



Neutral Citation Number: [2025] EWCA Civ 990

Case No: CA-2024-001754

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MRS. JUSTICE LIEVEN
[2024] EWHC 1693 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2025

Before :

LORD JUSTICE DINGEMANS
LORD JUSTICE LEWIS
and
LORD JUSTICE HOLGATE

Between :

R (RIGHTS: COMMUNITY: ACTION LIMITED)	<u>Appellant</u>
- and -	
THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	<u>Respondent</u>
- and -	
(1) THE OFFICE FOR ENVIRONMENTAL PROTECTION	<u>Interveners</u>
(2) GREEN ALLIANCE	
(3) ESSEX PLANNING OFFICERS' ASSOCIATION	

Alex Goodman KC and Alex Shattock (instructed by **Leigh Day**) for the **Appellant**
Ned Westaway (instructed by **Government Legal Department**) for the **Respondent**
Stephen Tromans KC and Ruth Keating (instructed by **Office for Environmental
Protection**) for the **First Intervener**
Estelle Dehon KC (instructed via direct access by **Green Alliance**) made written submissions
for the **Second Intervener**
Rowan Clapp (instructed via licensed access **EPOA**) made written submissions for the **Third
Intervener**

Hearing dates : 24 and 25 June

Approved Judgment

This judgment was handed down remotely at 10.00am on 25 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holgate :

Introduction

1. Rights: Community: Action Limited appeals against the decision of Lieven J on 2 July 2024 ([2024] EWHC 1693 (Admin); [2025] PTSR 135) refusing its application for judicial review of the written ministerial statement (“WMS”) made by the Secretary of State for Levelling Up, Housing and Communities on 13 December 2023 entitled “Planning – Local Energy Efficiency Standards Update” (“the 2023 WMS”). The appellant sought an order quashing the 2023 WMS and/or a declaration that it is unlawful.
2. The 2023 WMS is a statement of national policy on the inclusion by local planning authorities (“LPAs”) of policies in their development plan documents (“DPDs”), for example local plans, setting building efficiency standards for new development that exceed the requirements of building regulations. The Government is concerned that higher standards set at a local level may cause developers to incur costs which adversely affect the delivery of new homes, or other forms of development. The 2023 WMS gives guidance on the approach to be taken to local policies setting higher standards in both adopted DPDs and in draft DPDs that are subject to independent examination by a Planning Inspector under the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”).
3. The duties and powers of a LPA to prepare and adopt DPDs for their area are contained in Part 2 of the PCPA 2004. Section 1 of the Planning and Energy Act 2008 (“PEA 2008”) introduced an additional provision to be read alongside the PCPA 2004. This enables a LPA to include in their DPDs policies imposing reasonable requirements for development *inter alia* to comply with energy efficiency standards that exceed the energy requirements of building regulations. The ambit of such DPD policies is subject to a number of limitations defined in s.1.
4. Sections 17 to 19 of the Environment Act 2021 (“EA 2021”) are concerned with the Policy Statement on Environment Principles (commonly referred to as “the EPPS”). Section 17 imposes a duty on the Secretary of State to prepare an EPPS which explains how the five environmental principles set out in s.17(5) should be interpreted and “proportionately applied” by Ministers when making policy. Section 19(1) of the EA 2021 imposes a duty on a Minister to have “due regard” to the EPPS when making policy.
5. Section 17 of the EA 2021 came into force on 10 May 2022. The EPPS was published on 12 May 2022. A final version of the document was laid before Parliament on 31 January 2023 and came into effect on that day (s.18(6)). The duty in s.19 to have due regard to the EPPS came into force on 1 November 2023, a few weeks before the decision to approve the 2023 WMS.
6. On 5 October 2023, before the s.19 duty came into force, officials sent a draft of the 2023 WMS, together with a brief assessment of that policy against the EPPS to a Minister, Mr. Lee Rowley. He approved that draft for publication. But on 14 November 2023 ministerial responsibility for this area passed to Baroness Penn. A final version of the WMS with some changes from the October draft was sent to her for approval. The Minister was told that Mr. Rowley had approved the October 2023 draft, but not about

the s.19 duty, and she was not given an EPPS assessment of the policy. She approved publication on 13 December 2023. Following pre-action protocol correspondence which raised non-compliance with the s.19 duty, on 22 February 2024 a more detailed EPPS assessment was submitted by officials to Baroness Penn asking her to decide whether, in the light of that assessment, the WMS should remain as published. Baroness Penn responded that it should. The matter was put before the Secretary of State who delegated the final decision to a Minister, who turned out to be Mr. Rowley again, Baroness Penn being unavailable. A submission accompanied by the EPPS assessment was put to Mr. Rowley on 18 March 2024. He decided the following day that, after considering the assessment, the WMS should remain as published.

7. The appellant raised three grounds of challenge before the judge of which only the first two are relevant in this appeal:

Ground 1:

In promulgating the WMS, the Minister failed to fulfil his duty under s.19(1) of the Environment Act 2021 to have due regard to the Environmental Principles Policy Statement ('EPPS').

Ground 2:

The Minister through the 2023 WMS unlawfully purports to restrict the exercise by local authorities of powers conferred by statute. In particular:

a) The 2023 WMS misdirects local authorities, or purports to restrain them, as to the exercise of their powers under s.1 of the Planning and Energy Act 2008, in a manner inconsistent with the Act's purpose (which expressly empowers local authorities to impose energy efficiency standards in their development plan documents that exceed the energy requirements of the Building Regulations).

b) The 2023 WMS unlawfully misdirects or purports to restrain the ability of local authorities to meet their duty under s.19 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") (which provides that development plan documents must include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change).

c) The 2023 WMS unlawfully misdirects decision-makers as to the application of the statutory presumption in favour of the development plan contained in s.38(6) of the PCPA 2004.

8. Dr. Naomi Luhde-Thompson, the appellant's Director and Chief Executive, explains in her witness statement that the company is a NGO involved in community planning and, in particular, the formation of local development plans. It is a group of campaigners, lawyers, planners, writers and scientists with a commitment to tackling climate change.
9. The Office for Environmental Protection ("OEP") was granted leave to intervene in this appeal. The OEP was established by Chapter 2 of Part 1 of the EA 2021. Its principal

objective is to contribute to environmental protection and the improvement of the natural environment (s.23). The OEP is responsible for holding Government and public authorities to account for their compliance with environmental law. The OEP must monitor the implementation of such law (s.29(1)) and may report on any related matter. Its reports are laid before Parliament and published (s.29(6)). The OEP also has functions under the EA 2021 for the enforcement of environmental law (ss.31-43). Mr. Stephen Tromans KC and Ms. Ruth Keating made written and oral submissions on behalf of the OEP.

10. Green Alliance is a charity and environmental think tank. It has been involved in helping to shape and improve national environmental governance post-Brexit. The Alliance was given leave to intervene in the appeal by written submissions. They focused on the s.19 duty, drawing parallels with the public sector equality duty (“PSED”) in s.149 of the Equality Act 2010. They made submissions similar to those of the appellant.
11. The Essex Planning Officers’ Association was given leave to intervene by written submissions. They focused on the interpretation of s.1 of the PEA 2008 and the effect of the 2023 WMS in relation to that provision. In particular, they made submissions comparing the metrics used by the Government for assessing the energy efficiency performance of a building – Target Emission Rates (“TER”) and the Standard Assessment Procedure (“SAP”) – with those used by a number of LPAs. They rely upon a witness statement from one of its members, Nicola Melville, the Lead Planning Officer in the Climate and Planning Unit at Essex County Council.
12. The appellant, the OEP and the Green Alliance have made some wide-ranging submissions about the interpretation and application of the s.19 duty, referring to the case law on the PSED. There is a dispute about the extent to which the two duties are similar and the case law on the PSED is applicable to the s.19 duty. Some of those submissions invited the court to lay down principles which go far beyond the ambit of the issues raised by this appeal. That would be inappropriate. However, the statement of Lord Neuberger PSC in *Hotak v Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811 at [74] is certainly apposite for the s.19 duty: “the weight and extent of the duty [to have due regard] are highly fact-sensitive and dependent on individual judgment.” The issues in the present appeal concerning compliance with the s.19 duty can largely be resolved by reference to the facts of this case. The broader legal issues which have been raised should be left to a case in which they fall to be determined.

Statutory framework

Planning legislation

13. A decision-maker determining an application for planning permission must have regard to *inter alia* the provisions of the statutory development plan (s.70(2) of the TCPA 1990) and that determination must be made in accordance with the plan unless material considerations indicate otherwise (s.38(6) of the PCPA 2004).
14. In *Loup v Secretary of State for the Environment* (1995) 71 P&CR 175 the Court of Appeal held at p.186 that although s.38(6) of the PCPA 2004 gives priority to the development plan, it does not tell the decision-maker what weight to give to policies of the plan, or to other material considerations. These are matters for the decision-maker

to weigh. This statement was approved by the House of Lords in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1458H to 1459A. Lord Clyde added that it is for the decision-maker to assess the relative weight to be given to all material considerations, including the development plan.

15. Part 2 of the PCPA 2004 deals with local development documents (“LDDs”). Under s.15 of the PCPA 2004 a LPA must prepare and maintain a “local development scheme” (“LDS”). The scheme must specify (*inter alia*) LDDs which are to be DPDs and therefore the subject of the presumption in s.38(6).
16. By s.17(3) the adopted LDDs of a LPA, taken as a whole, must set out the authorities’ policies relating to the development and use of land in their area.
17. DPDs must be prepared in accordance with the LDS (s.19(1) of the PCPA 2004). Those documents must, taken as a whole, include policies designed to secure that the development and use of land in the area of a LPA can contribute to the mitigation of, and adaptation to, climate change (s.19(1A)).
18. Each LPA must prepare DPDs which identify its strategic priorities for the development and use of land in their area and their policies for addressing those priorities (s.19(1B) and (1C)). In preparing a DPD (or any other LDD) a LPA must have regard to national policies and advice contained in guidance issued by the Secretary of State for Housing, Communities and Local Government (s.19(2)(a)). That guidance may be found in the National Planning Policy Framework (“NPPF”), Planning Practice Guidance and WMSs.
19. Following consultation on an initial draft of a DPD, the LPA must prepare a further draft which it must submit to the Secretary of State, along with representations on that document, for independent examination by a Planning Inspector under s.20 of the PCPA 2004. One of the purposes of that examination is to enable the Inspector to determine whether the plan is “sound” (s.20(5)(b)).
20. Upon the conclusion of the examination, the Inspector must provide a report to the LPA with a recommendation as to whether the DPD is to be adopted by the LPA. The Inspector cannot recommend the DPD for adoption, and the DPD cannot be adopted by the LPA, unless *inter alia* the Inspector judges that the plan is “sound”, whether as submitted for examination, or as subsequently modified (s.20(7) to (7C) and s.23).
21. The legislation does not define what is meant by the “soundness” of a DPD. But para.36 of the NPPF, to which an examining Inspector must have regard, states that a plan is “sound” if *inter alia* it enables the delivery of sustainable development in accordance with the policies in the NPPF and other relevant statements of national policy¹.
22. A person or body exercising any function under Part 2 of the PCPA 2004 in relation to a LDD (including a DPD) must do so “with the objective of contributing to the achievement of sustainable development” (s.39(1) and (2)). In discharging that obligation, regard must be had to national policies and advice contained in guidance issued by the Secretary of State (s.39(3)).

¹ Carnwath LJ (as he then was) put this policy into its proper legal context in *Barratt Development Limited v City of Wakefield Metropolitan District Council* [2010] EWCA Civ 897; [2011] J.P.L. 48 at [11].

23. The Secretary of State, as the central planning authority, has the function of helping to bring coherence and consistency in development control. National policy is part of the framework for consistent, predictable and prompt decision-making. The formulation of national policy is an essential element of securing coherent and consistent decision-making. The power to make such policy derives expressly or by implication from the legislation which gives the Secretary of State overall responsibility for the oversight of the planning system. National policy does not displace the primacy given by s.38(6) of the PCPA 2004 to the statutory development plan. It is an “other material consideration” to which a decision maker must have regard (s.70(2) of the TCPA 1990). The weight to be given to conflict or compliance with the NPPF is a matter of judgment for the decision-maker. It is also a matter for his judgment as to whether other considerations outweigh the priority to be given to the development plan (*R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and Regions* [2001] UKHL 23; [2003] 2 AC 295 at [139]-[143]; *City of Edinburgh Council* at [1997] 1 WLR at 1459-1460; *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 WLR 1865 at [19] to [21]; and *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 104; [2021] PTSR 1450 at [33] to [34]).
24. A Planning Inspector determining a planning appeal or examining a draft DPD does not act as a delegate of the Secretary of State but exercises his or her own independent judgment within the framework of national policy set by the government. But that policy is no more than guidance. The national policy-making role “must be exercised consistently with, and not so as to displace or distort, the statutory scheme” (Lord Carnwath JSC in *Hopkins* at [21]). Local circumstances may justify a departure from national policy in the formulation of local DPD policy, even where the national policy is expressed in unqualified terms (*R (West Berkshire District Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] 1 WLR 3923 at [21]-[30]).

Section 1 of the Planning and Energy Act 2008

25. Section 1 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;

(b) the Welsh Ministers, in the case of a corporate joint committee or a local planning authority in Wales.

(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;

(aa) section 60M of that Act, in the case of a corporate joint committee;

(b) section 62 of that Act, in the case of a local planning authority in Wales.

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

(6) Policies included in a strategic development plan or a local development plan by virtue of subsection (1) must not be inconsistent with relevant national policies for Wales.

(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).”

The duty to take into account the EPPS.

26. Part 1 of the EA 2021 is concerned with “environmental governance”. Sections 17 to 19 appear under the heading “Policy statement on environmental principles”.

27. Section 17(5) identifies five relevant principles:

- The integration of environmental protection into the making of policies
- Preventative action to avert environmental damage
- The precautionary principle in so far as it relates to the environment
- The rectification of environmental damage at source as a priority
- The polluter pays principle.

These principles are to be found in Arts.11 and 191(2) of the Treaty on the Functioning of the European Union. They ceased to apply within the UK on its withdrawal from the EU, but by Art.393 of the EU and UK Trade and Cooperation Agreement the two parties committed to respecting those principles.

28. Section 16 of the European Union (Withdrawal) Act 2018 required the Secretary of State to publish a draft Bill which *inter alia* would impose (a) a duty on the Secretary of State to publish a policy statement on the application and interpretation of those environmental principles for the making and development of policies by Ministers and (b) a duty on Ministers to have regard to that statement. A draft Bill was published in 2018. This was replaced by relevant sections of the Environment Bill which passed into law as the EA 2021.

29. Section 17 of the EA 2021 provides:

“17 Policy statement on environmental principles

(1) The Secretary of State must prepare a policy statement on environmental principles in accordance with this section and section 18.

(2) A “*policy statement on environmental principles*” is a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.

(3) It may also explain how Ministers of the Crown, when interpreting and applying the environmental principles, should take into account other considerations relevant to their policy.

(4) The Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to—

- (a) the improvement of environmental protection, and
- (b) sustainable development.

(5) In this Part “*environmental principles*” means the following principles—

- (a) the principle that environmental protection should be integrated into the making of policies,
- (b) the principle of preventative action to avert environmental damage,
- (c) the precautionary principle, so far as relating to the environment,
- (d) the principle that environmental damage should as a priority be rectified at source, and
- (e) the polluter pays principle.”

30. Section 18 lays down the procedure which the Secretary of State must follow leading to the publishing of an EPPS. After consultation on a draft, the document must be laid before Parliament to enable both Houses to make comments on it and the Secretary of State to produce a response. The Secretary of State must lay a final EPPS before Parliament whereupon the document has effect and is published.

31. Section 19 provides so far as is material:

“19 Policy statement on environmental principles: effect

(1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect.

(2) Nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it)—

- (a) would have no significant environmental benefit, or
- (b) would be in any other way disproportionate to the environmental benefit.

... ”

32. Section 47 includes the following definitions:

“*“making”* policy includes developing, adopting or revising policy;”

“*“policy”* includes proposals for legislation, but does not include an administrative decision taken in relation to a particular person or case (for example, a decision on an application for planning permission, funding or a licence, or a decision about regulatory enforcement);”

The evolution of the 2023 Written Ministerial Statement

33. The starting point is s.43 of the Deregulation Act 2015. If this is brought into force, it would insert subsection (1A) into s.1 of the PEA 2008 so as to disapply, in relation to the provision of new dwellings in England, s.1(1)(c) (which allows policies in a DPD to specify development energy efficiency standards for new development greater than the energy requirements of building regulations). In 2015 the Government intended to bring s.43 into operation in 2016. That sets the scene for the relevant part of the WMS made by the Secretary of State on 25 March 2015 (the “2015 WMS”), the day before the Deregulation Act 2015 received Royal Assent.
34. At that stage the relevant energy requirements for the purposes of s.1(1)(c) of the PEA 2008 were contained in Part L of the Building Regulations 2010, as amended in 2013 (“the 2013 standards”). In addition, the Code for Sustainable Homes had been introduced by the Department as a voluntary national code for achieving better levels of performance than the 2013 standards. But by 2015 the Government had decided that the Code should be withdrawn. It was in this context that the 2015 WMS stated:

“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.”

Level 4 of the Code for Sustainable Houses was set so that carbon emissions would be 19% lower than under the 2013 standards.

35. In summary, the Government intended that upon the commencement of s.43 of the 2015 Act in 2016:
- the 2013 standards in Part L of the Building Regulations would be amended so as to impose legal requirements equivalent to level 4 of the former Code for Sustainable Homes;
 - a Zero Carbon Homes policy would be introduced setting tighter national standards than the amended legal requirements in the Building Regulations;
 - LPAs would no longer be able to include policies in their DPDs setting higher energy efficiency standards than the Building Regulations.

The WMS stated that until s.43 of the 2015 Act was brought into force, the Government expected LPAs not to impose energy efficiency standards greater than level 4 of the Code.

36. Following a change of administration in May 2015 it was decided not to introduce the Zero Carbon Homes policy and s.43 of the 2015 Act was not brought into force.
37. In March 2019 the Government announced that it intended to implement the Future Homes Standards (“FHS”) from 2025. Homes built to the FHS would be compatible with the UK’s 2050 Net Zero Target for carbon emissions in the Climate Change Act 2008. The FHS would amend the Building Regulations 2010 so that new homes would produce CO₂ emissions at least 75% lower than those formerly permitted by the 2013 standards and avoid the need for any retrofitting in the future to achieve compatibility with net zero.
38. In October 2019 the Ministry consulted on two options for uplifting the energy efficiency standards in Part L of the Building Regulations as an interim measure from 2020 on the way to the introduction of the FHS in 2025. The first option was for a 20% reduction in carbon emissions compared to 2013 standards. The second option was for a 31% reduction in carbon emissions. The consultation also described the FHS and a timeline for achieving it.
39. The Government’s response to that consultation exercise was issued in January 2021. It chose the second option so that an interim uplift would be made to Part L of the Building Regulations, requiring new homes to produce 31% less CO₂ emissions compared to the 2013 standards.
40. The response also noted that:
- i. There had been uncertainty for LPAs as to their ability to set their own energy efficiency standards. Some had done so, going even further than level 4 of the Code, whereas others had not set any local standards;
 - ii. Developers faced disparate energy efficiency requirements from different LPAs, creating inefficiencies in, for example, supply chains;
 - iii. Although the consultation had proposed bringing s.43 of the 2015 Act into force so that developers would be required to build to a single higher standard set out

in Part L of the Building Regulations, most respondents favoured the retention of s.1 of the PEA 2008 to provide local flexibility, on the basis that LPAs were best placed to assess local need and viability.

41. However, medium-sized and large developers made the following points in response to the 2019 consultation:
 - i. For developers to be able to build the number of homes required, there needed to be consistency in the standards applied across the country;
 - ii. Local standards prevent the adoption of standardised designs across the country which are relied upon to achieve efficiencies in supply chains;
 - iii. Managing different standards in different areas is inefficient;
 - iv. LPAs have limited awareness on how the local standards they set affect supply chains.
42. The upshot was that the Government decided not to bring s.43 of the 2015 Act into force “in the immediate term”.
43. The Building Regulations were amended in 2021 so that the improvement in standards proposed for Part L came into effect in June 2022. In a submission to the Secretary of State dated 26 April 2023 officials advised that the new Part L level was better than the level 4 Code standard, so that the extract from the 2015 WMS (see [34] above) had become redundant. Moreover, Inspectors examining different DPDs had taken opposing views on whether the 2015 WMS should be treated as extant policy or out of date. One option suggested by officials was that a new WMS be issued clarifying how LPAs could use the power in s.1 of the PEA 2008. Officials advised that to take no action would perpetuate delays in the examination and adoption of DPDs and adversely affect housing supply. The Minister accepted that in principle a new WMS should be issued encouraging LPAs to adopt policies keeping as close as possible to national standards.
44. On 14 April 2023 the appellant brought a claim for judicial review of a report by examining Inspectors which concluded that a DPD was unsound because a policy which set energy performance standards higher than Code level 4 was in breach of the 2015 WMS. On 20 February 2024 Lieven J allowed that claim ([2024] EWHC 359 (Admin); [2024] PTSR 817).
45. In the meantime, on 17 July 2023 officials made a further submission to Ministers. They set out two policy options for consideration:
 - i. Strongly urging LPAs to consider carefully the forthcoming uplift in the FHS and the effect of their policies on development viability before going further than national standards. Because the FHS is in line with net zero by 2050, and because housebuilders need time to adapt to FHS requirements, LPAs may consider there is less need for them to go any further;
 - ii. Stating that LPAs are unlikely to need to include policies in their DPDs going beyond current building regulations, but new policy criteria set out in a WMS would have to be met should they wish to do so, so as to reduce the likelihood

of unviable local policies being put forward resulting in delays to the adoption of DPDs. One of the criteria suggested was consistency with national techniques for measuring energy efficiency.

46. On 12 September 2023 officials made a submission to the Secretary of State on reviewing the work carried out to prepare the FHS for consultation and the ministerial decisions which had been taken. The briefing explained that “when developing this policy proposal, environmental considerations were taken into account in line with the [EPPS]”. A “full Environmental Principles Assessment” was included as an annex. The assessment had found that the policy proposal would have a positive permanent effect upon the environment. The briefing also referred to the intention to publish a new WMS. Mr. Palmer explains in his witness statement (paras.26-31) that the 2023 WMS was developed in tandem with consultation proposals for the FHS.
47. On 5 October 2023 the Minister, Mr. Rowley, was sent the draft text of the 2023 WMS. He had previously been sent the EPPS assessment for the FHS on 12 September 2023. He was now also sent the EPPS assessment for the draft 2023 WMS.
48. The relevant part of the October 2023 draft of the 2023 WMS reads 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) 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. A further change to energy efficiency building regulations is planned for 2025 meaning that homes built to that standard will be net zero ready and should need no significant work to ensure that they have zero carbon emissions as the grid continue to decarbonise. Compared to varied local standards, these nationally applied standards provide much-needed clarity and consistency for businesses, large and small, to invest and prepare to build net-zero ready homes.

The improvement in standards already in force, alongside the ones which are due in 2025, demonstrates the Government’s commitment to ensuring new properties have a much lower impact on the environment in the future. In this context, the Government does not expect plan-makers to set local energy efficiency standards for buildings that go beyond current or planned buildings regulations. Any planning policies that propose local energy efficiency standards for buildings that go beyond current or planned buildings regulation should be rejected at examination if they do not have a well-reasoned and robustly costed rationale that ensures:

- That development remains viable, and the impact on housing supply and affordability is considered in accordance with the National Planning Policy Framework.
- The additional requirement is expressed as a percentage uplift of a dwelling's Target Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP).

To be sound, local plan policies should make it clear that the local energy efficiency standard need not be met where applicants can evidence that it is not technically feasible to do so, including in relation to the availability of appropriate local energy infrastructure (for example adequate existing and planned grid connections), and access to adequate supply chains and skills.

This WMS supersedes the 'Housing standards: streamlining the system (plan-making)' parts of the 25 March 2015 WMS. Planning Practice Guidance will also be updated to reflect this statement."

49. The EPPS assessment dated 5 October 2023 for that draft of the WMS was in the following terms:

"Under section 19 of the Environment Act 2021 which comes into force on 1 November, when making policy Ministers must have due regard to the Government's environmental principles policy statement. This includes the principle that policy should seek not only to prevent and mitigate environmental harm, but also to embed opportunities to improve and promote environmental protection and enhancement (the integration principle).

We have identified the following environmental impacts of the policy: Plan-makers have the power to set energy efficiency standards for housing which are greater than existing national regulatory standards, with the potential to further reduce carbon emissions from homes. The policy contained in the Written Ministerial Statement (WMS) aims to improve the consistency of application of any such locally mandated energy efficiency standards in new homes. The forthcoming Future Homes Standard (FHS) will set national standards in line with the objectives and provisions of the Climate Change Act 2008. Our assessment is that any energy efficiency improvements above the FHS would return marginal carbon saving benefits compared to the cost uplift of doing so. The policy contained in the WMS which sets out the requirements that plan-makers must meet in setting higher standards, may limit wider counterfactual environmental improvements from e.g., reducing energy consumption through the setting of better local fabric, compared to the FHS, however these again have diminishing returns.

Any environmental impacts of the policy need to be balanced against the potential positive impacts on housing affordability and availability. The policy in the WMS could also support a smoother and more cost-effective transition for the construction industry to higher standards. Furthermore, the counterfactual of varying standards across local plans could have viability impacts that reduce or delay the supply of newer, more energy efficient and lower emission homes. Thus prolonging the use of less energy efficient older stock.

On balance, we consider the policy in the WMS to not have the potential for significant negative environmental impact. Once the FHS is in force, the environmental benefits of going beyond the standards set by the FHS are at best marginal and unlikely to be cost-effective.”

50. Mr. Rowley approved the draft WMS for publication.
51. On 9 October 2023 there was agreement across Government that the WMS be published at the same time as the consultation document on the FHS. That consultation referred back to the principles which had been described in 2021 for the FHS and set out more detailed proposals, including technical specifications and metrics, which the Department had subsequently worked up.
52. The relevant part of the version of the WMS published on 13 December 2023 reads 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. A further change to energy efficiency building regulations is planned for 2025 meaning that homes built to that standard will be net zero ready and should need no significant work to ensure that they have zero carbon emissions as the grid continues to decarbonise. Compared to varied local standards, these nationally applied standards provide much-needed clarity and consistency for businesses, large and small, to invest and prepare to build net-zero ready homes.

The improvement in standards already in force, alongside the ones which are due in 2025, demonstrates the Government's commitment to ensuring new properties have a much lower impact on the environment in the future. In this context, the Government does not expect plan-makers to set local energy

efficiency standards for buildings that go beyond current or planned buildings regulations. *The proliferation of multiple, local standards by local authority area can add further costs to building new homes by adding complexity and undermining economies of scale.* Any planning policies that propose local energy efficiency standards for buildings that go beyond current or planned buildings regulation should be rejected at examination if they do not have a well-reasoned and robustly costed rationale that ensures:

- That development remains viable, and the impact on housing supply and affordability is considered in accordance with the National Planning Policy Framework.
- The additional requirement is expressed as a percentage uplift of a dwelling's Target Emissions Rate (TER) calculated using a specified version of the Standard Assessment Procedure (SAP).

Where plan policies go beyond current or planned building regulations, those policies should be applied flexibly to decisions on planning applications and appeals where the applicant can demonstrate that meeting the higher standards is not technically feasible, in relation to the availability of appropriate local energy infrastructure (for example adequate existing and planned grid connections) and access to adequate supply chains.

To be sound, local plans must be consistent with national policy enabling the delivery of sustainable development in accordance with the policies in the National Planning Policy Framework and other statements of national planning policy, including this one.

The Secretary of State will closely monitor the implementation of the policy set out in this WMS and has intervention powers provided by Parliament that may be used in respect to policies in plans or development management decisions, in line with the relevant criteria for such intervention powers.

The above supersedes the section of the 25 March 2015 WMS entitled 'Housing standards: streamlining the system', subparagraph 'Plan making' in respect of energy efficiency requirements and standards only. Planning Practice Guidance will also be updated to reflect this statement.”

I have italicised the text which was added to the version of the 2023 WMS approved in October 2023.

53. There is no dispute that the 2023 WMS is to be read as accepting that LPAs may set energy performance standards which exceed current building regulations up to the level

of the draft FHS before the FHS is finalised (see the reference in the WMS to “planned building regulations”).

54. The remainder of the chronology leading up to the Minister’s decision on 19 March 2024 has been set out in [6] above.

The judgment in the High Court

55. The judge said that the issues under ground 1 fell into two parts: (1) Establishing the correct legal approach to the “due regard” duty in s.19 and (2) whether the Secretary of State satisfied that duty on the facts of the case. But to address the first issue it was necessary to consider the application of the duty in the context of the specific factual circumstances of this case [25].
56. The judge then considered the appellant’s submission that s.19 is analogous to the PSED and so the principles in the case law on the latter should be applied to the former. Mr. Alex Goodman KC who together with Mr. Alex Shattock appeared on behalf of the appellant, relied *inter alia* on the well-known summary of principles on the PSED in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] Eq. L.R. 60. (see Lieven J at [27]-[29]).
57. After having summarised the rival submissions of the appellant’s counsel and of Mr. Ned Westaway on behalf of the Secretary of State [30]-[41], the judge began her analysis by explaining why she regarded the s.19 duty and the PSED as being very different in terms of the language used (save for the words “due regard”) and the aims to be achieved. Whereas impacts on persons with protected characteristics may generally be relatively straightforward, the environmental issues for policy-making, as set out in the EPPS, may often be multi-faceted and complex, and need to be assessed in a holistic manner [42].
58. But the judge did consider that the approach in *Hotak* should apply to the requirement for a Minister to have due regard to the EPPS when making a policy: the principles need to be considered in substance, with rigour and with an open mind. Beyond that, the approach necessarily turns on the individual facts and on the broader purposes of the EA 2021 [43].
59. Turning to the absence of an EPPS assessment when the 2023 WMS was finally approved in December 2023, the judge held that it would be inappropriate for the court to make a declaration that the 2023 WMS is unlawful without considering the legal adequacy of the assessment carried out subsequently. That assessment may provide adequate justification for the court to refuse to grant relief on the basis of the earlier breach of the s.19 duty when the policy was adopted. The court should consider whether the subsequent assessment was done conscientiously, in substance, with rigour and with an open mind [44].
60. The judge concluded that the EPPS assessment carried out in February 2024 satisfied those tests [46]-[50]. The assessment acknowledged that greater environmental benefits could be achieved if LPAs were able to set higher standards. In substance that involved accepting that, in relative terms, the 2023 WMS could have a negative impact. The judge concluded that the assessment, in accordance with the EPPS, considered whether the 2023 WMS had the potential to cause a negative environmental effect. It would, in

that the 2023 WMS might achieve less environmental benefit (e.g. in reducing carbon emissions) when compared to the higher standards that individual LPAs might set. But she said that the Secretary of State had been legally entitled to place considerable weight on the adverse impact that those higher standards might have on the supply of new housing. That was a policy choice for the Secretary of State, which was not irrational, even if experts might disagree about the issue [47].

61. The judge rejected the appellant's criticism of the reliance placed in the 2023 WMS on the FHS. Given that the WMS is only an interim policy intended to apply until the FHS is finally approved, there is nothing unreasonable in the WMS accepting that, in the meantime, local policies may impose requirements in excess of the current Building Regulations up to the level of the draft FHS [50].
62. In relation to ground 2 the judge rejected the appellant's contention that the 2023 WMS unlawfully emasculated s.1(1)(c) of the PEA 2008 [55]-[62]. The judge referred to a statement in Hansard by a Minister that section 1 allows a LPA to choose a standard in excess of the building regulations only if that standard has been set out or referred to in regulations made by the Secretary of State or which is set out or endorsed in national policy or guidance issued by the Secretary of State [65]. The 2023 WMS is entirely in line with that explanation. As a matter of national policy it allows a LPA to set a standard exceeding the Building Regulations up to the level of the draft FHS [66].

Grounds of Appeal

63. The grounds of appeal are as follows;

“Ground 1

The judge erred in her interpretation of s 19 of the Environment Act 2021 (“EA 2021”):

- i. The judge failed to understand that the duty to have “due regard” under section 19 EA 2021 is not discharged by way of a “rearguard” assessment of the kind undertaken in this case (see *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108) (and not simply retrospective).
- ii. Even if s 19 does permit rearguard action, it does not allow for an after-the-event assessment that was “*striving to defend an earlier decision in the context of adversarial litigation*”, applying *R (Banks) v SSEFRA* [2004] EWHC 416 (Admin), [105].
- iii. Nor did it permit an assessment carrying a real risk that a fair-minded member of the public would consider that the decision to revisit the 2023 WMS was improperly tainted by the Respondent's concern about a judicial review challenge, applying the Court of Appeal authority *R (Carlton-Conway) v LB Harrow* [2002] JPL 1216 (the judge did not address that latter point).

- iv. Properly understood, the s 19 duty requires consideration of the impacts of the individual policy against the environmental principles: that duty is not discharged by assessing the impacts by reference to anticipated benefits of an inchoate policy that is not yet in force. The judge erroneously held that the s 19 duty could be discharged from an assessment that was largely directed towards the Future Homes Standard (a different and as yet inchoate policy)
- v. Although the judge accepted the principle that the section 19 duty required regard to the EPPS with “substance, rigour and an open mind” (as the EPPS itself states), she failed to acknowledge the practical implication of that requirement was to demand due regard to each of the Environmental Principles and to make reasonable inquiries as to the impact of those policies on those affected, including in this case local authorities. She failed to acknowledge the intensity of review required in this context.

Ground 2

The judge erred in her interpretation of s 1 of the Planning and Energy Act 2008. Properly understood, it allows local authorities to set a percentage uplift above the Building Regulations that does not have to be set out in national policy. This error of interpretation tainted her consideration of whether the 2023 WMS cut across the statutory power in s 1.”

64. It is convenient to deal with ground 2 first.

Ground 2

65. The PEA 2008 resulted from a Private Member’s bill. As introduced to Parliament, s.1 of the Bill simply provided as follows:

“Development plans

A local planning authority may in its development plan and development plan documents specify that any person making an application for planning permission should include such reasonable provision as the authority may specify for—

- (a) the generation of energy from renewable sources as part of the proposed development;
- (b) the generation of low carbon energy as part of the proposed development;
- (c) an energy efficiency standard in all, part or parts of the proposed development that exceeds that required by any building regulations in force at the time of the application.”

66. In this original form s.1(c) would simply have allowed a LPA to include in a DPD a policy requiring proposed development to meet an energy efficiency standard that exceeded what was required by any relevant building regulation. The draft Bill did not limit the extent of any exceedance. It appears that the purpose of the Bill may have been to overcome doubts about whether LPAs could lawfully include in their DPDs policies of the kind referred to in s.1.
67. However, as a result of discussions with the Department, the promoter of the Bill, and then Parliament, agreed that a new version of s.1 should be substituted corresponding to the text which was finally enacted. The result was to impose constraints upon the policy-making power in s.1(1)(c) to set energy efficiency standards exceeding the requirements of building regulations. First, s.1(2) provides a definition of “energy efficiency standards”. Thus, a standard which a LPA wishes to include in a DPD policy made under s.1(1)(c) is one which is set out or referred to in regulations made by the Secretary of State, or is set out or endorsed in national policy issued by the Secretary of State. Second, s.1(1)(c) authorises local energy efficiency standards to be adopted which exceed the “energy requirements” (as defined in s.1(2)) of building regulations. Third, a policy included in a DPD by virtue of s.1(1)(c) must not be inconsistent with “national policies relating to furthering energy efficiency” (s.1(5) and s.1(7)(c)). That third requirement should be read compatibly with s.1(1)(c) and (2). Thus, local policies must not be inconsistent with national policies furthering energy efficiency which go beyond the setting out of energy efficiency standards. Read properly, s.1(5) does not duplicate or overlap s.1(1)(c) and (2).
68. 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.
69. It appears that the parties agreed in the High Court that extracts from Hansard addressing the amendments to the Bill were admissible. However, in *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Limited* [2001] 2 AC 349 Lord Bingham emphasised that the conditions laid down in *Pepper v Hart* [1993] AC 593 for the admissibility of Hansard on issues of statutory interpretation “should be strictly insisted upon” (p.392D). Lord Nicholls said at p.398H-399A that it is rare for a reference to Hansard to be of assistance on statutory construction.
70. In my judgment s.1(1)(c) and (2) of the PEA 2008 are not ambiguous or obscure. Their meaning is clear and the language used does not lead to an absurdity (see [67]-[68] above). Accordingly, the first test in *Pepper v Hart* is not satisfied.
71. In any event, the extract quoted by Lieven J at [65] is no more than a paraphrase of the legislation itself. The Hansard material does not shed any more light on the meaning or purpose of the legislation than the PEA itself. In my judgment it is not admissible. I

would only add that it has not been explained to us how a statement by a Minister on what appears to have remained a Private Member's bill is admissible under the second rule in *Pepper v Hart*.

72. The 2023 WMS also addresses previously adopted DPD policies that set energy efficiency standards more onerous than building regulations. It simply says that such policies should be applied flexibly in development control decisions where the developer can satisfy certain criteria. I agree with the judge that this approach is not unlawful. It is entirely consistent with s.38(6) of the PCPA 2004 as explained in *Loup* and *City of Edinburgh* (see [14] above) and the Secretary of State's role as the central planning authority (see [23] above). There is no inconsistency with any part of s.19 of the PCPA 2024.
73. The appellant has misread both the legislation and the 2023 WMS. For the reasons set out above, the 2023 WMS does not override the power conferred by s.1 of the PEA 2008 or distort or displace the statutory scheme (per Lord Carnwath in *Hopkins Homes*— see [24] above). The 2023 WMS does not empty s.1 of content, so that LPAs cannot set standards in excess of the Building Regulations (para.58 of the appellant's skeleton).
74. Some LPAs wish to go further under s.1(1)(c) than simply set a standard related to the draft FHS. They wish to set standards using metrics proposed by the London Energy Transformation Initiative ("LETI"). The practical significance of this point is explained in a witness statement by Dr. Hugh Ellis of the Town and County Planning Association, upon which the appellant relies. The Secretary of State's approach uses metrics based on Target Emissions Rate ("TER") and the Standard Assessment Procedure ("SAP") (see also [11] above). It is said that TER metrics rely upon grid decarbonisation to achieve reductions in carbon emissions compatible with net zero whereas LETI's approach does not. The latter sets absolute energy metrics for the performance of a building. The draft FHS which the 2023 WMS allows LPAs to use as the basis for their DPD policies employs the TER metric.
75. This application for judicial review is not a proper forum for resolving the dispute as to whether one metric is preferable to another. Rather, Mr. Goodman sought to avoid the analysis in [67]-[68] above by submitting that "standards" in s.1(1)(c) and s.1(2) of the PEA 2008 refers only to the metrics or measures used in assessing energy efficiency. Although this argument would appear to be simply one of statutory interpretation, in my judgment it involves rewriting, not interpreting, the legislation. The language used by Parliament does not limit "energy efficiency standards" to a choice of metric.
76. In any event, the appellant's argument would not assist LPAs who wish to set local standards based on LETI's approach. The relevant metrics for that approach have not been referred to or endorsed by the Secretary of State in national regulations or policy.
77. The 2023 WMS 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.

78. That raises the question, what is the statutory power under which a LPA could include in a DPD a policy standard more onerous than one set in national regulations or policy, such as the FHS? If the source is *not* s.1(1)(c) and (2) of the PEA 2008, could it be s.19 and the other related powers in Part 2 of the PCPA 2004? For reasons which are unclear, s.1(4) of the PEA 2008 makes s.1(1) subject to s.19 of the PCPA 2004. However, if s.19 provides the source of power for a LPA to make a local policy setting a more onerous standard than one endorsed by the Secretary of State, such as the draft FHS, it could be said that a LPA has no need to rely upon s.1 of the PEA 2008 at all and the restraints in that provision upon setting standards that exceed the requirements of building regulations could be circumvented. That would not appear to make sense.
79. I am left with the impression 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 legal principle that a LPA can include in its DPD a local policy which conflicts with national policy, justified, for example, by local circumstances (see e.g. *West Berkshire*).
80. The parties did not produce a convincing analysis of the legislation which would resolve this issue. No assistance is to be gained from the secondary materials to which we were referred, including Hansard. However, it is unnecessary for the court to reach a conclusion on the matter in order to determine this ground of appeal. Even if the PEA 2008 does not empower LPAs to set a higher standard than is contained in national policy, e.g. the draft FHS, then the fact that the 2023 WMS goes further by addressing that exceptional case does not lend any support to the appellant's argument that the WMS unlawfully cuts across the PEA 2008.
81. Accordingly, I would reject ground 2.

Ground 1

82. It is apparent from the ground of appeal (see [63] above) that much of the appellant's focus is on the allegedly "rearguard" nature of the EPPS assessment carried out in February 2024 after the decision to publish the 2023 WMS. The appellant also contends the s.19 duty was not discharged because the assessment related to the draft FHS, an inchoate policy not yet in force and failed to make reasonable inquiries to assess the effect of not allowing LPAs to set higher energy efficiency standards.
83. Mr. Tromans for the OEP made it clear that the main focus of his submissions was to challenge [44] of the judgment in the High Court, where the judge appeared to accept that a failure to comply with the duty at one point, for example, the decision to adopt a policy, could be remedied by an assessment carried out subsequently. Likewise, he criticised the statement that a later assessment could satisfy the statutory duty.
84. I return to the EA 2021. Section 19(1) requires a Minister to have due regard to the EPPS when "making policy". That expression "making policy" includes "developing, adopting or revising policy" (s.47).

85. Thus, the duty applies at a number of stages in the “making” of a policy. For example, the duty to have “due regard” to the EPPS applies when a policy is being developed and not simply at the point when a policy is adopted. It applies when a policy is being formulated and different policy options are being considered. Accordingly, it is necessary to be careful in the language used to deal with a situation where there was no regard to the EPPS at one material point but an EPPS assessment has been carried out subsequently.
86. Take the present type of case. No regard was had to the EPPS when the decision was taken to approve the 2023 WMS on 13 December 2023. Plainly, there was a breach of the s.19 duty at that stage. But if the court had declared that the decision to approve the policy was unlawful, no party suggests that the Secretary of State could not lawfully have considered afresh whether to approve the policy after having had due regard to the EPPS.
87. The position is not materially different where, as here, a Minister who has failed to have any regard to the EPPS when adopting a policy, reconsiders that decision with the benefit of an EPPS assessment before any challenge comes to a hearing before the court. The court’s focus will be on whether that assessment is *legally* adequate in order to comply with the s.19 duty.
88. Let us assume that a court finds that such an assessment is legally adequate, in the sense that due regard is had at that later stage to the EPPS. That does not alter the position that there was a breach of the s.19 duty when the policy was adopted initially. It would be wrong to say that a s.19 compliant EPPS assessment carried out subsequently has remedied the earlier breach of s.19 when the policy was adopted, or has retrospectively validated that decision. Instead, the court decides whether in the event of subsequent compliance with the s.19 duty, it would be appropriate to declare that the policy is unlawful or to quash the policy. “The focus should be on the adequacy and good faith of the later assessment”, although the court is also entitled to look at the overall circumstances in which the assessment was carried out (*West Berkshire at [87]*).
89. Here there is no suggestion that the EPPS assessment in February 2024 was not carried out in good faith.
90. Although the EPPS assessment in February 2024 was set out in more detail than the earlier one dated 5 October 2023, the topics addressed and the conclusions reached were substantially to the same effect. In those circumstances, it is inappropriate to describe the assessment in February 2024 as merely a “rearguard action” (*Bracking at [26(4)]*).
91. The EPPS was published on 23 January 2023, but the s.19 duty did not come into force until 1 November 2023. The legislation did not contain any transitional provisions. There was no retrospective requirement for policy-making decisions which had been reached before 1 November 2023 to be revisited so that the EPPS could be applied.
92. In fact, on 5 October 2023 a voluntary EPPS assessment was carried out which concluded that, on balance, the policy in the WMS did not have the potential for significant negative environmental impact. Officials had carried out an assessment of the carbon savings of LPA policies going beyond the FHS and concluded that they were marginal.

93. It is common ground, and I agree, that the duty in s.19 must be carried out in substance, with rigour and with an open mind. The duty is to have due regard to the matters specified in the EPPS that are relevant to the assessment. It is not a duty to achieve a particular result or outcome. It is for the Minister to decide how much weight to give to the relevant matters. Provided that there has been a proper focus on the relevant principles, the court cannot interfere simply because it would have given greater or less weight to particular matters. The weight and extent of the s.19 duty are highly fact-sensitive and dependent on individual judgment (*Hotak* at [73]-[75]).
94. Parliament's intention in relation to the s.19 duty is that the principles in s.17(5) be applied "proportionately" (s.17(2)). In the same vein, s.19(2) provides that s.19(1) does not require that a Minister should do or not do anything if that "would have no significant environmental benefit" or "would be in any other way disproportionate to the environmental benefit". It is therefore relevant to identify the nature of the policy in question and its environmental effects. These matters in turn affect which parts of the EPPS are relevant.
95. The 2023 WMS is concerned with reducing carbon emissions from residential development because of its impact on climate change and the UK's ability to meet its net zero target for 2050. The Government's view is that the forthcoming FHS will set national standards for residential development in line with the Climate Change Act 2008 (see EPPS assessment dated 5 October 2023). Similarly, the October 2023 version of the WMS, as well as the December 2023 version, stated that the FHS will result in the building of homes that are "net zero ready" and should require no significant work to ensure that they have zero carbon emissions as the electricity grid continues to be decarbonised. It is not a matter for the court in an application for judicial review to say whether those conclusions are right or wrong. No party has argued that, as a matter of law, the Secretary of State could not rationally hold those views.
96. The Government has taken the view that the increase in energy efficiency standards should be phased so that the development industry can prepare for the change to the FHS. As an interim measure the Government decided to increase the standards imposed by the Building Regulations 2010 with effect from June 2022, so that new homes will be required to produce 31% less CO₂ emissions compared to the 2013 standards.
97. The 2023 WMS is also an interim measure providing planning guidance until the FHS comes into force. During that period the 2023 WMS allows LPAs to set a more onerous standard than the current Building Regulations up to the level of the draft FHS. For the purposes of the challenge brought by the appellant, the issue relevant to the s.19 duty, and the assessment required, concerned the potential for achieving a greater reduction in carbon emissions if LPAs are able to set more onerous standards for new housing development.
98. It is also relevant to take into account the nature of the changes between the October 2023 version of the WMS approved by Mr. Rowley and the version approved in December 2023 by Baroness Penn and confirmed by Mr. Rowley in March 2024 (see the italicised text in [52] above). The differences are relatively minor. The first was simply a cross-reference. The second made a point about the impact of differing local standards on efficiency in delivering new homes, a matter previously identified in the Government's response to consultation issued in January 2021 (40)-[41] above). Third, the December 2023 version added a passage dealing with DPDs previously adopted that

set standards higher than the draft FHS. The WMS does not purport to override such policies. They form part of the statutory development plan. Instead, it indicates what a developer will need to show in order to justify a flexible application of such policies on a case-specific basis. Fourth, the December 2023 version stated that the Secretary of State would monitor the implementation of the policy in the WMS and has powers to intervene in relation to development plans and development control decisions. That statement did not alter the substance of the WMS.

99. The relatively narrow scope of the issue defined in [97] above, also affects the extent of the EPPS to which the Secretary of State needed to have “due regard” and the assessment required. In his oral submissions, Mr. Goodman focused on two of the five principles in s.17(5) of the EA 2021: the integration principle and the prevention principle.

100. Under the integration principle the EPPS states:

“Description: As set out in the Environment Act, integration is the principle that environmental protection should be integrated into the making of policies. This means that policymakers should look for opportunities to embed environmental protection and/or enhancement across fields of policy – not just those directly related to the environment.

When to use the integration principle: The integration principle applies to all policy in scope of the legal duty.

Application of the integration principle: Applying the integration principle involves considering whether the policy has the potential to cause a negative environmental effect which could be avoided, minimised, or reduced through alterations to the policy in proportion to other policy aims.

Integration may also present an opportunity for policymakers to build environmental protection, maintenance, restoration or enhancement into policies from the outset and throughout the development of policies.”

101. Under the prevention principle the EPPS states:

“Description: The prevention principle means that government policy should aim to prevent environmental harm. This principle underpins many aspects of environmental policy to ensure that environmental damage, such as CO₂ emissions, pollution or biodiversity loss, [footnote 6] is avoided.

The prevention principle should promote policy design options that prevent environmental damage either before it has occurred (through policy design), or to contain existing damage. This can have economic benefits as it prevents additional costs and complexities that arise when environmental damage occurs.”

102. In the section on “proportionality” the EPPS states that environmental effects will differ for each policy and will need to be assessed relative to the likelihood and/or significance of the potential effect on the environment. “In cases where the potential effect is limited, this allows policy makers to apply the policy statement in a lighter touch way”. The EPPS also states:

“Policymakers should take a proportionate approach in the application of the policy statement. They should balance social, economic, and environmental considerations in making policy. They should consider the potential environmental effects of a policy and any mitigating actions. They should consider this in the context of the associated costs and benefits.”

103. Section 1 of the EPPS assessment carried out in February 2024 summarised the policy objectives of the 2023 WMS:

“Plan-makers have the power to set energy efficiency standards for housing which are stricter than existing national regulatory standards. The policy contained in the December 2023 Written Ministerial Statement (WMS) aims to improve the consistency of application of any such locally mandated energy efficiency standards in new homes.

In responses to the Future Homes Standard consultation of 2019, we heard that disparate energy efficiency standards across local authority boundaries can create inefficiencies in supply chains and labour. Ministers are concerned that these effects would impact adversely on much-needed housing delivery. Concerns about housing delivery also contributed to the Future Homes Standard, in effect, being introduced in two stages. The 2021 “uplift” to Parts L and F and the creation of Part O provided a steppingstone for industry ahead of the FHS coming into force. The policy objective of the WMS is to mitigate adverse effects on delivery before the Future Homes Standard is introduced.

When considering the environmental principles in relation to the WMS, we considered the policy alongside the plans to introduce the Future Homes Standard (FHS). Homes constructed to the FHS, due to be implemented from 2025, will be zero-carbon ready. No further retrofit work will be necessary to ensure they have zero carbon emissions as the electricity grid continues to decarbonise.

The Future Homes Standard will set national standards in line with the objectives and provisions of the Climate Change Act 2008.”

Thus, the assessment confirms that the WMS is intended to be only an interim policy.

104. Section 2 of the assessment identified environmental effects:

“2. Is the environmental effect positive or negative?”

There is the potential for further positive environmental effects if LPAs set higher standards than those mandated by the Building Regulations. Any potential benefits would be further reductions in carbon emissions occurring largely in the period between now and the time the FHS is implemented. However, this should be balanced against the potential for disrupted housing supply caused by differing standards across the country. Such disruption could lead to the environmental benefits of the FHS not being met if fewer zero-carbon ready homes are built as a result of development not coming forward.

3. Are there primary effects (an intended result or an effect directly attributed to the proposed action) or secondary effects (indirect or induced changes)?

The FHS will have primary effects relating to reducing carbon emissions in new buildings, as well as secondary effects through the possible stimulation of the green economy (encouraging the creation of new green technologies and ‘green’ employment opportunities), increasing consumer familiarity with green technologies, especially heat pumps of relevance to decarbonising existing buildings, and more widely by reducing emissions over time.

The policy contained in the December 2023 Written Ministerial Statement (WMS) aims to improve the consistency of application of any such locally mandated energy efficiency standards in new homes. The potential effect of this could be to help secure more robust housing supply, as developers and housebuilders are given more certainty of standards.”

105. As the judge rightly said at [47], the assessment acknowledged that there was a potential for *greater* environmental benefits if LPAs could set higher environmental standards in DPDs. In substance that involved accepting a possible negative impact of the Secretary of State’s preferred approach in the WMS relative to those higher standards. However, the Secretary of State considered that that should be balanced against potential disruption to the delivery of housing caused by differing standards across the country. Ultimately that was a policy choice for the Secretary of State, informed by the EPPS assessment. In my judgment that policy choice cannot be impugned applying principles of public law.
106. I also agree with the judge’s rejection at [50] of the appellant’s criticism that the EPPS assessment wrongly assessed the policy impacts of the 2023 WMS by taking into account an inchoate policy, the FHS, which was not due to be in force until 2025. As I have explained, the WMS is an interim policy intended to apply until the FHS is finally approved and operative. This interim policy allows a LPA to adopt a local energy efficiency standard up to the level of the draft FHS, referred to in the WMS as a planned building regulation. The appellant has not suggested that as a matter of law the Secretary of State was not entitled to specify a draft policy such as the FHS as an energy

efficiency standard. Accordingly, it was appropriate, if not necessary, for the EPPS assessment to take the draft FHS into account.

107. Section 3 of the assessment identified which environmental principles are relevant to the WMS and in what respects. In relation to the integration principle, it was stated that at each stage of the policy development process, the proposals had been designed with environmental protection as their central objective. The FHS, complemented by the WMS, is intended to reduce significantly the generation of carbon from new development. In relation to the prevention principle, the assessment stated:

“Construction and the use of homes generates carbon emissions and other environmental harms. The Government’s work to increase the energy efficiency of new buildings already aims to prevent environmental damage. Taking the prevention principle to its extreme, we would immediately make all housing net zero ready, but we have chosen not to do that for social and economic reasons with a particularly focus on housing viability in the short term.”

The document continued:

“Prevention of environmental harm is possible through the policies we are proposing. The reduction of carbon emissions will have a positive net zero effect. The WMS encourages local policies to be consistent with national standards, but still provides an opportunity to implement higher standards where those standards are found to be viable and not impact on housing delivery.”

108. The last part of the assessment considered “further analysis”. Reference was made again to the cost-benefit assessment which the department had carried out and to the policy balance which lay at the heart of the decision to approve the WMS:

“Our assessment is that any energy efficiency improvements above these standards would return marginal carbon saving benefits compared to the cost uplift of doing so. The policy contained in the WMS, which sets out the requirements that plan-makers must meet in setting higher standards, may limit wider counterfactual environmental improvements from e.g., reducing energy consumption through the setting of better local fabric, compared to the FHS, however these again have diminishing returns.

Any environmental impacts of the policy need to be balanced against the potential positive impacts on housing affordability and availability. The policy in the WMS could also support a smoother and more cost-effective transition for the construction industry to higher standards. Furthermore, the counterfactual of varying standards across local plans could have viability impacts that reduce or delay the supply of newer, more energy efficient and lower emission homes.”

109. It is apparent that the February 2024 assessment did work through the relevant principles of the EPPS and apply them to the difference between the WMS approach to the setting of local standards based on the FHS during the interim period as opposed to the setting of yet higher standards. An important consideration was the marginal environmental benefits which would result from higher standards as demonstrated by the modelling work carried out by the Department (see the description in para. 43 of Mr. Palmer’s written statement of the Department’s marginal abatement costs curve (“MACC”) analysis). A further important consideration was the need to weigh in the balance the potential adverse effects of higher LPA standards on maintaining and increasing the delivery of new housing, in terms of the supply chain, availability and affordability.
110. Accordingly, I accept the submission of Mr. Westaway that the February 2024 assessment complied with the duty in s.19. That conclusion is reinforced by the proportionality principle in ss.17(2) and 19(2) and in the EPPS itself. The assessment was appropriate and proportionate to the issues raised by the 2023 WMS, the environmental effects involved and the environmental principles engaged.
111. It is apparent that the essential reasoning in the February 2024 assessment was also neatly summarised in the October 2023 assessment. The earlier document included, for example, a reference to the modelling or MACC work which the Department had carried out. The differences between the October 2023 draft WMS and the December 2023 WMS are insignificant in the context of the appellant’s challenge. In all the circumstances, the failure to comply with the s.19 duty when the 2023 WMS was approved and published in December 2023 did not justify the grant of any relief by the court.
112. When the documents are read fairly and as a whole, the appellant’s suggestions that the February 2024 assessment was simply a rearguard action or an after-the-event assessment which was “striving to defend an earlier decision in the context of adversarial litigation” are wholly without foundation. Similarly, no fair-minded member of the public, sufficiently informed of the circumstances of the case and the contents of the documents, would consider that the preparation of the February 2024 assessment “was improperly tainted by the respondent’s concern about a judicial review challenge”.
113. It is a matter of judgment for the policy-maker to decide whether to pursue any further line of inquiry in order to comply with s.19 of the EA 2021, subject to challenge on the grounds of irrationality (*R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37). The Secretary of State’s assessment that the adoption by LPAs of higher standards than envisaged by the 2023 WMS would yield only marginal benefits rightly is not the subject of challenge in this judicial review. In those circumstances, it cannot be said that the Secretary of State failed to comply with any legal obligation to inquire further into any other matter relevant to the s.19 duty.
114. Accordingly, I would reject ground 1.

Conclusion

115. For all these reasons I would dismiss the appeal.

Lewis LJ

116. I agree.

Dingemans LJ

117. I also agree.