Case Name: *Rights: Community: Action Ltd, R (On the Application Of) v Secretary of State for Housing, Communities and Local Government* [2025] EWCA Civ 990 (25 July 2025)

Full case: Link here

Commentary: This decision relates to the appeal of Mrs Justice Lieven's dismissal of the **Claimant and Appellant,** Rights: Community Action Ltd's judicial review to challenge the Minister's approval of a 2023 Written Ministerial Statement (**2023 WMS**). The Court of Appeal (**CoA**) dismissed the appeal and found that the Minister complied with the duty to have "due regard" to the Policy Statement on Environment Principles (**EPPS**) set out in the Environment Act 2021 when promulgating the policy.

This decision is the first appellate consideration of the interpretation of the Minister's duty under s19 of the Environment Act 2021 to have due regard to the policy statement on environmental principle in effect when making policy. The CoA also held that the 2023 does not override the power in s1 of the Planning and Energy Act which allows LPAs to specify energy efficiency standards that exceed current building regulations where the relevant energy efficiency standard has been set out in regulations or set out and endorsed in national policies or guidance. The CoA held that the effect of the 2023 WMS is that a LPA is able to set a local standard up to the level of the draft Future Homes Standard (**FHS**).

In terms of whether LPAs can go further than a standard related to the draft FHS, the CoA stated that the 2023 WMS does recognise that a LPA may wish to set energy efficiency standards which go beyond the draft FHS and requires that a well-reasoned and robustly costed justification should be provided which meets a number of criteria including the effect on housing supply and affordability.

The CoA recognised that there was a tension between s1 of the Planning and Energy Act, section 19 of the PCPA 2004 and the well-established legal principle that a LPA can include in its DPD a local policy which conflicts with national policy, justified, for example, by local circumstances but it was not necessary for the court to reach a conclusion on this matter.

Facts and legal framework: The **Appellant**, Rights: Community: Action Limited, initially sought (and was unsuccessful) judicial review in respect of the 2023 Written Ministerial Statement made by the Secretary of State for Levelling Up, Housing and Communities titled "Planning – Local energy Efficiency Standards Update" (**2023 WMS**).

The 2023 WMS is a statement of national policy on the inclusion of policies in LPA's development plan documents (**DPDs**) when setting building efficiency standards for new development that exceed the requirements of building regulations. The Government has concerns that setting higher standards at a local level might impact the delivery of development. The 2023 WMS provided guidance that local plan examiners should reject

energy efficiency standards going beyond "current or planned building regulation" unless there was rationale for doing so that ensured the development remained viable. It allowed LPAs to set a standard compatible with the draft Future Homes Standard (**FHS**) until that policy was formally adopted. Any additional requirement was to be expressed as "a percentage uplift of a dwelling's Target Emissions Rate (**TER**) calculated using a specified version of the Standard Assessment Procedure (**SAP**)".

The Environment Act 2021 (**EA 2021**) imposes a duty on the Secretary of State to prepare a Policy Statement on Environment Principles (**EPPS**) to explain how the principles set out within s 17(5) of the EA 2021 should be interpreted and applied by Ministers. The duty of a Minister in s19 of the EA 2021 to have due regard to the EPPS when setting policy came into force on 1 November 2023, a few weeks prior to the Minister's decision to approve the 2023 WMS.

On 5 October 2023, before the s19 EA 2021 duty came into effect, officials sent a draft of the 2023 WMS with a brief assessment of the EPPS against the draft to the relevant Minister, Mr Rowley, who then approved the October draft. On 14 November 2023, the relevant responsible Minister became Baroness Penn, who then approved an amended version of the draft without sight of the EPPS assessment. Following receipt of pre-action protocol correspondence, a subsequent EPPS assessment was carried out by the relevant Minister (this time, Mr Rowley again) in February 2024.

Proposed challenge: Mrs Justice Lieven dismissed the challenge in the first instance, which was then appealed and heard before Holgate, Dingemans and Lewis LLJ in the Court of Appeal (**CoA**). The Office of Environmental Protection (**OEP**), Green Alliance, and Essex Planning Officers' Association were all interveners in the proceeding.

The grounds of appeal were that:

- Ground 1: the Judge erred in her interpretation of s19 of the EA 2021 regarding the duty to have due regard to the EPPS. The Appellant raised a number of points under this ground, that can be broadly summarised as:
    - the "rearguard" nature of the assessment undertaken in February 2024 was not sufficient to discharge the duty to have due regard to the EPPS and that, even if s19 permits rearguard action, it does not allow for an after-the-event assessment (meaning the February 2024 assessment) to defend the earlier decision; and
    - the Judge erroneously found that the s19 duty could be discharged from an assessment that was largely carried out with reference towards the Future Homes Standard (**FHS**), a policy that was not yet in force, but instead the discharge of this duty requires consideration of the impacts of the individual policy against the EPPS.

- Ground 2: the Judge erred in her interpretation of s1 of the PEA by finding that an LPA could only specify an energy efficiency standard exceeding building regulation requirement if it falls within national policy. The Appellant argued that this was a restraint of local authorities' powers to meet their duties under s19 of the Planning and Compulsory Purchase Act 2004 (PCPA 2004).

In deciding Ground 1, the CoA found that the duty applies at a number of stages in the making of a policy, including developing, adopting or revising policy, rather than only at the point when a policy is adopted [85]. The CoA therefore considered that, whilst there was a failure to comply with the duty at one stage of the process, which was unlawful, the subsequent compliance in a later assessment was not unlawful. Further to this, the CoA found that the February 2024 assessment had been carried out in good faith and worked through the relevant principles in the EPPS.

The CoA also agreed with Lieven J's rejection of the Appellant's criticism that the EPPS assessment wrongly assessed the policy impacts of the 2023 WMS by taking into account the FHS, that was described as an inchoate policy and not due to be in force until 2025 [106]. The COA found that given the status of the WMS as an interim policy, it was appropriate "*if not necessary*" for the EPPS assessment to take the draft FHS into account [106].

Reading the documents "*fairly and as a whole",* Holgate LJ found the Appellant's suggestion that the February 2024 assessment was a rearguard action to defend the earlier decision was "*wholly without foundation*" [112].

In relation to Ground 2, the CoA also agreed with Lieven J's findings that the Appellant misread both the legislation and the 2023 WMS, and that it did not purport to override the power conferred by s1 of the PEA 2008 and rejected ground 2 [81].

At para 68 the judgment states that the "*key point is that s.1(1)(c) only authorises a LPA to choose an energy efficiency standard falling within the ambit of a standard referred to in regulations or policy made by the Secretary of State (s.1(2)). The 2023 WMS allows LPAs to set a standard compatible with the draft FHS ("planned buildings regulations") during the interim period leading up to the adoption of the FHS. The draft FHS is an energy efficiency standard which exceeds the energy requirements of current building regulations for the purposes of s.1(1)(c) and (2). The effect of the 2023 WMS is that a LPA is able to set a local standard up to the level of the draft FHS. The 2023 WMS therefore accords with the language and purpose of s.1 of the PEA and the manner in which it is intended to operate*."

However, "*the 2023 WMS also does recognise that a LPA may wish to set energy efficiency standards which go beyond the draft FHS. Here, the WMS states that a LPA should provide a well-reasoned and robustly costed justification for any such policy which meets a number of*

criteria. Development must remain viable, the effect of the policy on housing supply and affordability must be considered and the additional requirement should be expressed as a percentage uplift of a dwelling's "target emissions rate". Those criteria do not set out or endorse any particular "energy efficiency standard". Instead they lay down a basis upon which the justification for a LPA standard higher than the draft FHS can be tested by an Inspector during the examination of a DPD."[77]

This raised the question of what the statutory power was for an LPA to include a standard beyond the draft FHS if s1 of the Planning and Energy Act only applies to standards referred to in legislation and policy. The CoA stated that it appeared that "*the draftsman did not think through the tension between the intention to use national measures to impose statutory restraints on how far a LPA may set standards exceeding building regulations and the well-established principle that a LPA can include in its DPD a local policy which conflicts with national policy*". However, it was unnecessary for the court to reach a conclusion on the matter.

For now, following this decision it seems that LPAs can adopt local energy efficiency standards that exceed building regulations and the draft FHS, provided that there is rationale and justification for doing so in the relevant circumstances.

Case summary prepared by Emily Clapp