made plain in the final sentence, there are circumstances in which a personal interest need not be shown.""*

51. The IP submits that the Claimant does not have *"sufficient interest in the matter to which the application relates",* pursuant to s.31(3) of the Supreme Court Act 1981. Mr Banner submits that the "matter" cannot be the AAP because otherwise the ouster provision would apply, and it is not the adoption of the Plan or it would be premature. Therefore the "matter" is the recommendation and the Claimant was not entitled to be a party to the examination, under s.20(6), because the Claimant did not respond to the regulation 18 or 19 consultation in respect of the AAP. Therefore the Claimant does not have sufficient interest in the recommendation to have standing.

52. The Claimant's involvement in the AAP process is set out in the witness statement of Dr Luhde-Thompson. The Claimant is an NGO involved in community planning and particularly the formation of local development plans. It has the specific aim of addressing the climate crisis through the planning system, and in particular by monitoring the work being done by LPAs through their development plan documents. It is through this work that the Claimant became aware of, and began monitoring, the Salt Cross AAP.

53. The Claimant wrote to the Inspectors highlighting their concerns on 25 July 2022.

54. On 29 July 2022 the Inspectors wrote back to the Claimant stating that they were awaiting the Council's response, but the Claimant's letter had been placed on the examination webpage. Following the Council's decision to consult on the MMs, the Inspectors wrote further to the Claimant on 28 September 2022, stating that:

> *"We … encourage you to respond to the consultation which we will carefully consider before taking decisions relating to the AAP. Please note that we have instructed that this response be placed on the examination webpage."*

55. The Claimant further submitted a detailed consultation response on the MMs which ran from 23 September 2022 to 4 November 2022. Once again, this consultation response was placed on the examination webpage.

56. Mr Banner described this involvement as *"belated, fleeting and superficial".* He relied upon a passage in the *Good Law Project* at [59]:

> *"In the circumstances of the present case we have reached the conclusion that the obviously better-placed claimant for judicial review for the purposes of the public sector equality duty challenge is the Runnymede Trust, an organisation which exists specifically to promote the cause of racial equality. We consider that the Runnymede Trust has standing to bring the public sector equality duty challenge, but the Good Law Project does not."*

57. Mr Banner submits that there is an obviously better-placed claimant for the judicial review, namely the LPA, at the appropriate time.

58. The test for standing in judicial review is simply whether the claimant has sufficient interest in the matter to which the application relates. In this case, the matter is plainly the Inspectors' recommendation, which as I have set above, I find to be justiciable. In my view it is not material, or certainly not sufficiently material, that the Claimant may not have been entitled to be a party to the examination. The matter being challenged is the Inspectors' recommendation, which emerged from the AAP process.

59. The Claimant did engage in the AAP process, albeit only in the latter stages. However, this later engagement is both understandable and justifiable, because until the Inspectors indicated that they were considering recommending against Policy 2, there was no reason for the Claimant to engage. The LPA was pursuing a Plan which entirely accorded with the Claimant's aims, and there would not have appeared to have been any reason for the Claimant to take active steps. However, once the Inspectors' issue emerged that position entirely changed.

60. In my view the Claimant cannot properly be described as a busybody. It is an NGO established and operating in precisely the field of this AAP and this challenge, namely the role of LPA development plan making and climate change. That is an issue of enormous public concern, and one where this Claimant has particular knowledge and interest.

61. Further, I do not read the Divisional Court decision in *Good Law Project* as seeking to create a new test for standing, of whether there is a "*better placed claimant*". Such a test would be a radical tightening of the rules in standing, this being a long step from a requirement that a claimant is not a busybody. There may be many judicial reviews where it could be said that someone other than the Claimant was better-placed, in the sense that they were more directly affected by the decision. But there may equally be many reasons why such a person chooses not to bring a challenge.

62. In any event, considering the facts at [59] of *Good Law Project*, the better placed claimant was an organisation with the specific aim relevant to the case. That test would be met here by the Claimant in any event.

63. Therefore I find that the Claimant has standing to bring this claim.

The Grounds

Ground One

64. Ground One is that the Inspectors misinterpreted the WMS. The Claimant relies on the part of the WMS that states:

> *"[L]ocal 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 2015."*

65. The Claimant states, correctly, that the amendments that were to be brought in by the 2015 Bill (now Act) have not been brought into effect, and the Government has now indicated that it does not intend to do so. Therefore the WMS cannot be interpreted to proscribe local plan policies that exceed the Building Regulations, because the premise of the policy no longer exists. The Claimant submits that this must be the correct interpretation because no other interpretation now makes any sense of the policy position.

66. The intention of the WMS was that the LPAs could require standards above the Building Regulations until the PEA amendments came into force. This was part of a careful framework by which s.43 of the Deregulation Act 2015 was intended to remove the power to set standards for energy efficiency above the Building Regulations.

67. However, those amendments have not come into force, and the Government has issued a statement in January 2021 that they do not intend to bring them into force. Therefore the WMS has to be interpreted taking into account this change since the date of its drafting.

68. Section 1 of the 2008 Act gives the LPA the power to set policies for energy efficiency that exceed the Building Regulations. That would have been constrained by s.43 of the 2015 Act, but that section has not been brought into force. The Claimant submits, correctly, that the WMS cannot mis-state the law, or restrict the legal powers of the LPA under the 2008 Act. However, it is important to note that the breadth of the power in s.1(1) is itself then constrained by the limitation in s.1(5). Part of the difficulty in this

case is that national policy is not defined in the statute, and can in practice be promulgated in different ways, and unfortunately can and sometimes is, contradictory. The reality here is that the Government has issued documents and statements that pull in different directions, and that has made the interpretation of "policy" a difficult task.

69. There have also been a series of further changes, as set out above, which are inconsistent with the Inspectors' interpretation of the WMS as being a bar on the LPA setting higher standards in the AAP. Most importantly, in my view, is the Building Regulations (Amendment) in June 2022 which sets standards with a 31% reduction from the 2013 position. This leads to the odd situation by which the Building Regulations themselves now provide for stricter standards than the WMS appears to allow. This situation does not create a rational basis for applying a black letter interpretation to the WMS.

70. Mr Westmoreland Smith, supported by Mr Banner, submits that this challenge is a complaint about the application of planning policy, rather than the interpretation of policy, and is therefore a matter for the Inspector rather than the court.

71. The principles which the court should apply in challenges to planning decisions were helpfully summarised by Lindblom LJ in *St Modwen*:

> *"6. In my judgment at first instance in Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in handling a challenge under section 288 . This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:*
>
> *"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26 , at p.28).*
>
> *(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953 , at p.1964B-G).*
>
> *(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority*

determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759 , at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74 , at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] P.T.S.R. 983 , at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80 , at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB) , at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6 , at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137 , at p.145)."

72. Mr Westmoreland Smith submits that the Inspectors' approach in IR124 is entirely consistent with the words of the WMS. The Inspectors should be assumed to understand

national policy, and they understood that the WMS did not proscribe policies from exceeding the Building Regulations, they simply applied the policy as a matter of judgement. In accordance with the principles set out in *Tesco v Dundee*, this case is not a question of interpretation of policy, but merely the application of policy, and as such there is no error of law and no role for the Court.

73. In my view this is not a correct reading of the IR, and in particular IR124, 125 and 130. The Inspectors were interpreting the WMS and the NPPG in IR124 as Government policy being that *"policies should be not used to set conditions ... above the equivalent ... of Level 4*". In IR125 that is why they say the approach in Policy 2 *"conflicts with national policy set out in the 2015 WMS".* That sentence is based on their interpretation of the WMS, not on the application of the WMS to the facts of the particular case. They then revert to this point in IR130 by saying that there is inconsistency between the approach in Policy 2 and the AAP.

74. It follows from this analysis of the IR that Ground One does go to the interpretation of policy, and not merely its application.

75. The WMS has to be interpreted in accordance with the mischief it was seeking to address, and with an "updating construction", see by analogy with statute, Bennion on Statutory Construction (Eighth Edition) at Chapter 14. The WMS is not a statute but a policy, but even with a statute the mischief is a highly relevant consideration in interpretation, and the principle of applying an updating construction is well established. In order to make sense of the WMS in the circumstances that applied in 2023 it is essential to have regard to the fact that the restriction on setting conditions above Code Level 4, upon which the Inspectors relied in IR124, no longer apply.

76. In my view, the Inspectors' interpretation neither makes sense on the words, seen in their present context, or of the mischief to which it was applying. To interpret the WMS so as to prevent or restrict the ability of the LPA to set a standard higher than Level 4 is plainly wrong in the light of subsequent events. For this reason, the Inspectors erred in law in their approach by finding that Policy 2 of the AAP was inconsistent with the WMS.

77. I note that this analysis entirely accords with the position of the Government in its response to the Select Committee on Housing Communities and Local Government in January 2022, when it said: *"Local authorities have the power to set local energy efficiency standards that go beyond the minimum standards set through the Building Regulations…."* Therefore the Government itself did not appear to be suggesting that the policy in the WMS remains extant.

78. The same analysis necessarily follows in respect of the NPPG, given that it merely reflects the language of the WMS.

79. I therefore allow Ground One.

Ground Two

80. The Claimant submits that the IR is inconsistent with the Reports of the Inspectors in Bath and North East Somerset and Cornwall. The Inspectors at IR139 did refer to this

inconsistency but said that it turned on the findings relating to the specific evidence base in the other Plans.

81. In my view this Ground adds nothing to Ground One. The IR does refer to the inconsistency, so it was taken into account. The Inspectors considered that the different approach rested on the specific facts, but that plainly is not the case. The other two Inspectors found that the WMS *"had been overtaken by events"* (BANES at [84]) and therefore found that the relevant policies were not inconsistent with it, see [85]. The Cornwall Inspector took the same approach, see Cornwall at [167]. Although these inspectors refer to giving the WMS less weight, in practice they applied the WMS in a wholly different way, finding no inconsistency.

82. Both Mr Westmoreland Smith and Mr Banner refer to the specific factual differences between the areas, and the Inspectors' findings, but a proper reading of the Reports shows that there was a completely different approach to the WMS, quite separately from any different evidential findings.

83. In the present case the Inspectors found inconsistency with the WMS at IR127 and then relied on s.5 of the PEA. Therefore there is a fundamental difference of approach to the WMS between the IR in this case, and the other two Inspectors.

84. However, if the current Inspectors' approach to the WMS was lawful, then there would be no separate error of law in respect of the inconsistency between the two approaches. The Inspectors here have explained why they took their approach. In other words, if Ground One failed, then Ground Two would not give rise to a successful Ground. Equally, if Ground One succeeds then Ground Two adds nothing.

Ground Three

85. The Claimant alleges that the Inspectors approach to Policy 2 was procedurally improper because they failed to explain the nature of their concerns to the Local Authority either before or during the hearing sessions. They only did so when they presented their Report, by which stage it was too late for the Local Authority or the Claimant to influence the conclusions.

86. The fundamental problem with Ground Three is that for it to succeed, the Claimant has to show prejudice, see *R (Clientearth) v Secretary of State for BEIS and Drax Power* [2020] EWHC 1303 (Admin). The Local Authority has not brought the claim and is not arguing that it was prejudiced by the procedure adopted.

87. The Claimant submits that it was prejudiced because it did not understand the Inspectors' concerns. However, as the SoS points out, the Claimant did not participate in the hearings and it was at those hearings that Policy 2 was explored and the potential need for a Main Modification considered. The issues underlying the Inspectors' concerns were set out in advance in Questions 7 and 8.

88. The PINS Procedural Guide sets out the relevant requirement as being *"the LPA has a reasonable understanding of why the potential main modifications are likely to be needed".* Firstly, this is aimed at the LPA and not a third party such as the Claimant. Secondly, the LPA had had sufficient information to meet this requirement, because they had received Questions 7 and 8, and had participated in the hearings.

89. In my view the Claimant's failure to understand the Inspectors' reasons, and thus alleged prejudice, arose from the fact it had not been involved in the earlier stage, not from any lack of fairness in the process.

90. For these reasons Ground Three fails.

Relief

91. The SoS and the IP submit that even if the Claimant succeeds on Grounds One and Two no relief should be granted because the Inspectors found that the Policy 2 was unjustified on the evidence submitted in any event. This appears from IR131-138 and from the overall conclusions.

92. Those parties rely on s.31(3C) of the Senior Courts Act 1981, which provides that the Court should refuse relief if it is highly likely that the outcome for the Claimant would not be substantially different if the error of law had not occurred.

93. It is correct that the Inspectors divide their assessment into two parts, the first dealing with consistency with national policy and the second whether the overall approach in Policy 2 is justified. In IR131-138 they set out various policy specific points about Policy 2.

94. However, I do not accept that the *highly likely the outcome would be the same tes*t is met in the light of the precise language of the IR. The Inspectors' overall conclusions in IR139 -140 closely link the issue about the consistency of Policy 2 with national policy, with the evidence base issue. In IR139 their reasons for departing from the approach of the BANES and Cornwall Inspectors conflate the national policy issue and the evidence base conclusion. They then do the same thing in IR140 saying that there is a lack of evidence *"to justify departing from national standards".* It therefore appears that in the evidence base analysis the Inspectors were testing the arguments against their misinterpretation of the WMS, rather than against the Government's changed position.

95. Overall, in my view, the Inspectors error in respect of the WMS infected the entirety of their analysis. If they had properly understood and applied national policy, then they might well have reached a different set of conclusions on Policy 2, whether in part or on its entirety.

Postscript

96. After the end of the hearing but before judgment, on 13 December 2023 the SoS issued a further Written Ministerial Statement, which withdrew the 2015 WMS. The 2023 WMS included as follows:

> *"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."

97. The Claimant submits that this supports its case, as set out above. However, as the SoS and Interested Party submit, the 2023 WMS comes well after the Inspectors' recommendation, and is irrelevant to the question before me, whether the Inspectors' erred in law. This is not a case where there is any ground to rely on post-decision facts, and therefore I place no weight on the 2023 WMS.