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Levelling Up and Regeneration Bill
House of Commons – Committee Stage

Summary

1. This submission examines Part 3 of the Bill, related to the planning system, with a focus on the way it further supports the Government's efforts to combat climate change and bring greenhouse gas emissions to net zero by 2050, in line with the obligations set out in the Climate Change Act 2008.[1] The planning system has a key role to play in achieving this target because the buildings sector is the UK's second largest source of emissions. In fact, this sector alone contributed 20% of total UK emissions in 2021, of which the majority came from homes.[2]

2. The main conclusion is that the existing planning regime needs to be improved and the Bill offers an opportunity to do this. Specifically, this submission develops three ideas:

    a) Under the existing regime climate change is addressed at the strategic level in various instances, mostly involving the making of policy, but it is not expressly a factor that must necessarily be considered in the assessment of every planning application. This means that the strategic mandate to mitigate and adapt to climate change is not translated into practice.

    b) The Bill could fill this gap in the legal framework by introducing two amendments. The first is to elevate climate change as a statutory material consideration in the planning application process. The second is to establish that planning authorities

[1] Climate Change Act 2008, s.1(1).

[2] See Climate Change Committee – Report to Parliament, June 2022, page 158. Available at https://www.theccc.org.uk/wp-content/uploads/2022/06/Progress-in-reducing-emissions-2022-Report-to-Parliament.pdf

should give special regard to the objective of reducing greenhouse gas emissions in the assessment of every development proposal.

c) These changes would embed climate change, and specifically the objective of reducing greenhouse gas emissions, in the planning decision-making process, strengthening the role of the planning system in the delivery of net zero.

3. This submission is structured as follows. First, it explains how climate change is addressed in the existing regime and how the Bill could improve it. Second, it examines the first proposal, that is the elevation of climate change as a statutory consideration. Third, it explicates the second proposal, that is that the objective of reducing greenhouse gas emissions be accorded special regard in the assessment of planning applications. And finally, this submission offers some comments on the practical effects that might follow if the proposed changes were to be introduced.

Climate change under the existing planning regime

4. The Bill introduces new requirements to address climate change in the preparation of neighbourhood development plans, minerals and waste plans, supplementary plans, and joint spatial development strategies. In this regard, although legal obligations to consider climate change in the preparation of policies, plans, and strategies are necessary, additional steps could be taken to embed climate change considerations in the assessment of every development proposal. This constitutes a crucial task for the Government to meet legally binding targets under the Climate Change Act 2008.

5. Currently, the planning regime contains various references to climate change concerning both the making of policy and the determination of certain types of development proposals. In the first case, climate change is considered in the following instances:

a) National Planning Policy Framework (NPPF): the NPPF, which constitutes the overarching planning policy document in England, establishes that 'The planning system should support the transition to a low carbon future in a changing climate'.[3]

[3] National Planning Policy Framework 2021, paragraph 152.

Likewise, it mentions that the planning system should help to 'shape places in ways that contribute to radical reductions in greenhouse gas emissions'.[4] The NPPF also contains specific policies applicable to the preparation of local plans, indicating that 'Plans should take a proactive approach to mitigating and adapting to climate change',[5] and that 'Policies should support appropriate measures to ensure the future resilience of communities and infrastructure to climate change impacts',[6] amongst others.

b) National Policy Statements (NPSs): NPSs are policy documents which set out the government policy regarding nationally significant infrastructure projects, establishing a framework within which specific applications for development consent are determined. Particularly, a national policy statement must give reasons for the policy set out in the statement, and the reasons must include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change.[7]

c) Local plan policies: Climate change considerations must also be addressed in the preparation of local plans, which must include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change.[8]

6. Likewise, climate change considerations are expected to be examined, directly or indirectly, in the assessment of some development proposals, including:

a) EIA Development: Certain projects are subject to Environmental Impact Assessment (EIA). When this is the case, the proposal must contain an Environmental Statement including a description of the factors likely to be significantly affected by the

[4] National Planning Policy Framework 2021, paragraph 152.

[5] National Planning Policy Framework 2021, paragraph 153.

[6] National Planning Policy Framework 2021, paragraph 153.

[7] Planning Act 2008, s.5(8).

[8] Planning and Compulsory Purchase Act 2004, s.19(1A).

development such as climate, including greenhouse gas emissions and impacts relevant to adaptation.[9]

b) Major Infrastructure Developments: Large scale developments that qualify as nationally significant infrastructure projects are granted permission through Development Consent Orders (DCOs) by the Secretary of State. While there are no express statutory provisions requiring the Secretary of State to address climate change considerations in the grant of a DCO, the authority must have regard to any NPS in place concerning the development to which the application relates.[10] Given that NPSs must explain how Government policy relating to climate change is taken into account,[11] in practice this means that the grant of a DCO should explain how climate related issues contained in the respective NPS have been addressed in the application (though there is no express legal obligation imposed in this line).

7. From the above it follows that climate change constitutes an overarching planning policy objective in the NPPF, and also represents an important factor to be observed in the preparation of National Policy Statements and local plan policies. Likewise, climate change implications are also expected to be considered in the determination of certain proposals, specifically those that are classed as Environmental Impact Assessment development. Finally, climate change considerations may also be discussed in the grant of Development Consent Orders by the Secretary of State (although as mentioned before there is no express legal obligation in this regard).

8. Now, from the point of view of the efficacy of the existing regime, it can be noted that the strategic policy objective to consider climate change in the various instances discussed before does not really trickle down to the assessment of individual development proposals in a general way. This is so mainly for two reasons.

9. First, the NPPF contains only a broad statement of purpose guiding the functioning of the planning system, including specific policies applicable to the elaboration of local

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[9]The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, Reg.4(2), Reg.26(1), Sch.4(4) and Sch.4(5)(f).

[10] Planning Act 2008, s.104(2).

[11] Planning Act 2008, s.5(8).

plans. However, it lacks express policies governing the making of individual planning applications, which means that the mandate to consider climate change is not translated into practice. Second, National Policy Statements and related Development Consent Orders only apply to a reduced number of development proposals which qualify as nationally significant infrastructure projects. In the same vein, Environmental Impact Assessment, where climate change issues are considered, is also required in relation to a small number of projects that meet certain requirements.[12]

10. Therefore, the main issue is that most development proposals are assessed by local authorities,[13] or by the Planning Inspectorate on planning appeals,[14] in a procedure where climate change is not explicitly a consideration to which decision-makers should necessarily give regard. To put it simply, as a matter of law, planning authorities are under no express and general obligation to consider climate change implications in the assessment of individual development proposals.

11. This represents a substantial gap in the existing legal framework, which has important practical effects. For example, between March 2021 and March 2022, District planning authorities made 423,752 decisions, of which 373,433 granted planning permission.[15] Only 333 decisions included an Environmental Statement, where climate change implications are necessarily addressed.[16] Similarly, planning appeals constitute the largest area of work of the Planning Inspectorate. In 2020, for example, it decided 9,121 appeals.[17] There is no certainty regarding the extent to which climate change considerations are being examined in planning applications and planning appeals where this is not an express legal requirement.

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[12] See The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, Sch.1 and Sch. (2).

[13] Town and Country Planning Act 1990, s.70, and Planning and Compulsory Purchase Act, s38.

[14] Town and Country Planning Act 1990, s.78.

[15] Department for Levelling Up, Housing and Communities, Live Tables on planning application statistics, Table P134: District planning authorities: applications received, decided, granted, and delegated, and environmental statements received, by local planning authority, England, Year ending March 2022, available at https://www.gov.uk/government/statistical-data-sets/live-tables-on-planning-application-statistics

[16] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, Reg.4(2), Sch.4(4), Reg.26(1).

[17] Planning Inspectorate, *Planning Inspectorate: Annual Report and Accounts 2020/2021* (2021).

12. Consequently, this gap in the legal framework could be addressed by the Bill. Specifically, the Bill could be improved by including provisions ensuring that planning decisions will make a greater contribution to the mitigation of, and adaptation to, climate change, at the stage of assessment of every individual planning application. This could be achieved in two main ways:

    a) First, a provision establishing climate change as a statutory material consideration in relation to every planning application could be introduced.

    b) Second, another provision could establish that planning authorities are expected to give special regard to the objective of reducing the amount of greenhouse gas emissions in the determination of every planning application.

13. These amendments would ensure that climate change be embedded in the assessment of individual development proposals, thereby improving the existing legal regime. The following paragraphs explain these potential changes in more detail.

Climate change as a material consideration

14. Planning decision-makers must make planning decisions in accordance with the development plan, unless other material considerations indicate otherwise.[18] This means that to assess individual proposals planning authorities must identify material considerations, which have to be taken into account in the determination of planning applications.

15. The type of considerations capable in law of being material to a development proposal is very wide, including any consideration which relates to the use and development of land.[19] Material considerations, in turn, are generally divided into those which the decision-maker may take into account (but need not) and those which the decision-maker

[18] See Town and Country Planning Act 1990, s.70(2), Planning and Compulsory Purchase Act 2004, s.38(6).

[19] See Stringer *v. Minister of Housing and Local Government* [1971] 1 All ER 65, per Cooke J. at page 7.

must necessarily take into account. [20] A relevant consideration will fall under the latter category in two circumstances. First, when the decision-maker is expressly or impliedly required by the legislation, or by policy, to take a specific consideration into account.[21] And second, when on the facts of the case, the matter is so "obviously material" that it would be irrational not to consider it.[22]

16. For present purposes, the above classification is of practical importance. Given that neither planning legislation nor planning policy set out general and express obligations to address climate change in the determination of concrete development proposals, then it is unclear whether planning decisions that fail to consider this matter can be open to criticism on this ground. This is because, as has been held, 'a decision-maker does not fail to take a relevant consideration into account unless he was *under an obligation* to do so'.[23]

17. The Bill could clarify this situation by elevating climate change as a statutory planning consideration to which decision-makers should give regard. If this change were to be introduced, planning authorities would be, as a matter of law, 'under an obligation' to consider climate change in the assessment of every development proposal.

18. Complementarily, the Bill could also take another step to strengthen the place of climate change as a material consideration in the assessment of planning applications through establishing that it constitutes a matter to which planning authorities should give special regard, as explained below.

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[20] *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin) [2010] 1 P & CR 19; see also *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 [30]-[32].

[21] *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin), [2020] PTSR 1709 [99]; also see *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 [8].

[22] ibid.

[23] *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin), [2020] PTSR 1709 [99] (emphasis in the original).

Climate change: a weighty material consideration

19. One of the main functions of planning authorities in the assessment of planning applications is to attach weight to material considerations that are found to be relevant to the respective proposal. Once this is done decision-makers proceed to strike a 'planning balance' concluding whether planning permission should be granted or refused.

20. Generally, attaching weight to a material consideration falls within the exclusive jurisdiction of planning authorities, under *Wednesbury* standards.[24] This means that decision-makers can give such weight to a material consideration as they think fit within the bounds of rationality. For present purposes, this entails that when climate change implications are found to be a material consideration, planning authorities can give little, moderate, or significant wight to it, depending on particular circumstances.

21. In this context, the Bill could introduce an exception to that general approach, whereby planning authorities would be expected to give 'special regard' to the objective of reducing greenhouse gas emissions. In practice, this would entail that planning authorities, when undertaking the planning balance between various material considerations, would be obliged to attach great weight to the objective of reducing greenhouse gas emissions.[25] The effect of this would be that the weight to be attached to this consideration would be prescribed by Parliament rather than being determined by the decision-maker.

22. This new approach would ensure that, in practice, climate change considerations would always be given great importance, thereby reducing – but not automatically eliminating – the possibility that other material considerations outweigh climate change implications in the planning balance. This is an important point because even if great weight were to be attached to the objective of reducing greenhouse gases by statute, this would not on

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[24] See *Tesco Stores Ltd. V Secretary of State for the Environment* [1995] 1 WLR 759, per Lord Hoffman at 780F-H.

[25] The concept of 'special regard' has been interpreted to mean 'considerable importance and weight', as the courts have held in other areas where legislation sets out duties to give 'special regard' to certain factors. This is the case in relation to planning applications involving heritage assets. See *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council* [2014] EWCA Civ 137.

its own determine the outcome of individual planning applications. Planning authorities would retain their powers to attach little or significant weight to other material considerations and to exercise a planning judgement on the merits of the respective development proposal.

Effects of the proposed changes

23. The amendments suggested in this submission would have two main effects. First, the elevation of climate change as a statutory consideration would embed this factor in the planning decision-making process. In addition, Parliament would send a message to local planning authorities and planning inspectors that climate change constitutes a central issue which is expected to be considered in the assessment of every development proposal. This is an important point as currently there is no clarity as to whether climate change is being taken into account in the determination of planning applications and appeals.

24. The second amendment would place climate change on an equal footing to other considerations that are given 'special regard' by statute in the planning application process. This would avoid that climate change be treated as less important than other considerations. A good example illustrating this point involves proposals affecting listed buildings.

25. Under the existing law, when assessing development proposals concerning listed buildings, planning authorities are under a duty to give 'special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'.[26] This means that other considerations, including climate change considerations, are relegated to a secondary place, for any harm to the respective listed building is to be given great importance and weight.[27]

[26] Planning (Listed Buildings and Conservation Areas) Act 1990, s.66(1).

[27] See *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council* [2014] EWCA Civ 137.

26. The current regime has had the effect that, in practice, planning applications seeking to improve the environmental performance of listed buildings sometimes have a difficult time in the application process. This is because planning officers, by statute, must give great weight to any harm to the listed building. Although this does not mean that proposals intervening listed buildings are automatically refused, it does mean that it becomes difficult for an applicant to demonstrate that a climate friendly intervention would cause benefits outweighing the harm to the building.

27. For example, this is what happened in a planning application submitted by Medway Council, which caused public concern a couple of months ago.[28] The Council applied for permission for the installation of solar panels on the roof of its headquarters in Gun Wharf, classed as Grade II listed building.[29] The application emphasised that the proposal intended 'to embrace green technology in response to an ongoing climate crisis',[30] but this was not enough to convince the planning officer who advised to refuse permission.[31] In another case, a planning application to South Cambridgeshire City Council, also involving a listed building, sought to replace the existing single glazed softwood windows with double glazed units.[32] One of the objectives of the proposal was to enhance the environmental performance of the heritage asset in response to the climate emergency. Whilst acknowledging that objective, officers recommended that the Planning Committee refuse the proposal, on the grounds that the change of windows would harm the listed building.[33]

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[28] See https://www.thetimes.co.uk/article/sniffy-planning-laws-are-failing-the-climate-vqhv6t5ts and https://www.kentonline.co.uk/kent/news/council-told-to-refuse-its-solar-panel-plan-for-own-hq-269099/

[29] See Planning application documents, available at https://publicaccess1.medway.gov.uk/online-applications/applicationDetails.do?activeTab=documents&keyVal=R8DSYBKNL0200

[30] See Heritage Statement, page 1, available at https://publicaccess1.medway.gov.uk/online-applications/files/B05BCCB645733CDB28644E18B8305278/pdf/MC_22_0605-HERITAGE_STATEMENT-5938612.pdf.

[31] The application is still under assessment, but the statutory consultee continues to advice refusal of the planning application on the grounds of harm to the listed building. See Statutory Consultee Report, above note 30.

[32] Application Reference S/3626/19/LB, July 2022.

[33] ibid.

28. The above cases are just two examples but the universe of dwellings that might potentially face similar hurdles to adapt to climate change is vast. According to Historic England there are around 400.000 listed buildings in this country.[34] Presumably hundreds if not thousands of them will need to improve their environmental performance to adapt to climate change. And the current regime is not facilitating the implementation of climate related measures to tackle this issue. The situation might even worsen under the Bill as it intends to introduce new categories of buildings subject to the same level of protections as listed buildings, which might consequently face similar difficulties to adapt to climate change.[35]

29. By and large, the amendments proposed in this submission would bring clarity and certainty regarding the role and importance of climate change considerations in the planning decision-making process. In addition, taking such steps would allow the Government to ensure that planning decisions are consistent with the net zero goal, as recommended by the Climate Change Committee in its recent Report to Parliament.[36]

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[34] Information available at https://historicengland.org.uk/advice/hpg/has/listed-buildings/

[35] See new clause 92, Levelling Up and Regeneration Bill.

[36] See Climate Change Committee – Report to Parliament, June 2022, page 580.