The quest for sustainable buildings: Getting it right at the planning stage

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4 The Quest for Sustainable Buildings: Getting it Right at the Planning Stage

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4.1 Introduction

Climate change and security of energy supply are key drivers of policy and legislation in current times. At the same time, the UK government is also focusing upon those households subject to 'fuel poverty'.[1] There is an impressive number of initiatives in place to secure reduction in greenhouse gas emissions and to promote energy efficiency. These measures range from legally binding international agreements to local voluntary community schemes. The complexity of the policy and legal frameworks is accentuated by the fact that there are multiple goals to achieve and this results in some incidences of paradox. Take micro generation, for example. Certainly domestic schemes will result in reduced carbon dioxide emissions and should provide a reliable source of energy for the future. As evidenced by the Climate Change and Sustainable Energy Act 2006, the UK government also sees micro generation as one of the hopes for reducing fuel poverty. Micro generation does, however, tend to be expensive (certainly in comparison with current energy prices) and if it is to be successful in the alleviation of 'fuel poverty' then substantial financial support will be needed. Ultimately, whether the economics of micro generation make sense will depend upon whether the era of cheap centralized energy is really at an end (Dow, 2007). The array of measures in place to improve energy performance and thus reduce carbon emissions will also serve to ease the burden of energy expenses on poor households. However, their role in addressing the goal of reducing carbon emissions is based on the premise that a large proportion of energy provision is from fossil fuel sources. A switch to a mix of nuclear and renewable sources (although this may raise other entirely different issues in relation to the environment and sustainability) would arguably be far more efficient in reducing carbon emissions from buildings.

This chapter focuses upon the legal provisions in place to reduce carbon emissions from buildings in the UK. In particular, it reviews the role and the potential of the UK planning regime to this end. The first section sets the context in terms of global and regional commitments to counter climate change. Some of the legislative provisions in the UK are then explored. This

includes overarching measures such as the Climate Change Act, 2008 as well as specific legislation that targets the energy performance of buildings. This second section of the chapter also gives some brief attention to the non-legally binding 'Code for Sustainable Buildings' as this is integral to the way in which planning law can operate to improve standards. The third and final part of the chapter considers the role of the UK planning regime, including the development and future of the 'Merton Rule', incentives for micro generation through the 'Permitted Development Order' route and the use of model planning conditions. In order to illustrate how the use of planning conditions can succeed (or not), two case studies are considered. In one of the case studies, a planning condition was upheld whereas the relevant condition in the other case study was subject to a successful appeal. Some tentative conclusions are then drawn as to the future direction of law and policy in the UK relating to emissions from buildings in the context of the coalition government's 'localism' agenda.

4.2 The International and Regional Context

4.2.1 The International Regime

The international climate change regime comprises the United Nations Framework Convention on Climate Change[2] and its Kyoto Protocol.[3] Both of these instruments are in force and are legally binding. The Kyoto Protocol commits many of the industrial nations to a reduction in the annual average of greenhouse gas emissions. In the 'first commitment period' from 2008 to 2012 the reduction is to an average level of 95 per cent of 1990 emissions. Fundamental problems have been identified with the Kyoto Protocol. Not least of these is the fact that the United States (US), responsible for 20 per cent of the overall output of greenhouse gases, is not a party (UNDP Human Development Report, 2007/2008). It has also been suggested that the commitments made so far are inadequate and have not been successfully implemented (Barker *et al.*, 2007, den Elzen, 2008). With the first commitment period drawing to a close in 2012, it was hoped that, following the Bali Action Plan, adopted by the international community in December, 2007, an 'agreed outcome' on long-term cooperative action on climate change would be reached in Copenhagen in December 2009. Despite much debate as to the possible legal form of the 'agreed outcome' (Rajamani, 2009) and high hopes of a legally binding agreement (Thomas and Woodward, 2010) there was no such agreement. The result of the Copenhagen Conference is an accord, led by the US, between China, India, Brazil, South Africa and the US to tackle global warming and deliver aid to developing nations. Despite criticisms of the Kyoto Protocol and the failure to reach any kind of multilateral agreement at Copenhagen, there is no doubt that the Kyoto goals have been a powerful driver for governments. The Copenhagen accord does provide for nations to commit to implement emissions targets for 2020 and

a number of world leaders have signified their intention to introduce further more stringent, legally binding targets (Thomas and Woodward, 2010).

4.2.2 Law and Policy of the European Union

The European Union (EU) has the quota of a reduction to 92 per cent of 1990 levels by 2012 under the Kyoto agreement. However, the EU is committed to even more stringent targets than those provided for under the international regime. The EU objective is to reduce overall greenhouse gas emissions by at least 20 per cent below 1990 levels by 2020 and by 30 per cent in the event of an international agreement being reached. The Union has also set a binding target for energy from renewable sources of 20 per cent of total EU energy consumption by 2020. A range of measures exist to achieve these goals, including a directive on energy end-use efficiency and energy services,[4] with an overall objective of saving 9 per cent of energy by 2012 and a directive on the promotion of the use of energy from renewable sources[5] that provides for the improvement of energy efficiency in the context of the binding target for energy from renewable sources. The key legislative instrument applying to the control of emissions from buildings is the directive on the energy performance of buildings (2002/91).[6]

Under directive 2002/91, member states are required to establish a methodology for determining the energy performance of buildings and set minimum energy performance standards. New buildings above 1000 square metres are to meet these standards as are buildings above this limit that undergo major renovation. On construction, sale or rent, an energy performance certificate for the building must be made available and this is to be no more than ten years old. Public buildings exceeding the 1000 square metres limit are required to display their certificates. The directive also provides for inspection regimes for boilers and air conditioning systems and for inspections to be carried out by independent experts (Hookins and Stonehill, 2006).

Over recent years there have been calls from the European Council and the European Parliament[7] for the Commission's priorities, established in its *Action Plan for Energy Efficiency: Realising the Potential* published in 2006,[8] to be comprehensively and swiftly implemented. The action plan identified the significant potential for cost-effective energy savings in the buildings sector and, as part of the package of measures to achieve the priorities of the action plan, a new directive on the energy performance of buildings was published in May 2010. When in force (2012), the directive will expand upon the provisions of the 2002 directive significantly (Mittenthal, 2009).

Under Article 4 of the new directive, member states will have to set minimum energy performance requirements for buildings or building units 'with a view to achieving cost-optimal levels'. This requirement will also apply to 'building elements that form part of the building envelope and that have a significant impact on the energy performance of the building envelope when

they are replaced or retrofitted'. The requirement to meet minimum energy performance requirements will apply to all new and existing buildings, regardless of size.[9] Member states will also be required to set energy performance for technical building systems installed in existing buildings.[10] The directive includes a new binding requirement upon member states to ensure that by 2020 all new buildings are nearly zero-energy.[11] The display requirements for public buildings are extended to include those 'frequently visited by the public' and the threshold size is lowered to 500 square metres (to be reduced further to 250 square metres in 2015).[12] In addition, inspection requirements are extended to apply to all elements of heating systems (not just boilers).[13]

4.3 UK Legislative Provisions

4.3.1 The Climate Change Act 2008

The UK is also committed to more ambitious targets than those set in the Kyoto Protocol. In fact, it is the first nation worldwide to adopt a legally binding long-term framework to cut carbon emissions. The controversial Climate Change Act, 2008 imposes a statutory duty upon the Secretary of State of 2050 'to ensure that the net UK carbon account for the year 2050 is at least 80 per cent lower than the 1990 baseline'.[14] The imposition of statutory duties on government is a novel approach in UK law (Stallworthy, 2010) and some might doubt the meaningfulness, in particular, of imposing a legal duty on an individual whose identity is, as yet, unknown. It is also difficult to see how legally binding this target can be, when it is unlikely to be legally enforceable (Townsend, 2009; Stallworthy, 2010). However, proponents of the act (Grekos, 2009; Townsend, 2009) recognize its possibilities in terms of improving carbon management, moving the UK towards a low carbon economy and providing strong leadership and commitment to shouldering an equitable burden in reducing global emissions. It may also provide some certainty and encouragement for industry and business.

The act requires that a series of five-yearly carbon budgets are set by order of the Secretary of State. The first three budgets (2008–22) have already been set by the Carbon Budgets Order[15] with a view to meeting the 2050 target. Thus 2018–2022 is 34 per cent lower than the 1990 baseline. There is a more ambitious figure of 42 per cent by 2020, which will only be adopted if a global agreement is reached. The crediting of carbon units is going to be crucial if these objectives are to be met. This is clearly illustrated by the scale of net reduction from 2007 to 2008, which was a mere 2 per cent (DECC, 2010). The Carbon Accounting Regulations, which define carbon units and set out how carbon can be credited to the account, came into force on 31 May 2009.[16] Greenhouse gas allowances (under trading schemes) can also act as credits, but only credits under the EU emissions trading scheme can be credited to the UK carbon account.

The Secretary of State is subject to a duty 'to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget'.[17] Some indication as to how this will be achieved is provided in measures recommended by the Climate Change Committee set up under the act to advise the Secretary of State.[18] The key short-term recommendations of the committee are:

- Energy efficiency improvements in building and industry
- Fuel efficiency improvement in road vehicles
- A significant shift towards renewable and nuclear power generation and renewable heat

In order to achieve the extremely ambitious targets provided for in the 2008 act, a range of policy and legislative initiatives have been put in place. The two primary mechanisms for the delivery of energy efficiency improvements in buildings are building regulations and the planning regime and these are considered below.

4.3.2 Powers under the Building Act 1984

The Building Act 1984 places certain aspects of building under statutory control and empowers the Secretary of State to make regulations that provide details of exactly how that control is exercised.[19] The scope of the Building Act in terms of regulating the conservation of fuel and power was significantly widened by two recent pieces of legislation: The Sustainable and Secure Buildings Act 2004 and the Climate Change and Sustainable Energy Act 2006. The Sustainable and Secure Buildings Act 2004 enables the making of regulations for 'furthering the conservation of fuel and power'[20] and extends the range of matters in respect of which regulations can be made.[21] Significantly it allows for the regulation of existing buildings in matters relating to energy conservation and carbon emissions.[22] It also inserts a new Section 2A into the Building Act 1984, which allows for regulations to be made that impose 'continuing requirements' on building owners and occupiers regardless of when the building was erected or whether other building works are ongoing. These powers are potentially far-reaching and would permit, for example, the making of regulations requiring all lofts to be insulated (McAdam, 2007). The Climate Change and Sustainable Energy Act 2006 further extended the powers under the Building Act 1984 by enabling regulations to be made under the act relating to the installation of micro generation technologies in buildings.[23] The act also extends the time limit for prosecution of those in breach of regulations specifically relating to the conservation of fuel and power.[24]

The Building Act 1984 allows for guidance documents to be approved and compliance with approved guidance creates a presumption that the works in question comply with the requirements of the act as provided for in The

Building Regulations. Part L guidance documents deal with the conservation of fuel and power[25]and these cover new dwellings, existing dwellings and new and existing buildings other than dwellings. Under The Building Regulations, target emission rates for buildings have to be set for new dwellings, and buildings over 1000 square metres must be brought up to Part L standard when renovated.[26] For new dwellings the government has committed to a programme by which regulations will demand 25 per cent lower carbon emissions by 2010, 44 per cent lower by 2013 and by 2016 all new dwellings should be zero carbon.[27] Thus, the Part L standard in building regulations will be incrementally raised over forthcoming years. New Part L guidance implementing the 25 per cent lower emissions requirement came into force in October 2010. For existing housing stock, it is arguable that the full potential of the Building Act and regulations made under it have not as yet been fully realized. The government has turned its attention to the problem of tackling emissions from existing housing and a House of Commons Report was published on the subject in 2008.[28] The report sets out recommendations for improving energy efficiency in existing housing with a 'shopping list' of recommended measures for government (Grekos, 2008). These include measures to encourage the take-up of home micro generation, requirements for consequential energy efficiency improvements in planning consent on extension of homes, new requirements for Energy Performance Certificates and the production of a 'Code for Existing Homes' along the lines of the 'Code for Sustainable Homes' (see below).

4.4 The code for sustainable homes

The Sustainable Buildings Task Group first proposed a Code for Sustainable Buildings in 2004. The idea was that the voluntary code would be a catalyst for low-carbon, low-impact building and set vanguard eco-standards for the government to follow. The Code for Sustainable Homes was finally launched in December 2006 and the technical guide followed in April 2007. The code sets six standards of increasing rigour against which the whole home can be measured. A whole range of factors are considered alongside carbon dioxide emissions. There are nine design categories and the levels are rated from one to six stars. Level 6 (six stars) of the code, in terms of emissions, is 'true zero carbon'. The lowest, one-star level was, until 2010, more demanding than minimum standards for building regulations. However, new Part L standards came into force in October 2010 which equate to level three of the Code. The Part L standard for emissions from buildings will then be equivalent to level 3 (three stars) of the code.

At its inception, the code was a voluntary mechanism, but since May 2008, sellers of new properties have been required to provide information to the purchaser on the rating of the building, either in the form of a code certificate or a statement of non-assessment. Also from 2008, achievement of code level 3 became mandatory for all publicly supported developments.

The first proposals for a code were intended to embrace both new homes and non-domestic buildings and calls continue for the code to be expanded in this respect (UKGBC, 2009) as well as for a similar code to be adopted for existing homes (see above). Although essentially still a voluntary system, as shall be demonstrated below, when used in tandem with the UK planning system it has the potential to drive up standards across the entirety of the nine design categories, and thus serve to increase the chances of reaching the overarching emission targets set by government in the Climate Change Act.

4.5 The UK planning regime

A full account of the UK planning regime is beyond the remit of this chapter, but an overview of certain elements of UK planning law is helpful in understanding how the planning system may operate to drive up emissions performance.

4.5.1 Development

The UK system is centred upon 'development'. The key statute, the Town and Country Planning Act 1990, states that 'Planning permission is required for the carrying out of any development of land'.[29] The definition of 'development' in the Act is extremely broad and encompasses both building operations and the change of use of buildings.

> Development . . . means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.[30]

4.5.2 The development plan

UK planning is led by the development plan and reference to the plan will be the starting point in determining a planning application. Development plans are broad, giving general policy, aims, objectives and goals are generally permissive in nature. The Planning and Compulsory Purchase Act 2004 introduced a new range of strategies and plans. The 'Regional Spatial Strategy' introduced under the 2004 Act has since been suspended by the current government, but the local development framework (including the development plan) continues to operate. The Planning and Compulsory Purchase Act states that

> regard is to be had to the development plan, the determination shall be made in accordance with the development plan unless material considerations indicate otherwise.[31]

4.5.3 Material considerations

Although the development plan provides the starting point, it will not necessarily be the dominant determinant in the decision.[32] Material considerations can be taken into account and on occasion they can win out over the development plan.[33] There is no statutory definition or guidance as to what constitutes a material consideration. Certainly planning guidance, representations, as well as many other matters determined by case law, will be material considerations. Environmental considerations are just one of many possible elements to be brought into the balancing act in the determination of a planning application.

4.5.4 Planning guidance

Planning guidance plays a pivotal role in the UK planning system. There are a range of guidance documents in place, which, as noted above, will constitute material considerations in the determination of a planning application. The statutory requirement in the Planning and Compulsory Purchase Act 2004 for all plan making bodies to exercise their functions 'with the objective of contributing to the achievement of sustainable development' is reflected in the government's Planning Policy Statement (PPS)1: Delivering Sustainable Development and its supplement, Planning Policy Statement: Planning and Climate Change as well as Planning Policy Statement 22: Renewable Energy. A new draft climate change planning policy statement was released in 2010,[34] which combines the policies currently set out in the supplement to PPS1 and PPS22.

4.5.5 Planning conditions

Almost all planning determinations include conditions. The Town and Country Planning Act, 1990 allows the local planning authority to impose such conditions 'as it thinks fit'.[35] Guidance is given in the act[36] and in the Secretary of State's policy on conditions.[37] The courts have taken quite a restrictive view on planning conditions and, in the case of *Newbury District Council v Secretary of State for the Environment*,[38] it was held that conditions must

- be imposed for a planning purpose and not for an ulterior motive
- fairly and reasonably relate to the development permitted
- not be perverse (so unreasonable that no reasonable authority could have imposed them)

4.5.6 General permitted development order

There are certain ways in which development can be permitted under statute and thus the need for a planning application is obviated. One such route is

available under the General Permitted Development Order.[39] There are a large number of development types listed in Schedule 2 that cover minor developments, developments carried out by public services and favoured activities (such as agriculture and forestry). Development consent may still be needed when projects exceed certain thresholds and the right to development can be withdrawn, for example, if an environmental impact assessment is required.

4.6 Planning and micro generation

The 2007 Government White Paper 'Meeting the Energy Challenge'[40] recognized that planning consents are a major constraint on the implementation of a future energy strategy. Indeed the Scottish Executive has acknowledged that the planning system has the potential to act as a tool in opposing nuclear power (Dow, 2007). There is certainly little doubt that barriers have been encountered in the development of micro generation, but conversely the planning system has also been a driver behind the adoption of on-site renewable energy, which will have a significant role to play in delivering the government's 2016 zero carbon homes agenda (Sustainable Energy Partnership, 2007).

4.6.1 The Merton Rule

The Merton Rule takes its name from Merton Council. It amounts to a borough-wide prescriptive planning policy for all buildings, which was developed and adopted by the council in 2003. The policy requires new developments to generate at least ten per cent of energy needs from on-site renewable technology. The normal threshold for application of the rule is ten homes or 1,000 square metres of non-residential development. The Merton policy has had a significant impact and was subsequently adopted by the Mayor of London and the majority of local authorities nationwide. Planning Policy Statement 22 on renewable energy expressly acknowledges the Merton Rule and advocates its adoption by local planning authorities and the encouragement of renewable energy projects through local planning documents.

However, the future of the rule is uncertain. Whilst Merton Council intends to extend the policy to cover all development in Merton and is considering whether it is appropriate to increase the percentage of the policy up to a 20 per cent requirement (Merton Council, 2010), it has been suggested (Sustainable Energy Partnership, 2007) that the rule was watered down in the 2007 Climate Change supplement to PPS1 by the removal of the requirement to consider renewable energy projects 'in **all** new developments'. The emphasis also seems to have shifted from a requirement for a percentage of on-site renewable energy to consideration of the possibility of utilizing off-site renewable energy supplies. This latter development is

subject to criticism as, it is suggested that, linking new housing to off-site renewable energy developments provides no additional cut to carbon dioxide emissions (Sustainable Energy Partnership, 2007). The recent draft supplement to PPS1 essentially prohibits the adoption of the Merton Rule in the future, stating that

> [t]argets for application across a whole local authority area which are designed to secure a minimum level of decentralised energy use in new development will be unnecessary when the proposed 2013 revisions to Part L of the Building Regulations . . . are implemented.

However, it should be noted that currently a disclaimer appears on the Department for Communities and Local Government website, where the draft PPS appears, warning that all the content is subject to review in the light of the recent change of government.

4.6.2 Permitted development order

One of the problems with micro generation and the planning system traditionally lies with local authorities taking different approaches to small household projects. For example, some allow small turbines on houses whereas some do not and similarly with solar panels, whilst allowed in some areas, other local authorities view panels as damaging to conservation areas (Dow, 2007). The Climate Change and Sustainable Energy Act 2006 allows for such differences in practice to be reduced through amendment to the permitted development order. After due consultation, the Secretary of State made an order[41] amending the General Permitted Development Order[42] allowing permitted development for the installation of domestic micro generation equipment. Within the framework of the restrictions and conditions outlined in the order, solar panels, heat pumps and biomass heating systems are all subject to the order. This should make it easier for households to install micro generation equipment because, in many cases, it will no longer be necessary to apply for planning permission. It should also lead to greater consistency across local authority areas.

4.7 Planning conditions and sustainable buildings

The supplement of Planning Policy Statement 1 on climate change urges planning authorities and developers to 'engage constructively and imaginatively to encourage the delivery of sustainable buildings'. The statement also acknowledges that 'There will be situations where it could be appropriate for planning authorities to anticipate levels of building sustainability in advance of those set out nationally'. Planning authorities are advised to focus on development area or site-specific opportunities and specify requirements in terms of nationally recognized standards such as the Code for

Sustainable Homes. Some local planning authorities have sought to achieve the goal of driving up standards of sustainability in new domestic dwellings in their areas by recommending enhanced levels of performance and certification under recognized codes and schemes.

4.7.1 Brighton and Hove City Council

An example of this practice is to be found in the 'Model Planning Conditions and Informatives' of Brighton and Hove City Council. The model planning conditions state that, unless otherwise agreed in writing by the Local Planning Authority, no new-build residential development can commence without evidence that it will achieve a minimum code level 3 under the Code for Sustainable Homes. Furthermore (again, unless agreed in writing), the approved units cannot be occupied until a final code certificate is issued confirming the minimum code level 3 performance. Similarly, the model conditions state that unless agreed with the Local Planning Authority, no residential development involving existing buildings can commence unless it is certified that the development will achieve an 'Ecohomes' rating and no occupation can take place until a post construction certificate to this effect has been submitted to and approved by the authority. In a similar way, BREEAM registration, assessment, rating and confirmation are conditions of development and occupation for new build non-residential developments. Such conditions in planning determinations might, however, be open to challenge as is illustrated by the two following case studies.

4.7.2 The former New Penny public house

Planning permission had been granted subject to conditions for the construction of twelve new-build flats on the site of a former public house. An appeal was brought by the developers against the decision of Cheltenham Borough Council. One single condition to the planning permission was disputed. The condition in question stated that

> prior to the commencement of development a scheme to demonstrate a reduction in carbon emissions to achieve a minimum level of code 3 of the Code for Sustainable Homes shall be submitted to and approved in writing by the local planning authority. The development shall be carried out and maintained in accordance with the details so approved.

The reasons given for the condition were to ensure compliance with national and regional objectives and the aims of local plan policy CP1 regarding sustainable development. The latter policy stated that development would be permitted only where it took adequate account of the principles of sustainable development and it set out a number of criteria for this. The policy also stated a number of principles of sustainable development which

might be taken into account as material considerations in the determination of planning applications.

The appeal was allowed, the inspector concluding that the condition was imprecise and unreasonable and that it did not meet the tests set out in Circular 11/95. A new planning permission was granted without the disputed condition but retaining the relevant non-disputed conditions from the previous permission. The key reasons for allowing the appeal were as follows:

- The Supplement to PPS1 (the Supplement), states that councils wishing to proceed in advance of the Government's timetable must set out their policies for sustainable developments in development planning documents (DPDs) so as to ensure examination by an independent Inspector. Neither policy CP1, *Sustainable Development of the Cheltenham Local Plan Second Review* nor the Council's supplementary planning guidance documents relating to policy CP1 referred to the Code for Sustainable Homes.
- Paragraph 42 of the Supplement allows non-compliance with adopted DPD policies if this is not feasible or viable. The appellant argued that the development had not been designed to attain code level 3 and that fundamental changes, involving a different design to that which had been approved, would be required to achieve this. The cost involved, it was argued, would make the proposed development unviable. Little evidence was proved by the council to counter these claims.
- The approach set out in the Supplement indicates that conditions requiring compliance with level 3 of the code or above should only be imposed if the developer has demonstrated a willingness to comply. Condition 13 was unreasonable without the developer's agreement to it.
- The developer had committed to construction of the flats in accordance with the Code to a level to be determined at the time of construction and to a number of measures of sustainable methods of construction. The Inspector concluded that the measures incorporated in the scheme met the sustainability objectives identified in policy CP1. It was also noted that it was normal to assess the code level of a development post-completion of the development rather than pre-commencement as required by condition 13.

(Appeal Decision, 2009)

4.7.3 Hut Cottage

Planning permission had been granted subject to conditions for a replacement bungalow at Hut Cottage, a single-storey dwelling with outbuilding on a small and irregularly shaped plot of land abutting listed buildings and in a conservation area. Planning permission had been granted for a replacement bungalow in 2005, which had expired. A further application of 2008 seeking

renewal of the planning permission was for a proposed development identical to the earlier scheme. When planning permission was granted it was subject to conditions, one of which was disputed in an appeal against the decision of Chelmsford Borough Council. The condition in dispute (No. 5) stated that, unless otherwise agreed in writing by the Local Planning Authority:

a) the development hereby permitted shall be built to a minimum of Level 3 of the Codes for Sustainable Homes (or its successor);
b) No development shall take place until a Design Stage assessment (under the Code for Sustainable Homes or its successor) has been carried out and a copy of the summary score sheet and Interim Code Certificate have been submitted to and approved in writing by the Local Planning Authority;
c) Prior to the first occupation of the dwelling, a copy of the summary score sheet and Post Construction Review Certificate (under the Code for Sustainable Homes or its successor) shall be submitted to the Local Planning Authority verifying that the agreed standards have been met.

The reasons given for the condition were to achieve sustainable development in accordance with Policies CP11 and DC24 of the Adopted Core Strategy and Development Control Policies Development Plan Document (CSDCP) and the Sustainable Development Supplementary Planning Document (SPD). Policy CP11 provided guidance relating to energy and resource efficiency, renewable energy and recycling and Policy DC24 established criteria relating to energy-efficient design and the use of materials, including a requirement that all new dwellings should attain a minimum rating of Level 3 of the Code for Sustainable Homes or its successor.

The appeal was dismissed and the disputed condition was found to be reasonable and necessary. The reasons given by the inspector were as follows:

- There had been changes in policy in response to growing concerns surrounding global warming since the first permission was granted, which were reflected in the 2007 Supplement to PPS1. The Council's determination and conditions were guided by the policies within the CSDCP.
- It was noted that the Planning and Compulsory Purchase Act 2004[43] states that regard must be had to the development plan unless material considerations indicate otherwise.
- It was also noted that where planning permission expires, fresh applications should be judged against current planning considerations.[44]
- The decision to reject the appeal was made notwithstanding the resultant financial implications and the voluntary nature of the Code for Sustainable Homes.

(Appeal Decision, 2009)

4.8 The future of requirements for sustainable buildings in local planning

The two appeals outlined above deliver some interesting lessons if planning conditions are to be successfully utilized to attain higher standards than currently required under building regulations. Clearly, the requirement of attaining a particular level of an accepted national code such as the Code for Sustainable Homes is, in principle, acceptable (at least under current planning guidance). The key message to be drawn from the different outcomes of the two case studies above is that explicit reference to the code in question should be contained within the development plan document (DPD). The question as to whether requirement can be made for schemes of compliance to a level of performance pre-commencement rather than post-completion is less clear cut. To err on the side of caution local planning authorities might be best advised to stick to post-completion requirements in order to minimize the chances of successful appeal. It is interesting that in the Hut Cottage appeal, the fact that the condition was not imposed with the agreement of the developer was given little weight. Also, although the inspector noted the financial consequences of the imposition of condition No. 5, the issue of the feasibility and viability of compliance with level 3 of the code were not really explored in depth.

Although the future of the new draft supplement to PPS1 is uncertain, the draft policy on the local planning approach to setting requirements for sustainable buildings, as it is currently framed, would continue to allow requirements for a building's sustainability as long as they are set out in the DPD. The approach is, however, considerably more restrictive than that in the current supplement. Requirements should

> relate to a development area or specific sites and not be applicable across a whole local authority area unless the justification for the requirement can be clearly shown to apply across the whole area.[45]

If this is retained in any new PPS, then it will be much harder for local authorities to adopt a requirement to meet elevated levels of a code across their whole area. Certainly they will have to provide clear and convincing justification within their DPD if this is to be the case.

4.9 Conclusions

The law surrounding climate change and energy efficiency is complex and multi-layered. This complexity is accentuated by the multiple aims involved and the fact that measures adopted do not always align to all of these. What is clear is that buildings are of central importance in realizing international and local goals to reduce levels of greenhouse gas emissions and thus help counter the threat of climate change. There are many ways of tackling the

reduction of emissions from buildings. Alternative energy sources, renewables and energy efficiency are just some of these. Legislation will not provide the whole solution, nor will one single legislative route.

Regulations adopted under the Building Act 1984 are clearly of key importance in implementing the standards required of buildings in order to meet the targeted reductions in carbon dioxide emissions and the ultimate aim of carbon zero buildings. However, voluntary schemes, such as the Code for Sustainable Homes, also have an important role to play. This is clearly illustrated by the way in which the new Part L standards in the Building Regulations mirror level 3 of the code as well as the way in which the code has been used to drive up standards through the planning process.

New proposals for planning guidance appear to suggest that in some respects the role of the planning system is done. The proposal is to outlaw initiatives such as the 'Merton Rule' and restrict the requirements that can be imposed at the planning stage on the sustainability of buildings. Whilst there is doubtless some merit in having a single central level of control in the guise of building regulations, the building control system operates in a different way and at a different stage in the building life cycle to the planning regime. Having a single central standard also ignores variations in local environments and stifles the drive to strive for better standards and develop new and affordable technologies, which have in the past been encouraged by voluntary code ratings and compulsory on-site renewable energy requirements.

There is great uncertainty at the moment as to the direction that planning law will take. The new UK government promises radical reform of the planning system and has pledged through its proposed Decentralisation and Localism Bill[46] to devolve greater powers to local authorities. Specifically, it plans to abolish Regional Spatial Strategies and 'return decision-making powers on housing and planning to local councils'.[47] It may, therefore, be that the trend outlined above will be reversed and local communities and their planning authorities will be able to lead the way in delivering alternative energy sources and sustainable buildings.

Notes

1 Following the Warm Homes and Energy Conservation Act 2000, 'fuel poverty' is generally accepted as a consumer spend of more than 10 per cent per week of income on energy.
2 United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107.
3 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) 37 ILM 22.
4 Dir 2006/32 on energy end-use efficiency and energy services OJL 114 27.4.2006 p64–85.
5 Dir 2009/28 on the promotion of the use of energy from renewable sources OJL 140 5.6.2009 p16–62.
6 Dir 2002/91 on the energy performance of buildings OJL 1 4.1.2003 p65–71.

7 European Council of March, 2007, European Parliament Resolutions of 31 January 2008 and 3 February 2009.
8 Communication from the Commission, *Action Plan for Energy Efficiency: Realising the Potential*, Brussels, 19.10.2006 COM (2006) 545 final.
9 Dir 2002/91, Articles 6 and 7.
10 Dir 2002/91, Article 8.
11 Dir 2002/91, Article 9.
12 Dir 2002/91, Article 13.
13 Dir 2002/91, Article 14.
14 Climate Change Act, 2008, Section 1.
15 SI 2009, No. 1259.
16 SI 2009 No. 1257.
17 Climate Change Act 2008, Section 4 (1).
18 Building a low-carbon economy – the UK's contribution to tackling climate change published on 1st December 2008.
19 Building Act 1984, Sections 1, 2, 2A and Schedule 1.
20 Sustainable and Secure Buildings Act 2004, Section 1 (1) (b).
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