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**Summary**

1. This submission examines the legal framework governing the English planning system and its relation to climate change. It promotes the adoption of legal measures which would enhance the way the existing regime helps the UK to tackle climate change and deliver net zero by 2050. It answers question number 10 of the Call for Evidence: 'Are there further significant changes which would improve this system?'.<sup>1</sup> The main conclusions are as follows:
  - a) The buildings sector is the UK's second largest source of greenhouse gas emissions. This sector contributed 20% of total UK emissions in 2021, the majority from homes.<sup>2</sup> Planning law must ensure that new developments support the transition to net zero and the delivery of the UK's net zero targets.
  - b) The planning system serves multiple purposes. Climate change adaptation and mitigation is neither prioritised nor given the weight it requires in the making of planning decisions.
  - c) Under the existing regime, climate change is addressed at the strategic level mostly in the development of planning policy, but it is not expressly a mandatory consideration that must necessarily be regarded and given great weight in the making of individual planning decisions. The strategic mandate to mitigate and adapt to climate change is not fully translated into practice.
  - d) Empirical evidence shows that the lack of a statutory duty to consider climate change as a material consideration in planning decision-making

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<sup>1</sup> See Call for Evidence here: <https://committees.parliament.uk/call-for-evidence/3062/>

<sup>2</sup> Climate Change Committee, Progress in Reducing Emissions, 2022, page 158, available here: <https://www.theccc.org.uk/publication/2022-progress-report-to-parliament/>

is negatively impacting on the way planning authorities approach these issues in practice.

- e) This situation could be fixed by introducing a statutory duty to give special regard to climate change adaptation and mitigation in the assessment of planning applications. A similar duty could address the need to contribute to the delivery of net zero.
  - f) These changes would embed climate change objectives and targets in planning decision-making, thereby helping to clarify the role and responsibilities of planning authorities in climate change adaptation and mitigation.
2. I explain these ideas below in some detail. Firstly, I discuss why existing references to climate change in planning law and policy are ineffective in practice. Secondly, I show that given the lack of a climate duty in planning decision-making, climate change is too often not considered as a material consideration in planning decisions. Thirdly, I explain how when climate change is in fact considered, this is not given priority in the planning balance. Finally, I explain how a statutory duty to give 'special regard' to climate change and to the need to contribute to the delivery of net zero would fix these problems.

**Planning authorities are currently under no statutory duty to consider climate change adaptation and mitigation in the making of individual planning decisions**

- 3. Planning decisions must be made in accordance with the local plan unless other material considerations indicate otherwise.<sup>3</sup> This means that to assess individual proposals planning authorities must identify material considerations (subject to judicial oversight), which have to be taken into account in the determination of planning applications.
- 4. The main issue is that most development proposals are assessed by local authorities,<sup>4</sup> or by the Planning Inspectorate on planning appeals,<sup>5</sup> in a

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<sup>3</sup> See Town and Country Planning Act 1990, s.70(2), Planning and Compulsory Purchase Act 2004, s.38(6).

<sup>4</sup> Town and Country Planning Act 1990, s.70, and Planning and Compulsory Purchase Act, s38.

procedure where climate change is not a mandatory material consideration to which decision-takers should necessarily give regard. As a matter of law, planning authorities are under no express statutory obligation to consider climate change implications in the determination of every development proposal.

5. Climate change certainly constitutes a relevant consideration in some areas of planning where express legislative reference is made to it. These include, for example, the preparation of local plans,<sup>6</sup> the designation of National Policy Statements,<sup>7</sup> the grant of Development Consent Orders by the Secretary of State,<sup>8</sup> and the appraisal of projects requiring Environmental Impact Assessment.<sup>9</sup> In addition, the National Planning Policy Framework (NPPF), which is a material consideration in planning decisions, also contains broad references to climate change.<sup>10</sup>
6. In this regard, and in response to amendments to the Levelling Up and Regeneration Bill at Committee Stage in the House of Lords, a Government Minister has recently pointed out that existing obligations are sufficient to ensure that climate change is considered in the determination of planning applications.<sup>11</sup>
7. Contrary to the Minister's view, most obligations and requirements to consider climate change mitigation and adaptation currently in force, are not expressly applicable to the taking of every planning decision. This is so for various reasons:

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<sup>5</sup> Town and Country Planning Act 1990, s.78.

<sup>6</sup> Planning and Compulsory Purchase Act 2004, s.19(1A).

<sup>7</sup> Planning Act 2008, s.5(8).

<sup>8</sup> Planning Act 2008, s.104(2). Whilst this provision does not explicitly refer to climate change, it indicates that in deciding an application for an order granting development consent, the Secretary of State must have regard to any national policy statement which has effect in relation to development of the description to which the application relates. Relatedly, by virtue of s.5(8) of the Planning Act 2008, national policy statements must explain how the policy set out in the statement takes account of climate change considerations.

<sup>9</sup> The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, Reg.4(2), Sch.4(4), Reg.26(1).

<sup>10</sup> See for example NPPF paragraphs 152 and 153.

<sup>11</sup> See *Hansard*, HL Debates, volume 828, 22 March 2023, columns 1775-1776 (Baroness Scott of Bybrook), available here: <https://hansard.parliament.uk/lords/2023-03-22/debates/6E985E50-62BC-41AA-8F77-BE6BB60F9F9C/Levelling-UpAndRegenerationBill>

- a) Section 19(1A) of the Planning and Compulsory Purchase Act 2004 establishes that development plan documents must (taken as a whole) 'include policies designed to secure that the development and use of land in the local planning authority's area contribute to the mitigation of, and adaptation to, climate change'. It is plain that this statutory provision, which was cited by the Minister in support of their view, is only applicable to the development of policies, and it is not associated with the determination of individual planning applications.
- b) Relatedly, though local authorities must elaborate policies that contribute to climate change mitigation and adaptation, the reality is that, as the Climate Change Committee has established, 'Most local plans do not acknowledge the extent of the challenge of delivering Net Zero and need significant revision'.<sup>12</sup>
- c) Similarly, a significant proportion of local plans are out-of-date. This was recently acknowledged by the same Minister, who stated in Parliament 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'.<sup>13</sup>
- d) Generally, the NPPF is a material consideration in planning decisions. However, the NPPF contains no specific paragraph establishing that climate change mitigation and adaptation should be considered in every planning application. Existing mentions of climate change in the NPPF are relatively broad and mostly applicable to the development of local plan policies.<sup>14</sup>
- e) Specifically, chapter 14 of the NPPF, headed 'Meeting the challenge of climate change, flooding and coastal change', only contains a few paragraphs dealing with the determination of some planning applications in very narrow terms. The chapter succinctly addresses energy

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<sup>12</sup> 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/>

<sup>13</sup> *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>

<sup>14</sup> See NPPF paragraphs 8, 11, 20, 98, 105, 131, 152, 153, 154, 156, 158, and 161.

consumption of new development,<sup>15</sup> applications for renewable and low carbon development,<sup>16</sup> and development in areas at risk of flooding.<sup>17</sup>

- f) Given that the NPPF contains no express proviso directing the mind of decision-makers to the climate change implications of every planning application, it can hardly be argued that climate change is expressly a material consideration in all planning decisions based on the NPPF. This is because the NPPF is a material consideration where it is relevant to a planning application or appeal.<sup>18</sup>
- g) Additionally, the planning regime gives no priority to climate change mitigation and adaptation. Currently, there is no express legislative provision or policy guidance establishing that great weight should be given to climate considerations in individual planning decisions (I explain this point below in paragraphs 14 to 17).
- h) The Climate Change Committee has recently highlighted that the planning framework does not prioritise climate change in planning decision-making. In its 2023 Report to Parliament, it concluded that 'There is potential for planning and environmental improvement policies to enable planning decisions to consider adaptation, but clear mechanisms are currently lacking'.<sup>19</sup> Similarly, the Committee has pointed out that 'Climate resilience features in the language of current guidelines, but *these lack the detail and specificity to ensure that resilient new development is prioritised on-the-ground*' (emphasis added).<sup>20</sup> Whilst the Report centres on climate adaptation, the same is true of climate change mitigation.
- i) Finally, National Policy Statements and related Development Consent Orders, where climate is directly or indirectly considered, only apply to a

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<sup>15</sup> NPPF Paragraph 157.

<sup>16</sup> NPPF Paragraph 158.

<sup>17</sup> See NPPF paragraphs 159, 163, 166, 167, and 168.

<sup>18</sup> See Planning Practice Guidance, Paragraph: 006 Reference ID: 21b-006-20190315.

<sup>19</sup> Climate Change Committee, Progress in Adapting to Climate Change, Report to Parliament, March 2023, Page 189. Available here: <https://www.theccc.org.uk/publication/progress-in-adapting-to-climate-change-2023-report-to-parliament/>

<sup>20</sup> Ibid, page 221.

reduced number of development proposals which qualify as nationally significant infrastructure projects. Equally, Environmental Impact Assessment, where climate change issues are expressly considered, is also required in relation to a small number of projects that meet certain requirements.<sup>21</sup>

8. It should also be mentioned that the draft NPPF recently published for consultation seeks views on the approach to carbon assessments, mentioning that the Government will carry out a full review following Royal Assent of the Levelling Up and Regeneration Bill to ensure that planning will contribute to climate mitigation and adaptation.<sup>22</sup> However, the published draft contains no changes to the current NPPF making it clear that climate change is a material consideration in the determination of individual planning applications. Equally, in the draft NPPF there is no mention to the weight that climate considerations should be given in individual planning decisions.
9. Overall, the lack of a statutory duty to consider climate change in the making of planning decisions represents a significant gap in the existing legal framework. This gap has important practical effects, as explained below.

**Evidence shows that a significant proportion of local authorities do not always regard climate change as a material consideration in planning decisions**

10. A recent report published in 2022 by the Association for Public Service Excellence (APSE) and the Town and Country Planning Association (TCPA) demonstrates that climate change and greenhouse gas emissions are not always regarded as a material consideration in the making of planning decisions.<sup>23</sup>

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<sup>21</sup> See The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, Sch.1 and Sch. (2).

<sup>22</sup> See Levelling-up and Regeneration Bill: reforms to national policy, chapter 7, paragraph 12, available here: <https://www.gov.uk/government/consultations/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy#chapter-7--protecting-the-environment-and-tackling-climate-change>

<sup>23</sup> 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->

11. The study shows that in England only 56 out of 156 local authorities (36%) recognise fully the need to adapt to climate change as a material consideration in the planning decision-making process. Likewise, 82 out of 156 respondents (53%) acknowledge that climate change constitutes a material consideration only 'to some extent'. More troubling, 18 out of 156 respondents (11%) neither agree nor disagree, disagree to some extent, or strongly disagree that climate change can be recognised as a material consideration in planning decision-making.<sup>24</sup>
12. Similarly, the same report highlights that only 44 out of 156 local authorities (28%) recognise greenhouse gas emissions as a material consideration in planning decision-making, whereas 83 out of 157 respondents (53%) do so only 'to some extent'. Equally, 30 out of 157 respondents (11%) neither agree nor disagree, disagree to some extent, or strongly disagree that greenhouse gas emissions can be regarded as a material consideration.<sup>25</sup>
13. Overall, the lack of a statutory duty to consider climate change as a material consideration in every planning decision is negatively impacting on the way planning authorities approach this issue in practice. The statutory regime facilitates this situation because under the existing law it is unclear whether planning decisions that fail to consider this matter can be open to criticism on this ground. This is because 'a decision-maker does not *fail* to take a relevant consideration into account unless he was *under an obligation* to do so'.<sup>26</sup> The end result is that the planning framework is not ensuring that new developments contribute to climate change adaptation and mitigation.

**The existing legal framework does not prioritise climate change adaptation and mitigation in the determination of individual planning applications**

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> *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).

14. The planning system serves many purposes. For example, the NPPF promotes disparate objectives ranging from delivering a sufficient supply of homes and building a competitive economy to protecting Green Belt land and facilitating the sustainable use of minerals.<sup>27</sup> The same is true in the case of local plan policies, which very often 'pull in different directions'.<sup>28</sup>
15. In practice, this means that in cases where climate change and greenhouse gas emissions are considered in the assessment of a planning application, they are balanced against other material considerations at stake in the respective proposal, including competing local and national planning policies. In other words, climate change and greenhouse gas emissions are not given priority. They are treated as mere material considerations to which planning authorities can attach such weight as they think fit.
16. The previous point is illustrated by a recent appeal decision concerning a major solar farm in Derbyshire. The project involved the production of up to 49.9 MW of renewable energy, sufficient for between 11500 and 13360 homes or more than 22% of Amber Valley Borough's total households. The local council refused planning permission. In turn, in December 2022 a planning inspector refused permission on appeal on the ground that the project would harm the landscape character and visual amenity of the area.<sup>29</sup>
17. The above case highlights that the contribution that a project makes to the delivery of net zero is not always given sufficient weight and priority – it receives the same importance as other considerations for example the preservation of the landscape character of an area. A statutory climate duty would not only ensure that, wherever possible, new developments are built to zero carbon standards but would also clarify the priority to be given to climate change adaptation and mitigation, including the delivery of net zero, as key considerations in the decision-taking process.

**Climate change mitigation and adaptation should be given 'special regard' in the making of planning decisions**

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<sup>27</sup> See NPPF paragraphs 60, 81, 137, and 209.

<sup>28</sup> *R (Corbett) v Cornwall Council* [2020] EWCA Civ 508 [27].

<sup>29</sup> See Appeal Decision, paragraphs 57 and 60, Appeal Reference: APP/M1005/W/22/3299953



18. The Levelling Up and Regeneration Bill, currently at Committee Stage in the House of Lords, offers an opportunity to tackle the problems described above. There are various ways of achieving this and Peers have tabled several amendments to the Bill, which seek to address the existing gap (amendments 179, 179A, 271, and 309).
19. To address the statutory gap in relation to individual planning decisions, the Bill could amend the Town and Country Planning Act 1990 by introducing a statutory duty whereby planning authorities would be expected to give 'special regard' to climate change mitigation and adaptation in the determination of individual applications.
20. A similar duty could address the wider issue of better aligning climate change and nature targets within the planning system. This could be implemented through a duty to give 'special regard' to the need to contribute to the net zero target set out in section 1 of the Climate Change Act 2008 as well as the environmental targets set out in sections 1 to 3 of the Environmental Act 2021.
21. It is important to highlight that, in the planning context, to give 'special regard' to a specific consideration has been interpreted to mean that a decision-maker should accord 'considerable importance and weight' to it in the planning balance.<sup>30</sup> Consequently, the main effect of the proposed duty would be that the weight to be given to climate change adaptation and mitigation as a material consideration would be prescribed by Parliament rather than being determined by the decision-maker.
22. Relatedly, it should be noted that the proposed duty to give 'special regard' to climate change goes further than a duty 'to have regard' to it. This is because, as the courts have held, '[t]o have regard to a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters'.<sup>31</sup> Hence, only a duty to have 'special regard' would ensure that climate change considerations are duly

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<sup>30</sup> See *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council* [2014] EWCA Civ 137, in relation to planning applications involving heritage assets.

<sup>31</sup> *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin), [46] (Cranston J).

prioritised and given considerable importance and weight in the planning balance.

23. This new approach would reduce (but would not automatically eliminate) the possibility that other material considerations outweigh climate change implications in the assessment of planning applications. In this scenario, planning authorities would retain their powers to attach greater weight to other material considerations and to exercise a planning judgement on the merits of the respective development proposal. The proposed duty would give planning authorities sufficient flexibility to tailor their decisions to specific local circumstances.

*The Centre for Climate Engagement is an academic institution based at Hughes Hall, University of Cambridge. Its mission is to encourage academic excellence in climate law, governance, and organisational change, and to translate and transfer this knowledge to the public and private sectors to accelerate the race to net zero emissions and climate resilience. Dr Samuel Ruiz-Tagle is Senior Researcher in Law at the Centre for Climate Engagement, where he investigates the relationship between administrative law, climate change, and urban governance. He is also Research By-Fellow at Hughes Hall, University of Cambridge, where he teaches Administrative Law. He obtained his doctorate from the Faculty of Law of the University of Oxford.*

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