

**IN THE MATTER OF**  
**LOCAL PLANNING AUTHORITIES AND LEGAL OBLIGATIONS TO SET CARBON REDUC**  
**TION TARGETS IN RELATION TO CLIMATE CHANGE**

---

**OPINION**

---

1. I am asked to advise on a number of issues concerning the legal obligations placed on local planning authorities to include carbon reduction targets in their local development plans. My advice is being sought on this issue due to the receipt of a letter sent by ClientEarth to several local planning authorities which contends that local planning authorities are under a legal obligation to include carbon reduction targets in their local development plans. I have already advised in consultation. I now put that advice into a written opinion.
2. I am asked to advise on the following questions:
  - (i) whether local planning authorities have a legal obligation to include carbon reduction targets in their local development plans as contended by ClientEarth in its letter;
  - (ii) specifically, whether there is a legal requirement for local planning authorities to include carbon reduction targets in their local development plans arising from:
    - (a) the Town and Country Planning Act 1990 and associated Regulations;

- (b) the National Planning Policy Framework (February 2019);
  - (c) National Planning Practice Guidance;
  - (d) European Union Directives, case law or international treaties;
  - (e) any other source.
- 
- (iii) if the legal obligations are as contended by ClientEarth in their letter, what are the legal implications and guidance on how best local planning authorities should approach this including advice on what proportionate local evidence would be required to support setting relevant targets;
  - (iv) if the legal obligations are not as is contended by ClientEarth in their letter, what are local planning authorities required to do and how can they best approach this;
  - (v) the relevance and implications for any councils that have declared a climate change emergency;
  - (vi) any other relevant matters that authorities should take into account in respect of their legal obligations relating to climate change and carbon reduction.

### **Advice**

### **Carbon Reduction Targets**

### **Issues (i), (ii), (iii), (iv) and (vi)**

3. s. 19(1A) of the 2004 Act provides:

Development plan documents must (taken as a whole) 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

4. Based on this provision, ClientEarth argue that (p. 2):

It is only by setting local carbon reduction targets by reference to wider national and international targets — and demonstrating proposed policies' consistency with local targets — that it is possible to establish and track an area's contribution to the mitigation of climate change (and for policies to be "designed to secure" that local land use and development mitigates climate change). In this sense, section 19(1A) makes emissions reduction a central, organising principle of plan-making.

5. This is the central contention made by ClientEarth in their letter. It essentially amounts to a claim that s. 19(1A) imposes a specific statutory duty to set carbon reduction targets in development plan documents. I believe that this is wrong.
6. Starting with the wording of s. 19(1A), there is no express statutory obligation to include carbon reduction targets. The obligation is a much broader one — to "include policies designed to secure that the development and use of land contribute to the mitigation of, and adaption to, climate change" (s. 19(1A)). In my view, had Parliament intended to place local planning authorities under an express — and very specific — statutory obligation to include carbon reduction targets in their local development plans then one would have expected Parliament to have said so expressly.
7. To get around this issue, ClientEarth seem to suggest that it is "only by setting local carbon reduction targets in line with wider national and international targets that it is possible to establish and track an area's contribution to the mitigation of climate change and for policies to be "designed to secure" that local land use and development mitigates climate change)" (p. 2)). That contention is wrong in numerous respects:

- (i) it is a stretch to say that it is "only by" including specific carbon reduction levels that a local planning authority will be able to

discharge its obligation under s. 19(1A), because otherwise it is not possible to determine whether the policies in question are designed to secure a contribution to the mitigation of and adaption to climate change. There are numerous other ways that this obligation can be complied with, which are outlined in detail in the Planning Practice Guidance (Climate Change). The policies which some local planning authorities have sent to me with my instructions are clearly policies which are “designed to secure that the development and use of land contributes to the mitigation of and adaption to climate change” (s. 19(1A));

- (ii) if that were correct, then a local plan inspector would be bound to find that a proposed plan was not legally compliant with s. 19(1A) if it did not include a specific carbon reduction target. That simply cannot be correct. The task for the inspector is a much broader one; they must exercise planning judgement, asking whether the policies taken as a whole “contribute to the mitigation of and adaption to climate change”. There is no indication in the statute that Parliament intended the duty under s. 19(1A) to be reduced to a mechanistic consideration of whether a local planning authority has included a specific carbon reduction target in its local development plan;
- (iii) any challenge to a finding of legal compliance would face an uphill struggle (*Zurich Assurance v Winchester City Council* [2014] EWHC 758 (Admin) at [114] and *Trustees of the Barker Mill Estates v Test Valley Borough Council* at [58]). I find it entirely improbable that the Planning Court would strike down a finding by an Inspector under s. 20 of the 2004 Act that s. 19(1A) was complied with on account of the fact that the local development plan did not include a specific carbon reduction target;
- (iv) ClientEarth also argue for carbon reduction targets on the basis that it is otherwise impossible to “establish and track the contribution of

an area to the mitigation of climate change” (p. 2). That is simply wrong. Take for example a local development plan which has a number of flooding policies which are specifically designed to mitigate the effects of rising water levels and inclement weather conditions, both of which have been brought about by climate change. Assume that this local development plan does not have a specific carbon reduction target. It would still be possible to “establish and track the contribution of an area to the mitigation of climate change” (p. 2) in this scenario by analysing at a local plan review whether the specific flooding policies have been effective. The inclusion of a specific carbon reduction target is one way to “establish and track the contribution of an area to the mitigation of climate change” (p. 2) but it is not the only way;

- (v) and in any event, there is no specific obligation to “establish and track the contribution of an area to the mitigation of climate change” (p. 2). The obligation under s. 19(1A) is to include policies which (when taken as a whole) are “designed to secure” relevant mitigation and adaption. It is not an obligation “to secure” but to “design to secure” which is much weaker. It will be for a local plan inspector to determine whether on the evidence available before them the policies in question are “designed to secure” relevant mitigation and adaption. That will be a matter for their planning judgment. The lawful exercise of that planning judgement does not require an assessment to be made against a specific carbon reduction target;
- (vi) it would be odd too if local planning authorities had a statutory obligation to comply with “national and international targets” (p. 2) in circumstances where that is not made clear in the statute. The obligation is plainly to include policies “designed to secure” (s. 19(1A)) the mitigation and adaption of climate change in general, not to include a specific carbon reduction target which tracks national and international obligations;

(vii) as the Planning Practice Guidance (Climate Change) notes, tools such as the sustainability appraisal (which is required) and environmental impact assessments (which may be required) are likely to provide a sufficient evidence base for an inspector to reach a lawful conclusion on compliance with the s. 19(1A) duty. Other tools such as the Flood Risk Assessment will also be helpful. Documents like the 'UK Climate Change Risk Assessment: UK Government' may also provide useful guidance;

8. For these principal reasons, I consider that it is wrong to assert that s. 19(1A) imposes a specific obligation on local planning authorities to include a specific carbon reduction target which tracks national and international obligations in their local development plans. It is highly improbable that a challenge mounted on this basis would succeed.
9. Turning to the NPPF, the ClientEarth letter picks up on a number of quotations which are generally supportive of a shift to a low carbon future (p. 2). There can be no doubt that the planning system is generally supportive of this principle and local planning authorities should be expected to grapple with this principle during the plan-making process as part of their obligation under s. 19(1A).
10. In that context, for example, local planning authorities should be aware of the commentary in 'Chapter 14: Meeting the Challenge of Climate Change, Flooding and Coastal Change' of the NPPF given that they will be required to demonstrate general conformity with the NPPF during the examination process (s. 19(2)(a) of the 2004 Act).
11. However, again, it is one thing to say that there is a general principle in favour of a shift to a low carbon future; it is quite another thing to say that there is a specific obligation to include a specific carbon reduction target which tracks national and international obligations in a local development plan.
12. ClientEarth picks up on footnote 48 of the NPPF which states that local planning authorities should address rising temperatures "in line with the objectives and

provisions of the Climate Change Act 2008” (p. 2). The provisions of the Climate Change Act 2008 do not place local planning authorities under a specific obligation in respect of carbon reduction; obligations are instead placed on the Secretary of State (s. 1 – 31). The objectives of the Climate Change Act 2008 are plainly the reduction of greenhouse gas emissions and this is a matter which local planning authorities should address during the plan-making process. Beyond this, I do not read footnote 48 of the NPPF as authority for the proposition that a specific carbon reduction target which tracks national and international obligations must be included in local development plans.

13. The reference to the Clean Growth Strategy adds nothing (p. 2) as it a statement of the obvious principle that central government will need assistance from local government in order to achieve national and international targets on climate change. This is achieved through a fair reading of s. 19(1A).
14. The reference to Planning Practice Guidance (p. 3) also adds very little. It is true that addressing climate change is a “core land use planning principle” which local planning authorities must be alive to. It is also true that the Planning Practice Guidance states that a “robust evaluation of future emissions” (p. 3) is one way of “identifying appropriate mitigation measures” in accordance with s. 19(1A). The basic point that is being made is that a local planning planning authority needs to adopt an evidence based approach to mitigation and adaption; a local planning inspector will ask whether the policies introduced in discharge of the s. 19(1A) have been “positively prepared, justified, effective and consistent with national policy” (NPPF, §35). Plainly, a local planning authority will need to understand the contribution which its area makes to climate change (e.g. through carbon emissions) before it can proceed to design effective and justified policies for the mitigation of and adaption to climate change in accordance with s. 19(1A). Again, none of that requires a specific carbon reduction target which tracks national and international obligations to be included in a local development plan.
15. ClientEarth then point out the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004 which are addressed through the sustainability appraisal which must accompany local plans (p. 3). I accept that local

planning authorities must consider the impact of their local plans on the environment — which includes climatic factors — through the sustainability appraisal (Schedule 2, 6(i)). The Planning Practice Guidance makes clear that this will be one of the useful tools when assessing how local plans can address climate change. Local planning authorities should give some thought to how their sustainability appraisals can help create an evidence base which allows them to discharge their obligation under s. 19(1A).

16. The reference to the duty to cooperate under s. 33A of the 2004 Act does not add much to the discussion (p. 3). Local authorities will be aware of their obligations under s. 33A and they should give thought as to whether climate change is a matter which they should cooperate with other local authorities in respect of.
17. The monitoring obligations under s. 35 of the 2004 Act and Regulation 35 of the Town and Country Planning (Local Planning) (England) Regulations 2012 say nothing about a specific carbon reduction target which tracks national and international obligations.
18. I do not accept that “there is a duty on decision makers to ensure that Local Plan policies are designed to secure emissions reductions that are at least consistent with national and international commitments” (p. 3) for the reasons given above.
19. For the sake of completeness, the issue of international obligations runs into the additional difficulty that unincorporated treaties have no effect in domestic law such that it would be entirely novel for a court to find that local planning authorities were required to comply with obligations contained in international agreements (*R (Spurrier) v Secretary of State for Transport & Heathrow Airport Limited* [2019] EWHC 1070 (Admin) at [606]).
20. In my view, some of the suggestions made by ClientEarth in respect of modelling may be useful for local planning authorities to consider when they are addressing their evidence base for climate change (p. 4).
21. It is important to be realistic about what ClientEarth is trying to do through the terms of their letter. They are trying to get local planning authorities to commit to specific targets for carbon reduction in their local development plans with an eye to holding

them to account — probably through litigation — if they fail to adhere to these targets. Local planning authorities should think twice before they commit themselves to specific local carbon target frameworks which are based on national and international climate targets. I imagine that developers will push against the inclusion of such targets in local development plans and inspectors will be wary of approving specific targets in the absence of a robust evidence base. These are strategic matters which local planning authorities need to discuss with members.

22. The above advice addresses questions (i), (ii) (iii) and (iv). In respect of (vi), I have commented throughout on the obligations which local planning authorities do have under the legal and policy framework. Particular consideration should be given to the provisions discussed above and in the letter sent by ClientEarth. I turn to question (v) below.

#### **Issue (v)**

##### **Declarations of Climate Emergencies**

23. I am instructed that as of 15<sup>th</sup> July 2019, 230 local authorities across England and Wales have declared a climate emergency (<https://www.climateemergency.uk/>). Broadly speaking, the idea of a climate emergency has no legal effect; there is no statutory process governing the declaration of climate emergencies or the implications of doing so. In the context of local authorities, the declaration of a climate change emergency has generally taken the form of a resolution being passed by the full council which highlights the risks associated with climate change and pledges that certain steps will be taken in order to counteract those risks.

24. Some general points are worth highlighting:

- (i) there is no formal process governing the declaration of a climate change emergency which has two important consequences:
  - a. there is no particular significance in the declaration of a climate change emergency because the term is not governed or regulated

by either statute or common law. It is because there is no formal process governing the declaration of a climate emergency that there is no formal consequence of doing so as a matter of law;

- b. there is no uniform way in which a climate change emergency must be declared. Each declaration is different, which means that it is difficult to give general advice on the issue;

- (ii) even though a declaration of a climate change emergency has no formal legal effect, it is possible that some declarations will have public law implications (e.g. they may be material considerations; they may create legitimate expectations; they may trigger the duty to act consistently);

- (iii) whether a particular declaration does have public law implications will depend on the terms of the individual declaration under consideration and general advice is unlikely to be helpful.

25. I would advise that the local planning authorities should undertake an internal review of their declarations of climate change emergencies in order to determine whether they have any public law implications for planning and more widely. I would advise the local planning authorities to consider the following issues carefully:

- (i) the declarations are likely to amount to material considerations in the planning context, particularly if the climate change emergency refers to the planning system in some respect. It may be that the declarations are material considerations both in the context of plan-making and decision-making;

- (ii) the declarations may have generated legitimate expectations. For example, a declaration which commits the local planning authority

to achieving net-carbon will likely have generated a substantive legitimate expectation which will have to be addressed during the plan-making process. It may be possible to lawfully depart from any legitimate expectations, but this would need to be considered on a case-by-case basis. There may be questions arising about whether any legitimate expectations yield to the statutory scheme outlined above (*R (Albert Court Residents Association) v Westminster City Council* [2012] PTSR 604 at [34]). These are complex questions which will the local planning authorities will need to give further thought to. I am happy to advise further in respect of specific issues which arise in that context;

- (iii) the declarations may also trigger the public law duty to act consistently (*R (Lumba) v Secretary of State for Home Department* [2012] 1 AC 245 at [26]). For example, if a declaration commits the local planning authority to achieving net-carbon then the local planning authority would either have to adopt this course when drafting its local plan or give adequate reasons explaining why it cannot adopt this course. Again, this matter will require careful consideration.

- 26. The key point is that those local authorities which have declared climate change emergencies will have to take stock of their position from a public law perspective.

## **Conclusion**

- 27. In summary, my advice is:

- (i) Local planning authorities do not have a legal obligation to include carbon reduction targets in their local development plans;
- (ii) I am not aware of any source of law that supports the contentions made by ClientEarth in their letter;

- (iii) This issue does not arise given my answers to the previous two questions;
- (iv) The legal obligations on local planning authorities in respect of local development plans are principally set out in Part II of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) and the Town and Country Planning (Local Planning) (England) Regulations 2012 (“the 2012 Regulations”);
- (v) Those councils which have declared a climate change emergency will have to consider the terms of their declarations to determine whether they have any public law implications (e.g. they may be material considerations; they may create legitimate expectations; they may trigger the duty to act consistently);
- (vi) I have no further comments to make in respect of the obligations on local planning authorities from a plan-making perspective.

28. Those instructing me should not hesitate to contact me to discuss any matters arising from this advice.

**SAIRA KABIR SHEIKH QC**

