DOES THE UK HAVE A SUSTAINABLE HOUSING POLICY?

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Abstract

In July 2007 the UK government issued its policy statement, *Building a Greener Future*. Since then, the UK has seen a plethora of new regulations, planning policy statements and codes seeking to embed climate change mitigation into the development of new housing stock, and by retrofitting into existing buildings. The government's stated strategy involves changes to the Building Regulations to strengthen the requirements in relation to insulation, ventilation, air tightness, heating and light fittings. Planning policy has also been enlisted to set a framework for development to deliver 'zero carbon outcomes'.

This paper questions the UK government's assertion that it has a cogent strategy for the delivery of sustainable housing. With its narrow definition of 'zero carbon' outcomes, the UK strategy omits, dodges or underplays significant elements of a viable strategy for climate change resilience. Of those elements, climate change adaptation looms large.

There has been some statutory recognition of the need for climate change adaptation. The Greater London Authority led the way in 2007 by seeking a specific statutory duty to develop and implement a climate change adaptation strategy. The Climate Change Act 2008 extends that duty to other local authorities and regional development agencies. However, it is widely drawn and (as a recent planning decision indicated) is likely to be difficult to apply in a meaningful way to any specific development proposal. Consequently, this paper argues that the subtext of UK sustainable housing policy is to focus on the easily quantifiable, but to leave genuine climate change resilience to the market.

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Defining 'sustainable development' and 'sustainable homes'

The UK government has repeatedly stated that Housing is at the top of the UK political agenda, supported by various policy initiatives including the Green Paper (2007) and the Housing Regeneration Bill (2008). The government has promised to invest £6.5 billion over the next three years with an eventual target of creating three million more homes by 2020.

Alongside this ambitious goal, the UK government, devolved regional and local authorities have consulted on and implemented a wide range of legislation and policy documents designed to promote sustainability, and to respond to climate change, both by seeking to mitigate its impact by reducing greenhouse gas emissions, and by promoting adaptation to impacts that are "locked in" as a result of greenhouse gases already present in the atmosphere. In addition, sustainable housing policy seeks to address a wide range of economic and social justice issues.

Although not necessarily in conflict, there are significant tensions between the objectives of:

- providing more housing (whether through the public sector, registered social landlords or by private sector development), and
- promoting ‘sustainability’ and the creation of ‘sustainable homes’

Any policy seeking to promote or mandate sustainable development or to create sustainable homes must first navigate the minefield of definition. The difficulties were highlighted in a major report, *Behind the Green Facade*, published by London law firm Taylor Wessing. The report highlights the lack of an industry-wide consensus the meaning of ‘sustainability’. It concludes that the raft of European and international concepts and numerous Government policy papers had led to widespread confusion.

For the purposes of providing a platform for the Survey and fostering debate on its conclusions, Taylor Wessing borrowed from the Bruntland report to define 'sustainability' as 'meeting the needs of the present without compromising the ability of future generations to meet their own needs'. For the built environment, this includes the following objectives:

- minimising carbon emissions,
- the conservation of resources,
- maximising economies in the use of energy,
- eliminating unnecessary waste and optimising recycling opportunities,
- settling measurement criteria for how buildings meet the objectives, and
- more controversially, building use and operation.

The terms are broad, and the range of issues to be addressed extremely disparate. However, Taylor Wessing’s formulation has much in common with the terms adopted by policy makers and legislators. In its January 2009 consultation paper on Sustainable Homes the Welsh Assembly Government identified as the principles underpinning its strategy for sustainable homes:

- Providing the right mix of housing. We need to foster a housing market with a range of types and forms of housing to suit people at different stages of their lives and against differing local circumstances. We need to break down the barriers that prevent people moving between social housing, private rental, part-ownership and full owner occupation so that all individuals and families can enjoy housing that suits both their needs and incomes through life.
- Using housing as a catalyst to improve lives. Government interventions cannot be justified simply to provide or improve housing alone. Where we are supporting people, the aim must be to improve individual life chances by offering training, financial advice, healthcare and personal support - not just a roof.
- Strengthening communities. Housing is a vital part of community and physical regeneration. Any housing investment - public or private -should improve places, support local jobs and skills and help strengthen community cohesion.

- Radically reducing the ecological footprint. Housing accounts for a large amount of greenhouse gas emissions because of the energy we use for heating and lighting. It is also a large share of our ecological footprint or `earthshare`. Too many people in Wales are living in fuel poverty because houses are hard to keep warm. We must radically improve the energy and environmental performance of all housing in Wales.
- Ensuring better services. We need to make sure that everyone has a positive experience of housing by ensuring that the regulation and management of housing provides high standards of service in both the private and public sector.

Although presented as the principles around which a sustainable homes strategy is structured, these elements are by no means equally capable of being translated into operative policy or meaningful statutory language. Nor are they equally susceptible to the policy levers and methods of intervention available to public authorities. That toolkit includes:

- Planning and land use control
- Building regulations
- Control over access to public sector funding for social housing
- The use of fiscal policy to support compulsion or to provide incentives.

These levers are at their most effective as a means of compulsion for new builds. However, the replacement rate for existing housing stock is slow – approximately 0.6% a year. This led the Welsh Assembly Government to observe: "About 90% of the homes that will exist in 2020 have already been built. Most were built to low standards of energy efficiency and therefore existing housing offers the greatest potential for reducing emissions". Despite the sanguine assertion, unlocking that potential is not easy. Compulsion can work only where there is a trigger event, such as extension or refurbishment requiring Building Regulations approval. Beyond that, government is limited to providing incentives, where funding is available, to ensuring that recommendations for improving energy efficiency are attached to Energy Performance Certificates required when property is a marketed for sale or letting, or to publishing information and recommendations in an attempt to influence behaviour.

Incentive or compulsion?

A key element of any sustainable development policy is the balance between incentive and compulsion. That balance is driven in part by the availability of funding and resource, but also crucially by the nature of the commitments undertaken by government.

The UK government has committed itself to specific targets for reducing:

- greenhouse gas emissions through action in the UK and abroad by at least 80% by 2050, and
- CO2 emissions of at least 26% by 2020, against a 1990 baseline. The 2020 target will be reviewed soon after Royal Assent to reflect the move to all greenhouse gases and the increase in the 2050 target to 80%.

Climate Change Act 2008 also imposes a carbon budgeting system which caps emissions over five year periods. The first three carbon budgets will run from 2008-

12, 2013-17 and 2018-22, and were to be set by 1 June 2009. The Government must report to Parliament its policies and proposals to meet the budgets as soon as practical after that.

The government's commitment to binding targets reinforces its focus on the quantifiable and the bureaucratically verifiable. This tends to produce a regime based on compulsion – mandatory requirements or targets rather than on incentives. That in turn means that the regime tends to highlight elements that are most readily susceptible to definition and to expression in terms of targets.

In its 2009 budget the UK government introduced some incentives. However, they are directed towards the development of renewable energy technologies and promotion of the green manufacturing sector. For homes, the mandatory provisions of the Building Regulations remain the principal lever.

That trend continues. As requirements for the reduction of emissions, focused on energy use and energy efficiency, have come into force and become embedded in practice, other elements have been introduced. Early criticism of the Code for Sustainable Homes (discussed below) included its sparse coverage of issues such as rainwater harvesting. The case in favour of rainwater harvesting for uses that do not require a treated and potable supply is compelling. In October 2009 a new edition of the Building Regulations Part G (Sanitation, hot water, safety and water efficiency) is due to come into force. It specifies where untreated and non-potable water might be used (eg toilet flushing). However, its main effect is to introduce a new water efficiency standard for new homes of no more than 125 litres per person per day. This is supported by enhanced provisions and proposals for Drought Directions and the imposition of hosepipe bans and restrictions on swimming pools, hot tubs and fountains. There is no significant provision or tax break available to incentivise homeowners or the landlords of existing homes to invest in water efficiency measures. UK policy on water efficiency is more "stick" than "carrot".

"Sustainable development" in statute

UK legislation, policy statements and guidance tend to refer to rather than define sustainable development. It recurs as an objective that must be taken into account when making ministerial or administrative decisions (eg the grant of planning consent). That approach has been taken in a range of statutes including the Environment Act 1995, Energy Act 2004, the Government of Wales Act 2006 and Planning Act 2008. Indeed, the only UK statutory definition is found in the International Development Act 2002 and relates to the provision of aid. Even there, the definition is illustrative rather than prescriptive, stating that sustainable development "includes any development that is, in the opinion of the Secretary of State, prudent having regard to the likelihood of its generating lasting benefits for the population of the country or countries in relation to which it [ie the aid] is provided".

In the planning context, the lack of definition (which was explicitly challenged by environmental pressure group Friends of the Earth) was explained by the UK government as intentional. Definition was to be achieved through national policy guidance on the grounds that guidance can be developed and amended far more readily than language in primary legislation.

In practice, policy guidance remains couched in terms of objectives and principles. The UK government's Planning Policy Statement 1 (PPS1) *Delivering Sustainable Development* highlights four aims which sound mainly in social policy. They are:

- social progress which recognises the needs of everyone
- effective protection of the environment;
- the prudent use of natural resources; and,
- the maintenance of high and stable levels of economic growth and employment.

In 2007 PPS1 was supplemented by an additional statement on climate change, which added:

- secure enduring progress against the UK's emissions targets, by direct influence on energy use and emissions, and in bringing together and encouraging action by others;
- deliver the Government's ambition of zero carbon development;
- shape sustainable communities that are resilient to the climate change now accepted as inevitable;
- create an attractive environment for innovation and for the private sector to bring forward investment in renewable and low-carbon technologies and supporting infrastructure; and,
- give local communities real opportunities to influence, and take, action on climate change.

These are objectives and broad principles which, in the context of the UK legal system, are unlikely to lead to enforceable duties or to give rise to effective remedies.

"Climate change" in statute

As with "sustainable development", climate change is referred to rather than defined in UK statutes. In the Climate Change Act 2008 the mechanisms for developing guidance and policies depend very heavily on the Committee on Climate Change. The principal role of the Committee is to advise the UK Government on setting and meeting carbon reduction targets and budgets. It is also intended to act as the main point of liaison with representatives interested in climate change from across the UK in order to share research and information on climate change and gain input into its analysis.

The 2008 Act requires the Secretary of State and devolved authorities to report on progress in setting and meeting carbon reduction targets and budgets, and to provide information and guidance to the "reporting authorities" (broadly, all local and regional authorities).

During its Parliamentary stages there was significant criticism that the duties created by the Climate Change Bill lacked mechanisms for enforcement or correction, and so could not be considered as meaningful. The *ad hoc* Joint Committee of MPs and Peers ('the Joint Committee') said: "We have concerns regarding the legal enforceability of Clauses 1(1) and 2(1)(b), which impose a duty on the Secretary of State to ensure targets and budgets are met. We believe, therefore, that these provisions need to be altered or strengthened." The Government did not adopt the Joint Committee's recommendation, yet it insisted that the duty is legally binding and that judicial review will be available in the case of failure to meet targets.

Peter McMaster QC of Serle Court examined that proposition and pointed out that the government had, in fact, explicitly declined to include provision for corrective measures, preferring to leave the question of enforcement and remedies to the Court. He concluded that:

- it is improbable the Courts would decide that the duties in the Bill were intended to impose an obligation on the Secretary of State that was owed to every person who might suffer loss as a result of climate change due to failure to meet budgets. The class would include every person in the world and the difficulty of attributing particular loss to a particular failure to meet targets would be enormous.
- It is improbable that any claimant would be able to show that a particular loss due to a particular climatic event was (1) the consequence of anthropogenic warming and (2) that any particular warming was due to the specific failure to meet a carbon budget.

Reviewing the Government's decision to leave it to the Court to come up with suitable enforcement mechanisms, McMaster commented:

> This is legislation at its worst. If the legislature intends corrective measures it ought to specify what they are to be. Failure to specify what the consequences of breach will be creates uncertainty that undermines the duty. Furthermore, the decision about what corrective measures ought to be taken is a decision about how to run the country or spend public funds and, as such, not one that the Courts are in a position to make.

A key element of McMaster's criticism is the question of causation. Even if it could be shown that a duty existed in favour of an individual or group to reduce carbon emissions, it would still be necessary to prove a causal link between a breach of that duty and any damage or loss suffered by the claimants. That difficulty also applies to the one UK example of a specific statutory definition of "climate change".

The Greater London Authority Act 2007 amended the Greater London Act 1999 by, amongst other things, inserting a new duty on the Mayor to publish an Adaptation to Climate Change Strategy for London. The scope and content of that duty is explained by a new set of definitions inserted into the 1999 Act. The key definitions are:

- "climate change" means changes in climate which are, or which might reasonably be thought to be the result of human activity altering the composition of the global atmosphere and which are in addition to natural climate variability"
- "adaptation" in relation to climate change, means preparation for, or adjustment in response to, any consequences of climate change appearing to the Mayor to affect Greater London"

These definitions undoubtedly represent a significant 'win' for environmental lobbyists and pressure groups, in that they amount to an explicit recognition by a national legislature that climate change is, to some extent, directly referable to human activity. They also served as an extremely important precursor to the general duties imposed by Climate Change Act 2008. However, they do give rise to legal difficulty.

The Mayor's duty is to publish a strategy for adapting to "climate change" as defined. While many of the impacts identified in reports produced by bodies such as the

London Climate Change Partnership might be attributable to changes in the composition of the global atmosphere, it is arguable that others, including stress on water resources or the urban heat island effect, might equally be attributed, in whole or in part, to other causes (e.g. demographics, planning policies, changes in land use). To the extent that an impact can be attributed, on balance of probabilities, to causes falling outside the statutory definition, there would be no breach of duty.

The likely approach of the Court in England and Wales to such issues was recently illustrated by the ruling of Sir Thayne Forbes in *Barbone v Secretary of State for Transport* [2009] EWHC 463 (Admin). Objectors to the expansion of Stansted airport claimed that there had been a failure to take into account the climate change impacts of increased aviation. The objectors claimed that ministerial statements had given rise to a legitimate expectation that any decision would take into account all environmental impacts and that weight would be given to the objective of reducing greenhouse gas emissions, even if that meant refusing permission. The judge was unmoved. He found that the objectors' case "was not based upon the anticipated local impact of the aircraft emissions associated with the proposal. Rather, it was based upon the alleged global impact of that national planning policy, as exemplified by the evidence of a resident of Greenland". The judge was dealing with an application relating to a particular site, and was bound by the specific provisions of planning legislation as developed through case law. In that context, a case based on broad concepts and a notion of "legitimate expectation" arising from ministerial statements was highly unlikely to succeed.

The Code for Sustainable Homes

Policy in on somewhat surer ground, and is more likely to be deliverable, where it deals with narrowly defined and measurable issues.

The Code for Sustainable Homes (the "Code") was launched at the end of 2006. It has ratings (or levels) from one to six, with each level calling for a percentage reduction on the Part L1A dwelling CO2 emission rate over the target CO2 emission rate.

- Level one is 10%.
- Level two is 18%.
- Level three is 25%.
- Level four is 44%.
- Level five is 100%.
- Level six is a zero-carbon home.

The levels work on a point score system. Level three requires 57 points, whereas level six requires 90 points. To obtain enough points, everything about the build and the dwelling must be considered and rated.

There are nine categories to be considered.

- Energy and carbon-dioxide emissions
- Water
- Materials
- Surface water run-off
- Waste
- Pollution
- Health and wellbeing

• Management
• Ecology

Since April 2008 level three of the code has been mandatory for new social-housing developments and from 2010 all new homes will have to comply with it. Using devolved powers, the Welsh Assembly has accelerated to 1 September 2009 the requirement for new builds within Wales to attain level three.

Even here, though, the tension between incentive and compulsion has had an impact on the practical effect of the Code, particularly in terms of the criteria for level six or "zero carbon" homes.

The Code originally defined zero-carbon as being "where net carbon dioxide emissions resulting from all energy use in the dwelling are zero or better": code level 6. The definition took account of contributions from on-site renewable and low-carbon installations. Limited off-site renewable contributions could also be used.

However, the requirements relief from Stamp Duty Land Tax ("SDLT" - a tax on the disposition of a chargeable interest in land) new zero-carbon homes varied significantly from those outlined in the Code, and prompted calls for a single definition to be provided.

An updated version of the code was produced in October 2007, bringing the definition of zero-carbon homes in line with the SDLT definition. Crucially, where the code had previously permitted off-site renewable energy (provided that it met the requirement to be externally accredited and additional), the revised version did not allow this unless it was connected by a private wire network so that there was no connection with the national grid.

Following the exclusion of off-site renewables, developers raised concerns about the workability of the new definition. In response, the UK Green Building Council set up a task group consisting of a range of industry stakeholders, whose responsibility was to recommend solutions and provide clarity.

In May 2008, the group produced the *Definition of Zero Carbon Report*. It concluded that, in order to maintain the aim of the original policy, namely for all new homes to be zero-carbon by 2016, the definition should be revised, allowing for the use of off-site solutions in certain circumstances. The report also estimated that without revision, the current definition would exclude up to 80% of new homes.

The report examined a number of case studies to gain a view of the industry's approach to delivering zero-carbon developments. Various trends were identified in particular, that the cost of zero-carbon falls as a development increases in size. Thus, achieving code level 6 would be harder for smaller urban infill developments costs per dwelling for renewable energy varied from £13,128 for micro-urban development to £789 for a large rural development.

In order to encourage the building of sufficient homes and to level the playing field between small and large developments, the task group decided that the definition of zero-carbon would require three key elements:

- a minimum energy-efficiency requirement
- a minimum requirement for on-site and near-site solutions and
- a mechanism for allowing limited off-site solutions.

The report recommended that off-site schemes could be approved if it could be shown that the project was a genuine addition to the country's renewable energy provision and that the energy produced would be used to power a specific development. If it is not possible to provide an off-site scheme, a developer could, under certain conditions, pay into a community fund that would ensure equal or greater net carbon savings through new installations.

Consultation on proposals arising from the report closed on 18 March 2009. The consultation proposed a hierarchical framework that first addresses the issue of "energy efficiency". All new housing will have to be built to very high levels of energy efficiency, achieved by having an appropriate building form, good fabric insulation and good airtightness standards, and the consultation document suggested requirements similar to PassivHaus and Energy Saving Trust advanced practice standards.

Beyond the reductions achieved through energy efficiency improvements, there should be provision of on-site renewable technologies and/or direct connection to a district heating system that produces little or no carbon dioxide. This second level of the hierarchy is called "carbon compliance", and the consultation invited views on the minimum level that should be achieved on-site, from a 44% cut in CO2 (compared with Part L 2006) to a 100% reduction. The new concepts in the definition were "allowable solutions" to achieve zero carbon and a potential cost review in 2012 to provide increased certainty. These include:

- energy efficient appliances and building control systems
- exports of low-carbon or renewable heat (or cooling) to surrounding developments
- retrofitting other local buildings
- off-site renewable electricity via direct physical connections.

Although broadly welcomed by sector specialists, the definition remains open to the criticism that it is focused on "operational" zero carbon – the design and construction of buildings that in the course of their operation, do not add to the carbon dioxide in the atmosphere. This includes emissions from space heating, ventilation, hot water and fixed lighting, but also unregulated energy usage (powering of appliances, for example), which is typically about 35% of a home's total energy use. It does not extend to any readily identifiable or enforceable measure to assess and reduce the "embodied" carbon cost of a building – including the consequences of any demolition or other site clearance required to make way for a new build.

Narrow focus, limited results

UK sustainable development policy, and the subset of policy for sustainable homes, seeks to cover an extremely wide range of issues. However, it is at its most effective when dealing with narrowly defined elements, and when couched in terms of specific targets and direct compliance. When dealing with broader concepts or issues it can speak only in terms of aims and objectives, and not in terms of clear or enforceable duties, breach of which would have any meaningful legal or practical consequence.

This is entirely understandable in view of the complexity of the issues, and in view of the political and institutional processes that feed into the development, expression and implementation of policy. Within the UK responsibility for energy issues and climate

change *mitigation* passed to the new Department for Energy and Climate Change (DECC) created in 2008. However, responsibility for climate change *adaptation* remains with the Department for the Environment, Food and Rural Affairs (DEFRA), while planning and construction are the province of the Secretary of State for Communities and Local Government. In each of those areas, some responsibility has been devolved to the Welsh Assembly Government and to the Scottish Parliament, so that implementation of any policy proposal requires cooperation not only between departments, but across borders. Against that background, common approaches have been most readily found and adopted on points that flow directly from the UK government's specific commitments on emissions. In essence, agreement is most readily achieved in respect of the directly quantifiable. If targets are set, and met, then credit can readily be claimed – a significant asset for anyone seeking election or re-election.

While understandable, this consensus of convenience and focus on the measurable does carry a significant risk. Legislation and government intervention that focuses on compulsion by reference to a narrow range of targets risks the creation of a compliance culture – a box-ticking approach that does as much as it needs to do to meet specific requirements, but no more. That narrow focus can produce absurd and socially undesirable results. It would be entirely possible for a developer to build a house that scores well in terms of the Code, but that signally fails on other tests of "sustainability". It does not follow that a "zero carbon" home would come at a low or no cost in terms of carbon. The embodied carbon costs of demolition or building might be significant. Nor does it follow that a "zero carbon" house would be well adapted to climate change, or that it would meet any of the broader ecological or "social justice" elements of sustainable development (eg reducing travel times or food miles, or promoting social or community cohesion).

It is significant that those broader objectives are highly unlikely to create meaningful or enforceable duties on the part of government or public authorities. Where an obligation is merely to "have regard" to broad policy objectives, a breach is extremely difficult to prove. Even if a breach can be shown, no significant consequences follow.

Responses to the survey that underpinned Taylor Wessing's survey, *Behind the Green Facade*, strongly indicated that the development industry believes that a mixture of carrots and sticks are required and that by working together Government and industry can explore benefits and incentives that will promote behavioural change as well as effective regulatory sanctions.

To date, there is little indication that the UK government is willing or (in view of current pressures on public finances) able to shift the balance decisively towards incentive rather than compulsion. Indeed, there is every indication from the Regulatory Impact Assessments attached to legislation such as the energy performance of buildings regulations that the UK government sees incentive as coming not from the Treasury, but from the market. Even as the property market has deteriorated since autumn 2007, government has adhered to the view that improved environmental performance and sustainability would find its pay back in enhanced capital values and higher rents. Unless and until that article of faith is borne out in practice, sustainable development and sustainable homes are likely to be viewed by developers as a matter of cost and compliance.

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