Briefing Note – Use of CS 15 in Planning Decisions

Produced for:	Portfolio Holder Planning and Countryside Chairmen of Planning Committees Member of PAG, EAG and Planning Committees
Requested by:	Eric Owens
Portfolio Member:	Councillor Richard Somner
Service Director:	Eric Owens
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Briefing Author:	Bryan Lyttle, Planning Policy Manager

1 Purpose of the Briefing

1.1 To provide a definitive position on the use of CS15 in Planning Decisions.

2 Background

2.1 Core Strategy Policy CS15 – Sustainable Construction and Energy Efficiency was adopted in 2012 and provided a stepped requirement for all development in West Berkshire to be Net Zero Carbon by 2016 unless technologically or economically unviable.

2.2 The policy required non-residential development to be measured against the BREEAM standard and residential development to be measured against Code for Sustainable Homes (the "Code"). The Code was however withdrawn in 2015 by the Government and was to be replaced by new technical standards contained within Building Regulations.

3 Current Status

3.1 The Council declared a "Climate Emergency" in July 2019, and it has been argued that this should be used to enforce CS15 on all new development requiring planning permission. Officers have provided opinion that this was not possible and risked the Council losing appeals but also raised the possibility of costs being awarded against them for un-reasonable behaviour.

3.2 Due to the implications of not getting the approach to CS15 correct, the delay in the Secretary of State in issuing a decision on the Sandleford appeal at which the Council has argued that "major development" has to reduce CO2 emissions to Zero Carbon from 2016 using renewable energy or low/zero carbon energy generation on site, independent legal opinion has been sought. (Attached Appendix A)

4 Implications

4.1 The Council sought an opinion on CS15 generally and its application and interaction with the following:

Policy CS15;
The Revised NPPF;
The National Design Guide;
The National Model Design Code Parts 1 and 2;
(The Policy Playbook and/or equivalent guidance and Part L if considered relevant).

The Council also sought opinion on the following specific questions : -

- How CS15 can be applied today in light of the recent changes to the NPPF and the Ministerial Statement in 2019?

- Can the Council ask for Net Zero Carbon on all developments by just using the NPPF?

The Council has declared a Climate Emergency is this enough to ask for Net Zero Carbon for new developments?

4.2 The comprehensive response concludes that officer opinion has been correct. The first part of CS15 relates to standards of construction and Counsel's conclusion is that at a local policy level Policy CS15 does not provide a policy basis on which residential development can be required to meet a zero carbon construction standard. However, Policy CS15 is up to date and of full weight in terms of its requirement that non-residential development should meet BREEAM excellent.

The second part relates to energy use and reduction in carbon emissions. CS15 is up to date and of full weight. It can be relied upon to require new major development to demonstrate that all of a proposed development's energy use will be drawn from renewable or zero carbon energy generation on site or in the locality of the development is subject to consideration of viability.

4.3 The opinion has also provided clarification for how the Council should proceed with its objective for a replacement CS15 policy in the Local Plan Review.

5 Appendices

5.1 Appendix A – Counsel Opinion

Appendix A – Counsel Opinion November 2021

RE: Policy CS15 of the West Berkshire Core Strategy

O P I N I O N

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1. I am asked to advise West Berkshire Council in relation to the approach to be adopted in relation to Policy CS15 of the West Berkshire Core Strategy ("the CS"), which was adopted in July 2012.

2. Policy CS15 states:

"Sustainable Construction and Energy Efficiency

Residential Development

New residential development will meet the following minimum standards of construction:

- Minor development - Code for Sustainable Homes Level 3
- Major development[73] - Code for Sustainable Homes Level 4
- From 2013: All development - Code for Sustainable Homes Level 4
- From 2016: All development - Code for Sustainable Homes Level 6

Non-Residential Development

New non-residential development will meet the following minimum standards of construction:

- Minor development - BREEAM Very Good
- Major development - BREEAM Excellent
- From 2013: All development - BREEAM Excellent

Renewable energy

Major development shall achieve the following minimum reductions in total CO2 emissions

(regulated and unregulated energy use) from renewable energy or low/zero carbon energy

generation on site or in the locality of the development as long as a direct physical connection is used, unless it can be demonstrated that such provision is not technically or economically viable.

The percentage reductions in CO2 emissions should be based on the estimated CO2 emissions of the development after the installation of energy efficiency measures related to either the Code for Sustainable Homes, BREEAM or equivalent method has been applied.

Residential Development:

- A 10% reduction in CO2 emissions;
- from 2014: A 20% reduction in CO2 emissions;
- from 2016: Zero Carbon[74].

Non-Residential Development:

- A 10% reduction in CO2 emissions;
- from 2014: A 20% reduction in CO2 emissions;
- from 2019: Zero Carbon[75]."

3. Footnote 73 defines major development as a proposals for dwellings of 10 or more or on a site of more than 0,5 ha. For other uses it is where the floorspace is 1000 sq m or greater.

4. Footnotes 74 and 75 state "Requirements for zero carbon in line with stated Government aspirations, which may be subject to change".

<u>Policy CS15 and The Determination of Applications for Planning Permission</u>

5. When determining a planning application, a local planning authority is required to have regard to the Development Plan and to all other material considerations (S70(2) of the Town and Country Planning Act 1990 ("the 1990 Act").

6. This means that the Council will have to apply CS15 when determining applications for planning permission and consider whether the proposed development accords or breaches the policy.

7. In addition, the Council will need to determine the weight to ascribe to the policy. In determining the weight it should be given it will be necessary to determine whether it is up to date and whether or not it is consistent with the NPPF.

8. The NPPF explains at paragraph 219:

   "…existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

9. Accordingly, a development plan policy which is inconsistent with the NPPF, whilst it still falls to be applied, will be given little if any weight in the planning balance.

Applying Policy CS15

10. Policy CS15 is in two parts. The first part relates to standards of construction. The second part relates to energy use and reduction in carbon emissions.

(i) Standards of Construction

11. In terms of the standards of construction for residential development, since we are at a point in time beyond 2016, Policy CS15 requires all new residential development to attain Code for Sustainable Homes Level 6. However, the Government withdrew the code for sustainable homes in March 2015 and created new "national technical standards" contained in the Building Regulations.

12. Lord Pickles explained in the Ministerial Statement of 25 March 2015:

    "From the date the Deregulation Bill 2015 is given Royal Assent [26 March 2015], local planning authorities and qualifying bodies preparing neighbourhood plans should not set in their emerging Local Plans, neighbourhood plans, or supplementary planning documents, any additional local technical standards or requirements relating to the construction, internal layout or performance of new dwellings. This includes any policy requiring any level of the Code for Sustainable Homes to be achieved by new development; ***the government has now withdrawn the code, aside from the management of legacy cases***. Particular standards or requirements for energy performance are considered later in this statement.

13. In March 2019, the Government announced that it would introduce a Future Homes Standard (FHS) for new-build homes. In October 2019, the Ministry of Housing, Communities and Local Government (MHCLG) published a consultation on the FHS for new homes in England (see MHCLG: The Future Homes Standard: changes to Part L and Part F of the Building Regulations for new dwellings (1 October 2019)). MHCLG also published a National Design Guide setting out what it expects from new developments.

14. In January 2021, MHCLG published the government response to the October 2019 FSH consultation, which confirms:

    a. From 2025, the FHS will require new homes to be zero carbon ready and to have carbon emissions 75-80% lower than those built under current standards. Specifically, the FHS performance standard will be set at a level so that new homes will not be built with fossil fuel heating, such as a natural gas boiler. New homes will have low carbon heating (particularly heat pumps and heat networks) and high levels of energy efficiency to future-proof them so further energy efficiency retrofit work will not be necessary to enable them to become zero carbon as the electricity grid decarbonises. The government will consult on a technical specification for the FHS in spring 2023.

    b. In 2021, the government will introduce an interim uplift in Part L (Conservation of fuel and power) standards in the Building Regulations 2010. This will require homes that produce 31% less carbon dioxide (CO2) emissions compared to current standards.

    c. The role of local planning authorities in determining local energy efficiency standards will be clarified as part of the planning reforms initiated in 2020. The government will not amend the Planning and Energy Act 2008 in the meantime so local authorities will retain powers to set local energy efficiency standards for new homes

    d. The existing Fabric Energy Efficiency Standard (FEES) in Part L will be one of four performance metrics to address the balance between building fabric and low carbon heating. FEES is the maximum space heating and cooling energy demand for zero carbon homes.

    e. Transitional arrangements in the 2021 uplift of Part L standards will apply to individual homes rather than an entire development. The transitional arrangements that will apply to the FHS will be considered as part of the consultation on the technical specification in 2023.

15. The NPPF at paragraph 154 b) states:

"Any local requirements for the sustainability of buildings should reflect the Government's policy for national technical standards."

16. Drawing the above together, CS15 requires residential to attain a standard which has been withdrawn and replaced by a policy approach delivered via compliance with the national technical standards contained in the Building Regulations. Accordingly, the standards contained in CS15 for residential development can no longer be applied since they have been withdrawn. In my view the standards of construction for residential development contained in Policy CS15 are out of date and inconsistent with the NPPF. This part of Policy CS15 is thus out of date, inconsistent with the NPPF and of little if any weight in the planning balance.

17. Instead of a local planning policy based approach, at present within West Berkshire construction standards for residential development are thus regulated, not by the planning system, but via the Building Regulations. Whilst these are yet to be amended to reflect the requirement to attain Carbon Budget limits and Net Zero 2050, as I have explained above the Government intends to introduce relevant requirements in the near future.

18. A condition can only be imposed where it is necessary to make a development acceptable in planning terms. Accordingly, a condition requiring development to attain a particular standard of construction can only be imposed where there is a policy basis for so requiring.

19. As can be seen from the above, at a national level the Government's position is not one of requiring all housing to attain a standard of construction equivalent to zero carbon with immediate effect; rather the approach is to phase in over time the various policy approaches to deliver net zero.

20. At a local policy level Policy CS15 does not provide a policy basis on which residential development can be required to meet a zero carbon construction standard; rather in respect of residential development construction standards. CS15 is out of date, inconsistent with the NPPF and of little if any weight.

21. Accordingly, there is no policy basis upon which the Council could lawfully require residential development to come forward on a zero-carbon basis. At the present time, the Council will have to rely upon the building regulations regime delivering development which accords with the national technical standards.

22. In terms of the standards of construction for non-residential development, Policy CS15 requires all development to obtain BREEAM Excellent as a minimum. The Ministerial statement of March 2015 (see above) did not affect non-residential property. The BREEAM standard still exists and can be applied. It

has been included as a required construction standard in a number of recently adopted Local Plans (for example the Oxford Local Plan (adopted June 2020)).

23. Policy CS15 is up to date and of full weight in terms of its requirement that non-residential development should meet BREEAM excellent. Planning conditions can be imposed to require the attainment of this standard where this is necessary. However, since BREEAM excellent is not the equivalent to carbon zero, Policy CS15 does not justify a requirement that all on-residential developments should be carbon zero. A condition which required this could not be lawfully imposed in my view.

ii) CO2 Emissions and Energy Use

24. The second part of Policy CS15 relates to reductions in carbon emissions associated with energy use. It applies only to "major development" (see above). As such it cannot be relied upon to require reductions in energy use from <u>all</u> development, but rather only those developments falling within the definition of "major development" in footnote 73.

25. Since we are now at a point in time beyond 2016 and beyond 2019, CS15 provides that as a minimum a "Zero Carbon" target in terms of energy use is to be achieved:

    a. "from renewable energy or low/zero carbon energy generation on site or in the locality of the development as long as a direct physical connection is used"; and

    b. "unless it can be demonstrated that such provision is not technically or economically viable"

26. The phrase "zero carbon" is footnoted in footnotes 74 and 65 as follows:

    "Requirements for zero carbon **<u>in line with stated Government aspirations</u>**, which may be subject to change." (emphasis added)

The Meaning of Zero Carbon

27. As can be seen from the above, the phrase "zero carbon" cannot be interpreted simply as meaning that all energy use for developments to which this part of policy CS15 applies must draw their energy from renewable or zero carbon energy generation on site or in the locality of the development; rather what is meant by zero carbon" is a requirement "in line with stated Government aspirations".

28. This begs the question – what are the Government's stated aspirations in terms of energy use for new development?

29. The Planning and Energy Act 2008 was amended in 2015 to provide Government with powers to stop local planning authorities from being able to exceed the minimum energy efficiency requirements of the Building Regulations, but this amendment has not been commenced. In the Ministerial Statement in 2015 (see above), the Government set out an expectation that local planning authorities should not set energy efficiency standards for new homes higher than the energy requirements of Level 4 of the Code for Sustainable Homes, which is equivalent to a 19% improvement on the Part L 2013 standard.

30. In its response to the Consultation on the Future Homes Standard, the Government recognised that its approach had caused confusion:

    "The Future Homes Standard consultation recognised that the current position has caused confusion and uncertainty for local planning authorities and home builders, alike. While some local planning authorities are unclear about what powers they have to set their own energy efficiency standards and have not done so, others have continued to set their own energy performance standards which go beyond the Building Regulations minimum and in some cases beyond the Code for Sustainable Homes." (see paragraph 2.35)

31. The Government decided as a result of the consultation

    "To provide some certainty in the immediate term, the Government will not amend the Planning and Energy Act 2008, which means that local planning authorities will retain powers to set local energy efficiency standards for new homes…" (see paragraph 2.40)

32. Thus, the Government decided that, pending further changes to the Building Regulations which will seek to improvement energy efficiency, it is for local planning authorities to set local energy efficiency standards for new homes.

33. This means that the Government has not yet adopted a policy in relation to energy use by new development; rather it defers to local planning authorities in this regard. It does so in the knowledge that some local planning authorities are implementing standards that go beyond the Building Regulations and beyond the Code for Sustainable Homes.

34. In West Berkshire that local energy efficiency standard requires a "zero carbon" approach to energy use. It seems to me in the light of the above, that it cannot reasonably be said that this locally set approach is out of line with "stated Government aspirations"; rather the Government's stated aspiration

is that this is an issue for local policy to address and it recognises that this can go beyond the Building regulations requirements.

35. This means that it is open to the Council to require new development, to which this second part of CS15 applies, to demonstrate that all of its energy use will be drawn from renewable or zero carbon energy generation on site or in the locality of the development.

36. This position does, however, have the potential to change since the Government is undertaking further consultation on these issues (expected in 2023 with policy adoption in 2024). Once the Government does adopt its aspirations for carbon reduction in energy use by new development, then the Council will need to ensure that its requirements are in line with those aspirations.

37. In that regard I note that the Government Response contained a "Draft notional building specification for the Future Homes Standard" in Appendix A. This explained:

    "The introduction of the Future Homes Standard will ensure that from 2025, an average home will produce at least 75% lower CO2 emissions than one built to current energy efficiency requirements. In the short term this represents a considerable improvement in energy efficiency standards for new homes. Homes built under the Future Homes Standard will be 'zero carbon ready', which means that in the longer term, these homes will be future-proofed with low carbon heating and world-leading levels of energy efficiency. No further retrofit work will be necessary to enable them to become zero carbon homes as the electricity grid continues to decarbonise…"

38. This suggests that the requirement in CS15 (i.e. for zero carbon energy use) may go beyond the standard that the Government may introduce with effect from 2025.

Viability

39. As I have set out above, the requirement to demonstrate that all of a proposed development's energy use will be drawn from renewable or zero carbon energy generation on site or in the locality of the development is subject to consideration of viability.

40. Accordingly, it will be open to a developer to argue that it is not financially viable to meet the zero carbon energy use standard but some lesser standard. Thus, this issue can be a matter of negotiation much as the amount of affordable housing. The Council may need to adopt a flexible approach if it is not to stifle new development coming forward.

The NPPF and Energy Use

41. Paragraph 157 of the NPPF states:

"In determining planning applications, local planning authorities should expect new development to:

a) comply with any development plan policies on local requirements for decentralised energy supply unless it can be demonstrated by the applicant, having regard to the type of development involved and its design, that this is not feasible or viable…."

42. In my view, the second part of CS15 relating to energy use is thus entirely in line with the NPPF. It represents a local requirement for decentralised energy supply which can be altered if it is not viable or feasible to achieve in any particular case.

43. As a result, I conclude, that the second part of CS15 is consistent with the NPPF and of full weight.

44. Indeed, it is also consistent with the National Design Guide part R1 "follow the energy hierarchy" which states:

"138 Well-designed places and buildings follow the energy hierarchy of:
■ reducing the need for energy through passive measures including form, orientation and fabric;
■ using energy efficient mechanical and electrical systems, including heat pumps, heat recovery and LED lights; and
■ maximising renewable energy especially through decentralised sources, including on-site generation and community-led initiatives.

139 They maximise the contributions of natural resources such as sun, ground, wind, and vegetation.

140 They make use of potential for renewable energy infrastructures at neighbourhood and building level. These include photovoltaic arrays, heat pumps and district heating systems, to reduce demand for nonsustainable energy sources. IT advances and app-based solutions allow users to take ownership or to manage these systems so as to use them most efficiently.

141 They follow the principles of whole life carbon assessment and the circular economy, reducing embodied carbon and waste and maximising reuse and recycling. 142 Good developments minimise the cost of running buildings and are easy and affordable for occupants to use and manage."

CONCLUSION ON CS15

45. CS15 is in part out of date and of little if any weight and in part up to date and of full weight.

46. The standards of construction for residential development contained in Policy CS15 are out of date and inconsistent with the NPPF. Accordingly, the standards contained in CS15 for residential development can no longer be applied since they have been withdrawn. This part of Policy CS15 is thus out of date, inconsistent with the NPPF and of little if any weight in the planning balance. Instead, it is the requirements of the Building regulations which regulated the standards of construction for residential development.

47. Policy CS15 is up to date and of full weight in terms of its requirement that non-residential development should meet BREEAM excellent. Planning conditions can be imposed to require the attainment of this standard where this is necessary. However, since BREEAM excellent is not the equivalent to carbon zero, Policy CS15 does not justify a requirement that all on-residential developments should be carbon zero. A condition which required this could not be lawfully imposed in my view.

48. In terms of energy use by new major development, CS15 is up to date and of full weight. It can be relied upon to require new major development to demonstrate that all of a proposed development's energy use will be drawn from renewable or zero carbon energy generation on site or in the locality of the development is subject to consideration of viability.

<u>The NPPF and Net Zero</u>

49. The NPPF does not contain any policy requirement that all new development must be carbon neutral. There is no requirement in it to go beyond the national technical standards in terms of construction standards. Further, there is no requirement in the NPPF to ensure that new development is carbon neutral in terms of its energy use.

50. As a result, the NPPF does not provide a policy basis for imposing a requirement that a development achieves a zero carbon standard; that can only be done pursuant to Policy CS15 as I have described above.

51. The NPPF explains at paragraph 129 that the National Design Guide and the National Model Design Code "should be used to guide decisions on applications in the absence of locally produced design guides or design codes."

52. At paragraph 135 the National Design Guide states:

"135 Well-designed places and buildings conserve natural resources including land, water, energy and materials. Their design responds to the impacts of climate change by being energy efficient and minimising carbon emissions to meet net zero by 2050. It identifies measures to achieve:

■ mitigation, primarily by reducing greenhouse gas emissions and minimising embodied energy; and

■ adaptation to anticipated events, such as rising temperatures and the increasing risk of flooding."

53. Thus, the obligation is to minimise carbon emissions – there is no obligation to attain zero carbon emissions in every case.

<u>The Council's Declaration of a Climate Emergency</u>

54. In my view the declaration of a climate emergency does not provide a policy basis for imposing a requirement that a development achieves a zero-carbon standard. The declaration of the 2nd July 2019 was as follows:

"This Council notes that:

1. All levels of government (national, regional and local) have a responsibility to limit the negative impacts of Climate Breakdown. It is important for the residents of West Berkshire and the UK that we commit to working towards carbon neutrality as quickly as possible.

2. The consequences of global temperature rising above 1.5°C are so severe that preventing this from happening must be of the utmost urgency.

3. Bold climate action can deliver economic benefits in terms of new jobs, economic savings and market opportunities (as well as improved health and wellbeing) but will also require changes in individuals' lifestyles and have a cost implication to both the individual and the state.

West Berkshire Council therefore:

• Declares a Climate Emergency.

• Will create a strategic plan for West Berkshire, that aims to deliver carbon neutral by 2030. • Calls on HM Government to provide the Council with the powers and resources to make the 2030 target possible.

• Will work with other authorities to determine and implement where practicable best practice methods to limit Global Warming to less than 1.5°C."

55. The Councils' Environmental Strategy 2020-2030 which was designed to implement that Council's aspirations does not contain any statement that all new development should come forward on a basis which achieves a zero carbon standard. Indeed, in relation to energy use it explains

"We will:

• Work with local suppliers, community energy co-operatives and similar groups to invest in renewable energy in the District; and

• Lobby Government to change the tax system to favour low and zero carbon solutions…"

56. The declaration and the Environmental Policy produced pursuant to it cannot be construed as providing a policy basis that all new development must achieve a zero carbon standard. As such, they do not provide a basis for requiring all new development to meet such a standard.

National Design Guide

57. The NPPF paragraph 129 requires local planning authorities to use the National Design Guide and the National Model Design Code to "guide decisions on applications in the absence of locally produced design guides or design codes".

58. The NDG does not contain any requirement that all development should achieve a construction standard of zero carbon or that or zero carbon energy use. Paragraph 135 explains

    135 Well-designed places and buildings conserve natural resources including land, water, energy and materials. Their design responds to the impacts of climate change by being energy efficient and minimising carbon emissions to meet net zero by 2050. It identifies measures to achieve:

    ■ mitigation, primarily by reducing greenhouse gas emissions and minimising embodied energy; and

    ■ adaptation to anticipated events, such as rising temperatures and the increasing risk of flooding.

59. Thus the approach is one of seeking to minimise carbon emissions but it is not one that requires zero carbon emissions to be achieved by all new development.

60. Page 34 of the National Model Design Code part 1 identifies that local codes can include Environmental standards:

    "Codes may set standards for new development to meet relating to: • Embodied energy/carbon • Whole life-cycle carbon

    • BREEAM Ratings and other best practice guidance

    • Modern Methods of Construction

    • Water usage

61. But this does not create a policy basis for requiring attainment of a zero carbon standard within West Berkshire now.

REUBEN TAYLOR Q.C.

Landmark Chambers

180 Fleet Street

London

EC4A 2HG