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AAK/RA/SENATE/02 27th November 2025

**Mr. J.M. Nyegenye, CBS**
Clerk of the Senate
P.O. Box 41842-00100
Nairobi, Kenya

Dear Sir,

**RE: THE ARCHITECTURAL ASSOCIATION OF KENYA'S MEMORANDUM ON THE NATIONAL CONSTRUCTION AUTHORITY (AMENDMENT) BILL, 2025**

The Architectural Association of Kenya (AAK) is currently working closely with the State Department for Public Works in Kenya to develop the National Decarbonization Roadmap for Buildings and Construction. Through this process, we have in partnership with the Global Buildings Performance Network (GBPN) and other stakeholders:

1. A baseline assessment of sector emissions (operational and embodied)
2. Extensive stakeholder consultations across national and county governments
3. Mapping of regulatory, market, and institutional gaps
4. A detailed climate risk and resilience assessment
5. Development of policy, regulatory, and enforcement pathways aligned with global best practice (GlobalABC, UNEP, IFC, EU EPBD, South African SANS 10400-XA)

Our submission is based on this evidence base, global comparative research, and the need to ensure that the amendments strengthen, and do not unintentionally weaken, Kenya's construction governance ecosystem.

## 2. Summary Position

We strongly support the intent of integrating climate-responsive and environmentally sustainable construction practices into law. However, several provisions in the Amendment Bill introduce institutional overlaps, regulatory duplication, and constitutional inconsistencies that, if unaddressed, may:

1. blur institutional mandates
2. create parallel or contradictory approval systems
3. increase compliance costs
4. weaken cross-sector climate governance

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5. introduce enforcement ambiguity
6. reduce the effectiveness of Kenya's decarbonisation efforts

We therefore provide constructive technical recommendations to align the Bill with:

1. the National Construction Authority Act (Cap 118)
2. the Constitution of Kenya, particularly Fourth Schedule Part 2
3. the Energy Act (2019)
4. the Environmental Management and Co-ordination Act (EMCA) 1999
5. the emerging Kenya Green Building Standards (under development)
6. the approaches used by comparable countries (India, Rwanda, South Africa, Vietnam, EU)

## 3. Clause-by-Clause Analysis and Recommendations

### 3.1. Clause 2 – Amendment to Section 5(2): New Paragraph (ha)

*"...promote and enforce the use of environmentally sustainable construction materials, designs, standards and practices..."*

**Technical Concern**

This amendment significantly expands NCA's mandate from **quality assurance** to **environmental and energy enforcement**. This creates direct overlap with:

1. **National Environment Management Authority (NEMA)**, mandated to regulate environmental compliance under EMCA
2. **Energy and Petroleum Regulatory Authority (EPRA)**, mandated to regulate energy efficiency and renewable integration
3. **County Governments**, which legally approve designs and enforce building codes
4. **State Department for Public Works**, custodian of the Kenya National Building Code

**Global Practice**

Global best practice separates **building quality enforcement** (construction stage) and **environmental/energy compliance** (planning/approval stage):

1. *South Africa*: SANS 10400-XA (energy) enforced through municipalities, not the National Construction Regulator
2. *India*: ECBC enforced through Urban Local Bodies (ULBs)
3. *EU*: Energy Performance of Buildings Directive (EPBD) enforced at municipal level.

**Recommendation**

Reframe NCA's role to *coordination* rather than direct enforcement.

**Proposed wording:**

"(ha) promote, coordinate and support the adoption of environmentally sustainable construction materials, designs, standards and practices, in consultation with the State Department responsible for Public Works, county governments, the National Environment Management Authority, and the Energy and Petroleum Regulatory Authority."

This maintains leadership but avoids unconstitutional mandate conflicts.

### 3.2. Clause 3 – Insertion of Section 23B: Mandatory Solar System Installation Zones

**Technical Concern**

Granting NCA power to **designate zones** for solar installation contradicts:

1. County governments' constitutional mandate over **land-use zoning**
2. EPRA's regulatory mandate over **renewable energy systems**

**Global Practice**

1. *Rwanda*: Renewable-ready requirements applied through **district-level planning authorities**
2. *South Africa*: Municipal by-laws regulate solar mandates
3. *India*: Solar-ready codes enforced through local authorities (ULBs)

**Recommendation**

Delete the zoning function and replace Section 23B with:

**Proposed wording:**

"23B. (1) The Authority shall, in collaboration with the Energy and Petroleum Regulatory Authority and county governments, develop technical guidelines for solar-ready and renewable-ready building design for adoption by county governments in their planning and permitting functions.

(2) Any designation of zones for mandatory installation of renewable energy systems shall be effected through county spatial plans, county energy plans, or regulations issued under the Energy Act."

(3) The Authority, EPRA and county governments may jointly undertake pilot programmes to demonstrate the application of solar-ready and renewable-ready guidelines, prior to their incorporation into county regulatory frameworks."

### 3.3. Clause 4 – Amendment to Section 42(2): Climate-Responsive Mechanisms

**Technical Concern**

This amendment gives NCA broad new powers to regulate matters currently handled by:

1. NEMA (environment)
2. EPRA (energy efficiency)
3. Water Services Authorities (water efficiency)
4. Public Health authorities

This can create **parallel regulation** and **conflicting compliance pathways**.

**Global Practice**

In leading jurisdictions:

- Cross-sector climate mechanisms are developed via **inter-agency committees**
- Enforcement remains within each agency's statutory domain

**Recommendation**

Require inter-agency development of climate-related regulations. Replace the proposed amendment with:

**Proposed wording:**

"42(2A) The Authority shall, in collaboration with the State Department responsible for Public Works, the National Environment Management Authority, the Energy and Petroleum Regulatory Authority, the Council of Governors, and other relevant agencies, develop regulations on climate-responsive construction practices to ensure alignment with national building standards, environmental regulations, energy efficiency requirements, and devolved development control functions."

"42(2B) Regulations under this section shall be evidence-based, measurable, and linked to national monitoring, reporting and verification (MRV) systems established under the Climate Change Act."

## 3.4. Clause 5 – New Fourth Schedule: Climate Change Responsive Mechanisms

**Technical Concern**

The Schedule provides broad sustainability themes but:

1. lacks measurable criteria
2. duplicates existing standards under EMCA, Energy Act, Building Code
3. risks conflicting enforcement across agencies

**Global Practice**

- *EU*: Performance-based standards (EPBD)
- *South Africa*: SANS 10400-XA defines measurable performance thresholds
- *India*: ECBC includes quantifiable energy performance benchmarks

**Recommendation**

Adopt the schedule as **guiding principles**, with measurable performance standards to be developed through detailed regulations.

**Proposed wording:**

1. This Schedule shall provide guiding principles for climate-responsive construction, to be operationalised through detailed regulations developed jointly under Section 42(2A).

2. Climate-responsive construction shall be aligned with the Kenya Building Standards, the Climate Change Act, the Environmental Management and Coordination Act, the Energy Act, and county development control systems.

3. Regulations made under this Schedule shall incorporate measurable performance indicators, including-
(a) energy performance for buildings, guided by minimum energy performance standards (MEPS) and building-level efficiency requirements;
(b) embodied carbon and material efficiency, including promotion of low-carbon and recycled materials, in line with national standards;
(c) water efficiency, including rainwater harvesting and sustainable drainage;
(d) climate resilience measures, including passive design, thermal comfort strategies, and flood/heat/wind-resilience;
(e) circular economy and waste minimisation, aligned with NEMA and county solid-waste frameworks.

4. All regulations under this Schedule shall be developed through an inter-agency technical process involving NCA, SDPW, NEMA, EPRA, county governments, and relevant professional bodies."

## 4. Broader Governance and Constitutional Concerns

### 1. Devolution and the Constitution

Under **Part 2 of the Fourth Schedule**, counties have exclusive authority over:

1. planning
2. building permits
3. development control
4. building inspection

The Bill must not create parallel systems that bypass county approvals.

### 2. Avoiding Regulatory Duplication

The Bill should recognize existing mandates to avoid:

1. double inspections
2. double approvals
3. fragmented enforcement
4. investor uncertainty

### 3. Alignment with the Emerging Kenya Green Building Standards (2026-under development)

Kenya is developing **Green building standards** aligned with the roadmap. Any changes to NCA's mandate should complement, not override, these standards.

## 5. Summary of Recommendations

| Clause | Issue Identified | Risk / Impact | Recommendation |
|---|---|---|---|
| Clause 2 | Extends NCA mandate into environmental & energy enforcement | Duplicates NEMA, EPRA, counties | Change "enforce" to "coordinate"; require consultations |
| Clause 3 | NCA zoning for solar | Contradicts devolution & EPRA mandate | Shift zoning role to counties/EPRA; NCA provides technical guidelines |

| | | | |
|---|---|---|---|
| Clause 4 | Broad regulatory powers | Overlapping climate, energy, environmental regulation | Require inter-agency development of regulations |
| Clause 5 | Broad sustainability principles | Non-measurable; parallel to existing laws | Treat schedule as guiding; develop performance criteria via joint regulations |

## 6. Conclusion

We fully support the Government of Kenya's ambition to embed climate resilience, energy efficiency, and sustainable materials in the construction sector. However, for the amendments to be effective, internationally credible, and operationally implementable, they must:

1. **respect devolved functions**
2. **reinforce existing regulatory institutions**, not duplicate them
3. **align with the Kenya Green Building Standards (under development)**
4. **support the national decarbonization strategy**, not fragment it
5. **ensure clarity for contractors, developers, and professionals**

We therefore respectfully request the Senate to adopt the proposed refinements to ensure a coherent, constitutional, and climate-aligned construction governance system.

Yours sincerely,

**George A. Ndege**
**President, Architectural Association of Kenya (AAK)**