

Planning law, levelling-up, and net zero: empowering planning authorities to combat climate change

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Briefing Highlights:

- For many years local planning authorities in England have been under a statutory duty to prepare policies designed to address climate change. However, this obligation has proved relatively ineffective in practice since the buildings sector remains the second largest source of emissions in the UK.
- The UK's Levelling-up and Regeneration Bill, currently going through the House of Lords, presents an opportunity to ensure that new buildings adapt to climate change and support the delivery of the UK's net zero targets.
- Peers have tabled various amendments to the Bill which would empower decision-makers to consider climate change adaptation and mitigation, as well as climate and nature targets, in individual planning decisions.
- These amendments would complement existing statutory obligations thereby accelerating the delivery of net zero.

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Acknowledgements

The author is grateful to Alistair Mills, Emma Crane, and Harriet Harthan for comments on an earlier draft.

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Planning law and climate change

The buildings sector is the second largest source of emissions in the UK. It contributed 20% of total emissions in 2021, the majority from homes.¹ Despite this, a recent report shows that in England only 28% of local authorities fully recognise greenhouse gas emissions as a material (or relevant) consideration in planning decisions.² Similarly, only 36% of local authorities always acknowledge the need to adapt to climate change as a key factor in individual planning applications.³ Planning law has a central role to play in tackling this issue because it defines the extent to which planning authorities are empowered to deal with the effects of development proposals on climate change.

In this context, the Levelling-up and Regeneration Bill (the 'Bill'), which is currently going through the House of Lords,⁴ presents an opportunity to ensure that new buildings adapt to climate change and support the delivery of the UK's net zero targets.⁵ Crucially, Peers tabled two groups of amendments sparking debate about two different ways of understanding the role of planning law in climate change. Whilst the first group considers local policy-making as the main tool for addressing climate issues,⁶ the second group views the inclusion of decision-making alongside local policy-making as a key approach for achieving the same objectives.⁷

This policy briefing has three main aims. Firstly, it discusses how the existing statutory framework centres on plan-making as the primary mechanism to tackle climate change in the planning context. Secondly, it examines how local planning authorities face administrative capacity issues, which affect their plan-making functions and hinder the efficacy of the current legal approach to climate change. And third, this paper discusses how the second group of amendments tabled by Peers offers a solution to transition to a regime which empowers planning authorities to tackle the climate-related implications of individual development proposals.

The current legal approach: plan-making as a catalyst for climate action

From the point of view of the legislative architecture of planning, the planning system is divided into two main areas: policy-making, which involves the preparation of local plan policies (and also national policies),⁸ and decision-making, which refers to the determination of individual planning applications. The underlying idea sustaining that legal design is that local authorities will develop local plan policies for the use and development of land in their area, and then planning decisions on individual applications will be made in accordance with those

¹ Climate Change Committee, Progress in Reducing Emissions, 2022, page 158, available here: <https://www.theccc.org.uk/publication/2022-progress-report-to-parliament/>

² This report is based on a survey of 156 local authorities, see Rising to the climate challenge: The role of housing and planning within local councils, 2022, page 58, available at <https://tcpa.org.uk/wp-content/uploads/2022/05/Rising-to-the-climate-change-challenge-The-role-of-housing-and-planning-within-local-councils-with-annex-FINAL.pdf>

³ Ibid.

⁴ The Bill (as amended in Committee) is available here: <https://publications.parliament.uk/pa/bills/lbill/58-03/142/5803142.pdf>

⁵ Climate Change Act 2008, s.1.

⁶ See amendments 201 and 214.

⁷ See amendments 179, 271, and 309 tabled at Committee Stage. See also amendment 191 tabled at Report Stage by Lord Ravensdale and sponsored by Baroness Hayman of Ullock and Lord Lansley, available here: <https://bills.parliament.uk/bills/3155/stages/17727/amendments/10008291>.

⁸ Although national planning policy is a material consideration in planning decisions, it is not expressly recognised by the planning Acts. Its legal force, strictly speaking, is derived by implication from the planning Acts, see *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] UKSC 37 [19]-[20].

policies unless other material considerations indicate otherwise.⁹ This legal idea underpins the ‘plan-led’¹⁰ character of the English planning system.

Based on that legal structure, when it comes to addressing climate change, the existing planning regime concentrates considerably on local policy-making. That is, it relies on the administrative capacity of local authorities to develop policies tackling climate change in their local area. This is the approach adopted in s.19(1A) of the Planning and Compulsory Purchase Act 2004, which establishes that local plans 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’.

Equally, this is also the approach adopted in the Bill, which reaffirms the role of local plans in climate mitigation and adaptation,¹¹ and introduces requirements to address climate in the preparation of joint spatial development strategies¹², minerals and waste plans,¹³ supplementary plans,¹⁴ and neighbourhood development plans.¹⁵ Similarly, the same approach sustains a group of amendments tabled by Peers,¹⁶ which would require the local plan to be consistent with guidance issued by the Secretary of State relating to carbon reduction targets, and would ensure that the joint spatial development strategy is consistent with the participating authorities’ carbon and nature targets.

In theory, a focus on plan-making is logical because the legal expectation is that local planning authorities will prepare and publish local policies addressing climate, and then those policies will be taken into account in the determination of individual planning applications. This line of thought was advanced in the Bill’s debate, where Peers expressed that the focus of the first group of amendments ‘is plan-making itself, which leads into the subsequent decision-making’.¹⁷ In practice, however, this approach has not been fully effective for various reasons involving the administrative capacity of local planning authorities.

Administrative capacity and the efficacy of plan-making

For almost 15 years local planning authorities have been under a statutory obligation to prepare policies to contribute to climate change adaptation and mitigation.¹⁸ Despite this legal requirement, the Climate Change Committee has found that ‘Most local plans do not acknowledge the extent of the challenge of delivering Net Zero and need significant revision’.¹⁹ Relatedly, a significant proportion of local plans do not fully recognise climate change and climate targets because many of them are simply out-of-date. They are too old. This was recently acknowledged by a Government Minister in the context of the Levelling-up and Regeneration Bill debate in the

⁹ Town and Country Planning Act 1990, s.70(2), and Planning and Compulsory Purchase Act 2004, s.38(6)

¹⁰ *Chichester District Council v Secretary of State for Housing, Communities and Local Government and another* [2019] EWCA Civ 1640 [34].

¹¹ New section 15C(6), Schedule 7.

¹² New sections 15AA(2) and 15AA(8), Schedule 7.

¹³ New section 15CB(5), Schedule 7.

¹⁴ New section 15CC(9), Schedule 7.

¹⁵ Clause 92(3).

¹⁶ Amendment 201 and 214.

¹⁷ Hansard, HL Debates, volume 829, Column 559, 18 April 2023 (Lord Lansley), see here: <https://hansard.parliament.uk/lords/2023-04-18/debates/3484267B-C686-4CC9-A14C-82308A5449F7/Levelling-UpAndRegenerationBill>

¹⁸ Planning and Compulsory Purchase Act 2004, s.19(1A). This section was inserted by the Planning Act 2008, s.182, which entered into force on 6 April 2009 as set out in The Planning Act 2008 (Commencement No.1 and Savings) Order 2009, art. 3(e).

¹⁹ Climate Change Committee, *Local Authorities and the Sixth Carbon Budget*, 2021, page 33, available here: <https://www.theccc.org.uk/publication/local-authorities-and-the-sixth-carbon-budget/>

House of Lords. The Minister stated that ‘Some local plans are woefully out of date; for example, some date back to the 1990s. Only around 40% of local planning authorities adopted a local plan within the last five years’.²⁰

Similarly, most local plans are not up-to-date for well-known reasons. Plan-making is expensive, complex, and time-consuming, and too often local planning authorities have a shortage of personnel and financial resources to undertake their planning functions.²¹ Put simply, local planning authorities face institutional and administrative constraints that have a direct impact on their capacity to perform their plan-making duties properly. This hinders the efficacy of the plan-making process.

The existence of such limitations means that, in most cases, the preparation of local plan policies – including local policies addressing climate change and the delivery of climate targets – can take years. In fact, in a speech at the Chartered Institute of Housing 2022 conference, the Housing Minister highlighted that ‘it takes an average of seven years for councils to prepare a local plan’.²² Consequently, reliance on plan-making might not necessarily be the best course of action to take to tackle climate change speedily and deliver legally binding climate targets in the short term. A different remedy is needed.

From plan-making to decision-making

The lack of express statutory provisions empowering decision-makers to assess the climate-related effects of individual planning applications has consequences in practice²³. It hampers the ability of the planning system to support climate change mitigation and adaptation consistently across England. As mentioned, only 36% of local authorities always acknowledge the need to adapt to climate change as a key factor in planning decisions. This constitutes a significant problem because local planning authorities decide thousands of planning applications every year – 336,538 applications were granted in 2022.²⁴ There is no clarity about the extent to which the climate implications of new proposals were duly assessed. The same can be said about development projects granted permission in previous years.

A group of Peers tabled various amendments to the Bill seeking to find a solution to the above problem.²⁵ The amendments, which approach this issue in different ways, would empower decision-makers to consider climate change adaptation and mitigation, as well as climate and nature targets, in individual planning decisions.

The main difference between an approach that focuses on plan-making and an approach that centres on decision-taking is related to the pace with which the proposed changes can take place in practice. As explained above, the climate-related clauses in the Bill rely on the capacity of every local authority to develop climate policies. Different local authorities will move forward with varying degrees of speed – in most cases that means years. Only after these policies have been created and published will they begin to have full effect on planning

20 Hansard, HL Debates, volume 829, Column 42, 27 March 2023 (Baroness Scott of Bybrook), available here: <https://hansard.parliament.uk/Lords/2023-03-27/debates/C271DFE5-FD43-4717-82ED-10D4FF01D369/Levelling-UpAndRegenerationBill>

21 See Built Environment Committee, Meeting Housing Demand (HL paper 132), 2022, paragraphs 164 to 168, available here: <https://committees.parliament.uk/publications/8354/documents/85292/default/>

22 Speech available here: <https://www.gov.uk/government/speeches/cih-housing-2022-conference-housing-ministers-speech>
23 The need for a statutory duty for local authorities to consider climate change and net zero was recently highlighted in the report of the Independent Review of Net Zero, led by the Rt Hon Chris Skidmore MP, page 192-193, available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128689/mission-zero-independent-review.pdf

24 Live tables on planning application statistics, Table P134, District planning authorities, available here: <https://www.gov.uk/government/statistical-data-sets/live-tables-on-planning-application-statistics>

25 See amendments 179, 271, and 309 tabled at Committee Stage. See also amendment 191 tabled at Report Stage by Lord Ravensdale and sponsored by Baroness Hayman of Ullock and Lord Lansley, available here: <https://bills.parliament.uk/bills/3155/stages/17727/amendments/10008291>.

applications (though, in some circumstances, draft policies can be considered as material considerations in planning decisions²⁶).

By contrast, an amendment requiring climate change considerations and climate targets to be addressed in individual planning decisions may have immediate effect on planning applications across England after Royal Assent. This will not resolve the problem of administrative capacity currently affecting local planning authorities,²⁷ but it will accelerate the way climate change considerations are taken into account in the assessment of individual development proposals. Likewise, this is not to suggest that the current emphasis on plan-making should be abandoned altogether, but rather that it should be complemented by extending current requirements for climate change adaptation and mitigation, as well as net zero, to the determination of individual planning applications.

Guiding decision-makers

During the Bill's debate, it has been argued that expanding climate-related requirements to individual decision-making would be too risky, as it might entail the creating of 'a stand-alone criterion for planning decisions'.²⁸ This is a well-meaning concern. The courts have consistently highlighted that planning is not a rigid activity – the making of planning decisions involves largely an exercise of planning judgement by planning authorities.²⁹ However, the amendments would not jeopardise the flexible character of planning. The proposed changes would preserve the ability of planning authorities to tailor planning decisions to individual circumstances, in two ways.

Firstly, the primary purpose of the amendments is to direct a decision-maker's attention to two specific factors in the determination of individual applications. One is the climate implications of the respective proposal, and the other is how the proposed development contributes to a pathway towards the delivery of net zero. Overall, the effect of the amendments would be that a decision-maker is expected to consider those issues. Some of the amendments would in addition establish that climate change, as well as climate and nature targets must be prioritised, that is, that they must be given considerable importance and weight in the planning balance.³⁰

In other words, the amendments would not dictate the outcome of a planning application. The decision whether to grant or refuse planning permission, and to give greater weight to other considerations, would continue to be a matter of planning judgement for the local authority. The risk of creating a stand-alone criterion for planning decisions is avoided. In fact, the proposals are less prescriptive than recent changes to the planning system approved by Parliament in the Environment Act 2021, which make biodiversity net gain a condition to obtain planning permission in England.³¹

Secondly, under the amendments, planning authorities would retain their legal powers to develop local policies addressing climate change mitigation and adaptation, as well as climate and nature targets. The new regime would maintain the ability of individual local authorities to decide how these issues should be addressed in their local

26 *Cala Homes (South) Ltd v Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin) [32].

27 The Government launched a separate consultation on reforms to boost the capacity and capability of local planning authorities, see here: <https://www.gov.uk/government/consultations/increasing-planning-fees-and-performance-technical-consultation/technical-consultation-stronger-performance-of-local-planning-authorities-supported-through-an-increase-in-planning-fees#local-planning-authority-capacity-and-capability>

28 Hansard, HL Debates, volume 829, Column 559, 18 April 2023 (Lord Lansley), see here: <https://hansard.parliament.uk/lords/2023-04-18/debates/3484267B-C686-4CC9-A14C-82308A5449F7/Levelling-UpAndRegenerationBill>

29 See *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893 [50].

30 Amendments 179 and 271.

31 Environment Act 2021, ss.98-99.

policies, considering their specific contexts. The amendments would complement the role of plan-making without displacing it.

Finally, planning law already establishes that specific factors must be considered in the determination of individual planning applications. Under the existing law, when dealing with a planning application, planning authorities must consider any considerations relating to the use of the Welsh language, any local finance considerations, and a post-examination draft neighbourhood development insofar as they are material to a planning application.³² More importantly, in the case of development proposals involving heritage buildings, specifically listed buildings, the law goes further.³³ In that case, planning authorities are expected to give ‘special regard’ (considerable importance and weight) to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

The above are just a few examples of how planning legislation may guide decision-makers in the exercise of their public functions, directing their minds to consider issues which are regarded as particularly important. The climate-related amendments to the Bill are fundamentally aligned with the ethos of planning law.

Conclusion

The current legislative approach to tackling climate change in the planning context is premised on the assumption that plan-making functions as it in theory should function, without fully considering the practical reality of planning administration. On average it takes seven years for local planning authorities to prepare a local plan due to administrative capacity issues which hinder the prompt discharge of their plan-making duties. By emphasising plan-making as the main mechanism to address climate change in the planning context, the Bill risks maintaining a legal design which until now has proved relatively ineffective. The amendments tabled by Peers, which would extend requirements for climate change mitigation and adaptation to individual planning decisions, offer a speedy solution to this problem.



³² Town and Country Planning Act 1990, s.70(2).

³³ Planning (Listed Buildings and Conservation Areas) Act 1990, s. 66(1).