An Accelerated Planning System

Introduction

The Home Builders Federation (HBF) and its members are grateful to the Department for Levelling Up, Housing and Communities for the opportunity to respond to its consultation on an 'Accelerated Planning System'.

HBF is the representative body of the home building industry in England and Wales. Its members are responsible for providing around 80% of all new private homes built in England and Wales and most of our members are small or medium-sized enterprises.

Context

HBF welcomes recognition of the lengthening of planning application timescales and all initiatives to reverse that trend.

According to the RTPI[1], approximately 85% (354,000 of the 415,000) of decisions made in 2009 were within statutory time limits and without Planning Performance Agreements (PPAs), but by 2021 this figure has fallen to 49% (209,000 of the 427,000). As the RTPI noted, "whilst some of this could be put down to Covid, the trend over the last 12 years is worrying and highlights a downturn in the performances of local planning authorities (LPAs).

The final report of the Competition & Markets Authority (CMA) home building market study painted an even bleaker picture in this regard. It found that the share of applications reviewed within the statutory deadline of 13 weeks fell from 55% in 2009 to 12% in 2021 and the average time to make an outline planning permission decision between 2020 and 2022 was well over a year[2].

As the consultation material notes, the statutory time limit to decide major planning applications are not met in most cases. In the period July to September 2023, for example, only 21% of major applications were decided within 13 weeks.

The consultation material also notes that the average (median) time to determine a major planning application is estimated to be approximately 28 weeks, but, of course, the application period itself is only part of an approval process that takes in pre-application engagement before a planning application and the need to discharge conditions post-consent. According to recent data from Lichfields[3], the overall planning approval period can take 1.5 years for sites of 50 to 99 homes and 5.1 years for sites of 2000 or more homes.

Whilst the recent increase in planning fees and the Planning Skills Delivery Fund are welcomed, they, along with a 10-week statutory time limit for certain applications, new performance measures and restricting the use of extension of time agreements, will not make anything other than modest strides towards a high-quality and timely planning system. Fundamentally, this requires planning services to be put on a long-term, self-sustaining financial footing.

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[1] https://www.rtpi.org.uk/policy-and-research/research/planning-agencies/

[2] CMA, Housebuilding market study, February 2024

[3] https://lichfields.uk/content/insights/start-to-finish-3

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

Even if 13 weeks is an appropriate measure, and the majority of HBF members would accept that the overall planning period is longer than 13 weeks, these initiatives do not fundamentally address the reasons why only 21% of major applications are decided within 13 weeks. These include the absence of substantive pre-application discussions (as research for the Planning Advisory Service (PAS)[4] has identified), the role of consultees (statutory and non-statutory) and the convoluted process especially in two-tier administrative areas for signing Section 106 Agreements (for which template agreements are still not used as a matter of course).

Substantive pre-application advice from Local Planning Authorities (LPAs) and statutory consultees is vital to the formulation of any development proposal. In working up proposals, an applicant will be assessing which uses could be appropriate within a given sites developable area based upon an analysis of opportunities and constraints. It is at this crucial stage of the development process that the land value that underpins contractual arrangements between landowner and prospective developer is established.

Often, however, substantive pre-application advice is not provided, which means that development proposals are worked up without a complete analysis of opportunities and constraints, which can result in schemes (and the contractual arrangements behind them) being amended once a planning application has been made or in a subsequent resubmission.

Once a planning application has been made, the 'holding response' from consultees has become more prevalent in recent times, typically a generic 'more information needed' response, that a cynical applicant might assume simply masks that an application has not yet been read.

It has been suggested in some quarters that a culture has been allowed to take hold within some of the larger statutory consultees whereby taking 3-6 months to respond has become the normal and a resetting of expectations would be welcome.

Fundamentally, a lack of staff and especially a lack of experienced staff tends towards risk aversion and that in turn tends towards objections or reams of conditions (that consultees are even slower to respond to).

All of which contributes to the length of time it takes for planning applications to be processed and once approved, for development to start on site.

In relation to varying and overlapping permissions, HBF welcomes acceptance of the need for the planning system to respond to recent caselaw on the treatment of such permissions and welcomes Government attempts to maintain flexibility, especially for large multi-phase developments. HBF is keen to work with the Department towards the resolution of the issues raised within the consultation material.

Question 1. Do you agree with the proposal for an Accelerated Planning Service?

A high-quality and timely planning system would not need an Accelerated Planning Service, but, as stated, HBF welcomes recognition of the lengthening of planning application timescales and all initiatives to reverse that trend.

[4] https://www.local.gov.uk/pas/development-mgmt/pre-application-advice-and-planning-performance-agreements-ppas

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

Question 2. Do you agree with the initial scope of applications proposed for the Accelerated Planning Service (Non-EIA major commercial development)?

It could be said that commercial development is less contentious than, for example, residential development and that if an accelerated planning service is to be trialled then doing so in this sector affords more chance of success. This would mean that the lessons learnt could be rolled out more broadly.

It could equally be said, however, that with the number of planning permissions for new homes in the year to December 2023 dropping to the lowest for any 12-month period since 2014[5], and given the respective importance of commercial and residential development to the economy[6] and wider society, the notion that one type of application would be "prioritised" over the other introduces a peculiar and concerning dichotomy.

Question 3. Do you consider there is scope for EIA development to also benefit from an Accelerated Planning Service?

As the consultation material notes, if applications are of good quality; if they benefit from clear pre-application advice; and if statutory consultees are suitably engaged, there would be significantly less reason why all applications should not be determined much more speedily.

Question 4. Do you agree with the proposed exclusions from the Accelerated Planning Service – applications subject to Habitat Regulations Assessment, within the curtilage or area of listed buildings and other designated heritage assets, Scheduled Monuments and World Heritage Sites, and applications for retrospective development or minerals and waste development?

Planning applications in these contexts will be more complicated and / or more contentious and so without any meaningful improvement in pre-application advice and / or statutory consultee involved are much less likely to be determined within a shorter time period.

To exclude EIA development and applications that are subject to Habitat Regulations Assessment would be to curtail the potential of this initiative.

Question 5. Do you agree that the Accelerated Planning Service should:

A) Have an accelerated 10-week statutory time limit for the determination of eligible applications

10 weeks is obviously less than the current 13-week statutory time limit, but then anything less than the current 28-week average would represent an improvement on current performance. Since 13 weeks became the statutory target the planning system has become ever more complex to the extent that 13 weeks is not realistically achievable for the majority of major applications. Most in the development industry would accept that whilst 13 weeks is not very long for the whole consenting process, over a year is much too long. Certainly, for HBF members operating at planning's coalface being able to work collaboratively with a LPA towards a pre-agreed determination deadline is more important than an arbitrary statutory target.

[5] https://www.hbf.co.uk/news/housing-pipeline-report-q4-2023-published-march-2024/

[6] https://lichfields.uk/blog/2018/august/13/the-economic-impact-of-house-building/

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

B) Encourage pre-application engagement

Yes. It is also important that substantive pre-application advice becomes material to the ultimate decision.

C) Encourage notification of statutory consultees before the application is made

The notification of statutory consultees is helpful, but much more helpful will be the identification and remedying of any issues that would likely cause that statutory to object to a planning application.

Question 6. Do you consider that the fee for Accelerated Planning Service applications should be a percentage uplift on the existing planning application fee?

It is stated that the planning fee cannot exceed the cost of providing the service, but the cost of determining one type of major application within, for example, ten weeks in one part of the country may differ considerably from the cost of determining another type of major application within ten weeks in another. It is suggested that a centrally set flat rate would be fair and consistent, but the majority of applicants would likely accept that cost differential and perhaps not mind paying more in recognition that an application was particular complex if it meant being able to work collaboratively with a LPA towards a pre-agreed determination deadline.

Any increased fee should represent value for money and should be directly linked (and ringfenced for) the application in question.

Question 7. Do you consider that the refund of the planning fee should be:

A) The whole fee at 10 weeks if the 10-week timeline is not met

B) The premium part of the fee at 10 weeks if the 10-week timeline is not met, and the remainder of the fee at 13 weeks

C) 50% of the whole fee at 10 weeks if the 10-week timeline is not met, and the remainder of the fee at 13 weeks

D) None of the above (please specify an alternative option)

E) Don't know

A fee over and above that paid statutorily would be best designed to reward over-performance and disincentive under-performance on the part of both applicant and LPA.

Question 8. Do you have views about how statutory consultees can best support the Accelerated Planning Service?

Statutory (and non-statutory) consultees have become fundamental to the operation of the planning system, but it most cases planning is only peripheral to their respective core operations. Redressing that imbalance would arguably make the biggest practical impact to the operation of the planning system.

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

HBF welcomed the 'rapid three-month review'[7] into the statutory consultee system that was announced in December 2023 and very much looks forwards to the findings.

The issue is a timely one.

RTPI[8] research on local plan-making last year concluded as follows.

There appears to be evidence that Statutory Consultee engagement, or lack of it, has delayed the publication or submission of plans, but this is difficult to draw out from the written sources. There are however examples of where the lack of ongoing engagement (possibly on both sides) has led to delays at the examination process.

Delays in receiving responses from statutory consultees has also been identified by the CMA as one as one of factors driving up the length of the planning process. The CMA's paper on planning states that:

LPAs reported issues with getting statutory consultees to respond within the 21-day consultation period. Responses from statutory consultees were stated to commonly be late and, in many cases, returned well in excess of the required 21-day period. This was largely attributed to resourcing issues within the statutory consultee organisations.

In setting out possible future planning reform the CMA goes on to suggest that LPAs could only be required to consult with a clearly defined set of consultees (although this would not prevent LPAs from consulting with other stakeholders, if they choose to, or other stakeholders from providing their views to the LPA) and that LPAs could only be required to take into account the views of statutory consultees if they provide their views within the mandatory 21-day period. Under this proposal, if a statutory consultee does not respond within 21 days the LPA can deem them to have consented to the planning application.

Whilst the Secretary of State's 'Falling back in love with the future' speech stated that 'the performance of Natural England, the Environment Agency, Historic England and other arm's length bodies needs to improve', it should be noted that internal LPA consultees (highways, environmental heath, ecology, urban design, heritage, etc) and, in two-tier areas, County Councils (minerals and waste, flood risk, local nature recovery strategies, education and health), are equally as important to the formulation of policy and the determination of planning applications.

Similarly, whilst not a consultee as such, internal legal resource is fundamental to the ability of a LPA to transact Section 106 Agreements.

Increased fees should be distributed in such a way as to secure input from all of the relevant consultees throughout the entire planning approval process.

Question 9. Do you consider that the Accelerated Planning Service could be extended to:

A) Major infrastructure development

Yes.

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[7] https://www.gov.uk/government/speeches/falling-back-in-love-with-the-future

[8] https://www.rtpi.org.uk/policy-and-research/research/local-plan-research-project/

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

B) Major residential development

Yes.

C) Any other development

Yes.

HBF proposes that 'bespoke' might be a more meaningful ambition than 'accelerated' when considering appropriate time limit.

Question 10. Do you prefer:

A) The discretionary option (which provides a choice for applicants between an Accelerated Planning Service or a standard planning application route)

B) The mandatory option (which provides a single Accelerated Planning Service for all applications within a given definition)

HBF respectfully points out that PPAs already provide a project management tool for larger and more complex applications. As PAS has identified, PPAs should reduce timescales and create more positive outcomes, as well generating resources LPAs, but PAS research has found that there is limited experience of their use within LPAs and often when PPAs are used it is on an 'ad-hoc' basis. PAS found that applicants are willing to pay for a PPA if the service promised is delivered, a point that HBF would endorse the fact that, but that barriers exist to their more widespread use. These barriers though, such as skills, resources and buy-in from senior officers and council members, are not insurmountable and the benefits of improving the existing PPA proposition may provide wider benefits than a narrower Accelerated Planning Service.

Planning[9] recently reported that the PPAs used by Babergh District Council and Mid Suffolk District Council accounted for 26.5% of all PPAs used cross the country in the 12-month period to December 2023.

Question 11. In addition to a planning statement, is there any other additional statutory information you think should be provided by an applicant in order to opt-in to a discretionary Accelerated Planning Service?

It would be helpful to include the Heads of Terms or draft of a Section 106 Agreement.

Question 12. Do you agree with the introduction of a new performance measure for speed of decision-making for major and non-major applications based on the proportion of decisions made within the statutory time limit only?

As stated, HBF welcomes recognition of the lengthening of planning application timescales and all initiatives to reverse that trend.

It might be contended, however, that to tackle the use of extension of time agreements is to tackle a symptom of dysfunction within the planning system rather than the cause. An inevitable consequence of a focus on the statutory time limit will be the refusal of more applications, which is in nobody's interest.

[9] https://www.planningresource.co.uk/article/1867429/authorities-used-planning-performance-agreements-2023

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

It is striking that, according to Planning[10], 95% of LPAs fall below the 50% threshold for the speed of major district-level decisions over the 12 months to September 2023.

Of these 313 LPA, Planning notes, 24 failed to make a single major decision within the statutory period.

It is clearly neither desirable nor feasible for 95% of LPAs to be in special measures at the same time.

With the aim of shortening application timescales in mind it is pertinent to point out that this could be achieved if a greater proportion of decisions are taken by way of delegated powers, particularly where applications are consistent with a local plan. This is an issue highlighted by the afore-mentioned CMA study of the housebuilding sector.

Question 13. Do you agree with the proposed performance thresholds for assessing the proportion of decisions made within the statutory time limit (50% or more for major applications and 60% or more for non-major applications)?

An argument could be advanced that if only a 50% success rate is considered acceptable then the target is clearly unachievable.

Question 14. Do you consider that the designation decisions in relation to performance for speed of decision-making should be made based on:

A) the new criteria only – i.e. the proportion of decisions made within the statutory time limit; or

B) Both the current criteria (proportion of applications determined within the statutory time limit or an agreed extended time period) and the new criteria (proportion of decisions made within the statutory time limit) with a local planning authority at risk of designation if they do not meet the threshold for either or both criteria

C) Neither of the above

D) Don't know

HBF contends that there is a place for the statutory time limit in assessing performance, but there is also a place for a bespoke, mutually agreeable timeframe for a planning approval process in which applicants and LPAs work collaboratively towards a pre-agreed determination deadline.

Question 15. Do you agree that the performance of local planning authorities for speed of decision-making should be measured across a 12-month period?

Yes.

Question 16. Do you agree with the proposed transitional arrangements for the new measure for assessing speed of decision-making performance?

[10] https://www.planningresource.co.uk/article/1868143/97-planning-authorities-not-meet-proposed-new-special-measures-metric-slow-decision-making#:~:text=But%2C%20earlier%20this%20month%2C%20the,on%20the%20use%20of%20the

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

HBF offers no comment.

Question 17. Do you agree that the measure and thresholds for assessing quality of decision-making performance should stay the same?

Measures and thresholds have a role to play in working towards a planning service that delivers better outcomes in a timelier fashion, but it seems unreasonable to change the benchmarks against which LPAs are transacting applications without addressing the reasons why applications are not being transacted in a timelier fashion at the minute.

Question 18. Do you agree with the proposal to remove the ability to use extension of time agreements for householder applications?

HBF offers no comment.

Question 19. What is your view on the use of repeat extension of time agreements for the same application? Is this something that should be prohibited?

As stated, to tackle the use of extension of time agreements alone is to tackle a symptom of disfunction within the planning system rather than the causes.

The inevitable consequence of a single extension of time within the system as it is presently operating will be either an extension so long as to account for every conceivable worst-case scenario or, if an applicant did not agree to such an extension, the refusal of an application. The appeal costs regime might perhaps be updated to ensure that LPAs do not take this step unreasonably.

Rather than face a refusal it is, of course, the case that an applicant could withdraw an application to remedy any perceived deficiencies in the first submission, but the appetite to do so and not appeal will have diminished now that the ability to make a 'free go' application has been removed.

A further consequence could be LPAs persuading applicants to delay submission until it can be shown that an application is not just 'oven-ready', but stands up to scrutiny from every conceivable angle. It is not hard to imagine in this scenario that local validation lists, already onerous in most places and especially so for SMEs, become even lengthier.

Question 20. Do you agree with the proposals for the simplified written representation appeal route?

Yes.

Question 21. Do you agree with the types of appeals that are proposed for inclusion through the simplified written representation appeal route? If not, which types of appeals should be excluded form the simplified written representation appeal route?

Yes.

Question 22. Are there any other types of appeals which should be included in a simplified written representation appeal route?

HBF offers no comment.

Home Builders Federation
HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

Question 23. Would you raise any concern about removing the ability for additional representations, including those of third parties, to be made during the appeal stage on cases that would follow the simplified written representations procedure?

This could be considered appropriate in uncontentious cases, but excluding third parties from written representations appeals might not accord with the principles of natural justice if issues arise or arguments made by the main parties that could not have been foreseen or were not made at the application stage.

Question 24. Do you agree that there should be an option for written representation appeals to be determined under the current (non-simplified) process in cases where the Planning Inspectorate considers that the simplified process is not appropriate?

Yes.

Question 25. Do you agree that the existing time limits for lodging appeals should remain as they currently are, should the proposed simplified procedure for determining written representation planning appeals be introduced?

Yes.

Question 26. Do you agree that guidance should encourage clearer descriptors of development for planning permissions and section 73B to become the route to make general variations to planning permissions (rather than section 73)?

This matter is about addressing the effects of the Finney case, which made clear that a S73 application could not amend the description of development in a planning permission.

The suggestion in the consultation is that guidance should encourage the use of S73B applications for all proposed "changes" to planning permissions that are to do with the scheme description of any of the approved plans and that S73s should be used only for matters that are firmly in the territory of changes to conditions. The consultation stops short of suggesting that planning permissions should no longer have conditions that set out the plans that development is to accord with and HBF agree that this is the correct approach. The use of such conditions provides great clarity in terms of the approved details of a permission and this should be maintained.

Provided that S73B does allow proper consideration and approval of "changes" that can be approved without harm, be they to the scheme plans or the description of development then guidance that encourages some greater particularity in the description of development in a planning permission is acceptable.

It is important, however, that this not to be too prescriptive. Some applicants, perhaps those promoting sites and not building them, will have a far less clear picture of the details that a builder will want to build. The details of a scheme may well be fleshed out through the conditions imposed and the negotiations with the LPA prior to the grant of permission, not in the initial description of development. It would be completely counter-productive to the idea of accelerating the delivery of development to have a situation where it was almost inevitable that a S73B would be needed to change the description.

The key concerns with regard to whether S73B allows the flexibility it really seeks to provide relate to:

1. S73B relates to the whole site when it is often the case that the change sought relates to a section of it. This creates a great deal more administrative burden and requires the updating of supporting documents and assessments (please see below).

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

2. The test of "substantially different " in 73B (5) does not allow for the situation where a section of the site will be substantially different, but in a way that is not harmful to the remainder of the development that has been approved under the existing permission, outside that section of the site. The test and its application need clarification.

3. The effects of 73B (7) are unclear. The LPA must "limit its consideration" to those respects in which the permission applied for would differ from the existing permission. The "consideration" of an application suggests these are the factors to be considered in deciding to grant or not, but it is not clear that this would, for example, preclude requiring an updated amount of affordable housing, across the whole site. Clarity on this point would be helpful.

4. The prohibition in S73B (2) against being able to identify an existing permission as being itself one that is a S73, S73A or S73B permission is a severely limiting factor and curtails the usefulness of S73B in a great deal of cases. It is very often the case, particularly with a large site, that a development change will be needed to a permission that is already a S73 permission. This really needs amendment and certainly clarification as to the relationship of S73B (2) with S73B (3).

Question 27. Do you have any further comments on the scope of the guidance?

The guidance must assist in explaining the proper application of the tests of "substantially different" and "limits its consideration" to address the issues set out above.

The substantially different test could be said to capture degrees of change not degrees of acceptability and lead to a tightening of what gets approved under S73B rather than accelerating the delivery of development. Guidance needs to address this, as well as show to show that the substantially different test is a relatively high bar.

For the reasons set out above a great deal of clarity is required in guidance as to the meaning and application of the limit of what is to be considered when determining an application and what can be added or changed beyond the thing which is sought in the application when permission is granted.

Question 28. Do you agree with the proposed approach for the procedural arrangements for a section 73B application?

Yes.

Question 29. Do you agree that the application fee for a section 73B application should be the same as the fee for a section 73 application?

Yes.

Question 30. Do you agree with the proposal for a 3 band application fee structure for section 73 and 73B applications?

Yes.

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

Question 31. What should be the fee for section 73 and 73B applications for major development (providing evidence where possible)?

It is proposed that the fee for S73 and S73B applications be proportionate to the work necessary to consider the proposed variations, but not exceed full cost recovery. HBF wonders, therefore, what evidence may be collated from LPAs on the amount of time it typical takes to transact S73 and S96A applications already.

On the basis, however, that the 'substantially different' test, however it comes to operate in practice, will not result in S73B applications reopening issues of principle or having cause to reweight a planning balance for technical reasons, the costs involved in transacting such application are likely to be fundamentally administrative.

Question 32. Do you agree with this approach for section 73B permissions in relation to Community Infrastructure Levy?

Yes.

Question 33. Can you provide evidence about the use of the 'drop in' permissions and the extent the Hillside judgment has affected development?

The implications for layouts and viability as a result of the Hillside judgement has undermined the delivery of new homes, affordable homes and community facilities. It has had a detrimental impact on the ability of LPAs to demonstrate a five-year housing land supply (5YHLS) and reduced opportunities for SMEs.

The following are all Hillside-related issues that HBF members have had to grapple with.

<u>The delivery of new homes</u>

Case study 1.

- Planning permission for the large-scale redevelopment of a previously developed site was issued immediately prior to the adoption of a new local plan. Planning gain contributions were based on the former local plan.
- The developer of the site then negotiated the purchase (on a subject-to-planning basis) of an adjacent parcel of land. Following a pre-Hillside meeting with the LPA it was agreed that a new full planning application would be required as a 'drop in' since neither a S96A nor a S73 would be appropriate due to the nature of change.
- A full planning application was duly submitted. Post-Hillside, the LPA confirmed that it is satisfied that the new consent would standalone and not prejudice the wider consent obtained by the site owner.
- The site owner, however, is risk averse and wary that the new consent would prejudice the wider consent. Upon the site owner's request, a new full planning application for the whole site will be submitted, resulting in costs and delays and new planning gain contributions.

Case study 2.

- Outline consent was secured for 304 homes. 120 homes are unbuilt and land for 184 has been sold to another developer.

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

- The parcel containing 184 homes included an area to be gifted for community football pitches, but the developer of that element is seeking to relocate the pitches elsewhere and bring forward a care home and assisted living development on that parcel instead.

- As a result of the Hillside ruling, if that care home and assisted living development gains consent the outline permission for the 120 homes will fall away.

Limiting opportunities for SME developers

- A large house builder secured outline consent for 1,260 homes, as well as an enterprise centre, hotel, primary school, and various community facilities, as part of a sustainable urban extension (SUE).

- The large house builder agreed to sell a small parcel of the site to a SME builder.

- The SME builder proposed a different scheme for that particular parcel than that approved as part of the outline consent and so submitted a 'drop in' outline application, subsequently appealing against non-determination.

- At that point, 460 of the 1,260 homes had been built, 260 had Reserved Matters approval and 540 required detailed approval.

- As a result of Hillside the large house builder identified that the success of the appeal would compromise the ability to to deliver the remaining 800 homes because the 'drop in' scheme was materially different to the wider outline permission.

- Consequently, the large home builder was forced to object to the appeal.

- The appeal was dismissed because the Inspector accepted the harm in allowing the smaller scheme to invalidate the wider permission.

Impacts on 5YHLS

- A major SUE on a former brickworks, designed as a collection of villages that sit alongside one another, is being built over a 30 year period. It has a long planning history straddling multiple regimes and eras.

- The original consent for 5,200 dwellings was granted in 1993, but there have been numerous extensions of time and further applications increasing the number of homes.

- A builder has already delivered a village of around 860 homes and purchased a further phase of 243 homes with a contractual obligation to buy another 501.

- Post-Hillside, other developers pursuing Section 78 appeals based upon the absence of a 5YHLS have claimed that the judgement invalidates the later consents within the SUE and so should be removed from the LPA's 5YHLS position.

- Legal advice was needed to disproved these claims.

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HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed

Delays to the delivery of new and affordable homes

Case study 1.

- A SUE secured outline consent for 2,750 homes, as well as employment land, a local centre and a school.
- A builder submitted a 'drop in' for 211 additional homes (including 40% affordable housing) within the area proposed for the local centre, which was acceptable to the LPA and permission was about to be granted at the time of the Hillside judgement.
- The LPA was initially confident that the 'drop in' scheme would not obstruct or prevent delivery of the non-residential uses within the original outline consent, but upon taking legal advice it was concluded that it was inconsistent with the original land use and phasing plans.
- The builder resolved to make minor amendments to the phasing plan by way of condition discharge; change the approved land use plan by way of a non-material amendment; and submit Certificates of Lawfulness to provide assurances that the wider outline was secure upon implementation of the 'drop in'. This will result in a 12-month delay.

Case study 2.

- Two Reserved Matters submissions were approved so that an outline consent for 450 homes could be build out in two phases. A 'drop-in' permission secured an additional 20 homes within Phase 1 and was subsequently implemented.
- The builder subsequently sought to dispose of a number of completed homes within Phase 2 to a Registered Provider as non-S106 Agreement affordable homes. This disposal was delayed by a number of months because of concerns that the homes may not be lawful given that they had been built after the 'drop-in' permission had been implemented.

Detrimental impacts for viability and layout

- Please see the image below.
- Full planning permission for 429 dwellings, along with associated public open space, landscaping, drainage attenuation areas and access roads was approved in 2019. Builder 1 controls parcels A, B and C. Builder 2 controls parcel D.
- In May 2021, Builder 1 submits a full application to re-plan areas A and B to deliver an additional 21 homes.

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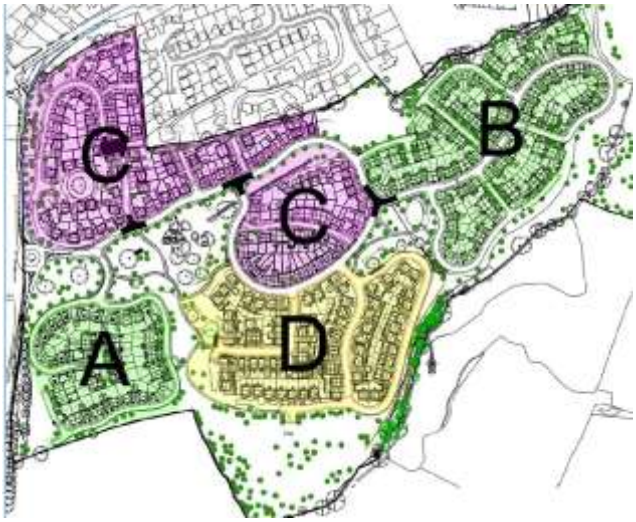
HBF House, 27 Broadwall, London SE1 9PL
Tel: 0207 960 1600
Email: info@hbf.co.uk Website: www.hbf.co.uk Twitter: @HomeBuildersFed



- Builder 2 subsequently submits and secures approval for a S73 plot substitution on area D.
- A resolution to grant permission for the replan of areas A and B was finally conferred by a planning committee in January 2023.
- Hillside presented Builder 1 with two options:
    - Phase the delivery so that areas C and D are built out before commencing on A and B, but works are significantly advanced in the build programme for areas A and B.
    - Submit a new application for A, B and C. The LPA has, however, adopted new Supplementary Planning Documents that would be applicable in a new application and would likely have an adverse impact on layout and viability.

Impact on community facilities

- Outline planning permission was granted for a mixed-use scheme comprising 325 homes, employment space, a health centre, a community centre, retail unites and a public house.
- The permission has been implemented and the builder is seeking to dispose of the commercial and retail elements to an investor.
- The potential investor is seeking to amend the commercial element to deliver additional floorspace. This was viewed as a material change as both the layout and description of development depart from the consented scheme. Implementation of the 'drop-in' permission could, therefore, render the residual (undeveloped) homes unlawful.

Undermining strategic schemes with multiple developers and phased development

- A builder has purchased a phase of a wider development, the permission for which includes a condition requiring the development to be build out in accordance with an approved masterplan.
- The LPA has an interest in a phase that comprises employment space, an extra care facility and a Park & Ride.

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- The LPA secured a ‘drop-in’ permission for an alternative development on this phase that comprises employment space and 80 homes.

- Hillside compromises the builder’s ability to deliver its housing phase because the original permission can no longer be built out.

Question 34. To what extent could the use of section 73B provide an alternative to the use of drop in permissions?

As stated, HBF welcomes acceptance of the need for the planning system to respond to recent caselaw on the treatment of overlapping permissions and welcomes attempts to maintain flexibility, especially for the type of large, multi-phase developments that have come to dominant land supply.

Savills[11] has identified, for example, that the average size of a local plan allocation in 2011 was 35 hectares. Between 2012 and 2016 that average had risen to 60 hectares. Between 2017 and 2021 it was 69 hectares. There is a similar pattern in the number of sites gaining full consent. In 2012, sites with capacity for over 1000 homes comprised less than 2% of all consents granted. That proportion had risen to 10% by 2020

As stated above, there are concerns as to the effectiveness of a S73B application to address the flexibility that is sought.

These are:

1. S73B relates to the whole site when it is very likely the case that the change that would have been sought via a "drop in" would relates to a section of it.

    a. This results in a great deal more administrative burden and cost in updating supporting documents and assessments for the whole site.

    b. On a large site, that has been sold to different parties, often after the initial grant of permission, the ability to pursue an application on the whole site is likely to create significant and perhaps irreconcilable tensions between landowners, developers and funders, some of whom would be content with the permission they already have and some of whom may want their own changes on their parcel of the site.

    c. Further, this could create situations where some parties developing a large site want to continue with the original permission and some, on different areas of land want to proceed with differing S73B permissions. The risk of Hillside-related issues could be increased.

[11] https://www.savills.co.uk/research_articles/229130/347962-0

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2. The test of "substantially different " in S73B (5) does not allow for the situation where a section of the site will be substantially different in a way that is not harmful to the remainder of the development that has been approved under the existing permission. As stated above, the test is aimed at degrees of difference, not degrees of harm. There is no guidance on the interpretation or application of this test. The consultation suggestion (91) that a commercial development phase could be swapped for a cinema, is far from a clear outcome in terms of how LPAs are likely to interpret and apply the "substantially different" test. On the face of it, one can easily see LPAs viewing a cinema as substantially different to commercial use such as offices. The test, its meaning, and its application needs clarification (or modification to address harm rather than simple difference), to specifically address the Hillside issues that arise from the use of "drop in" applications.

3. The effects of S73B (7) are unclear. The LPA must "limit its consideration to those respects in which the permission applied for would… differ in effect from.." the existing permission. The "consideration" of an application suggests these are the factors to be taken into account in deciding to grant or not, but it is not clear that this would, for example, preclude requiring an updated amount of affordable housing across the whole site (or any other such issue arising from a change in policy since the existing permission was granted). Clarity on this point would be welcomed.

4. Finally, there is a time limitation to the availability of using S73B (and indeed S73) as they cannot be used to extend time for the submission of reserved matters. Consequently, if the need to change a scheme arises after reserved matters have been submitted and approved and when no more can be submitted, S73B is completely ineffective. This sort of change may be entirely sensible in planning terms but may be only apparent towards the end of a development programme.

The greatest historic use of "drop in" applications has been to address a change needed in a particular part of a site, which may be a change of the proposed use within an individual phase or the re-planning of part of a layout.

The key to addressing Hillside issues is to allow a LPA the ability to approve discrete planning applications that cover an area of a site where change is sought, whilst allowing the decision maker to determine how the change affects the rest of the development overall, and whether that effect would be harmful. If such a change is not harmful, and permission is to be granted, then the law must allow it to be granted with certainty that it does not prevent continued reliance on the existing permission for the rest of the development site.

Naturally this must consider the cumulative position of earlier changes that have already been approved. It follows, to allow this cumulative assessment, that such a new "drop in" would also need to preclude reversion to the earlier permission on the section of the site in question.

It is likely that this would best be achieved by the introduction of new primary legislation. Indeed, it is understood that S73B was not drafted to address the effects of Hillside, but rather to address the effects of Finney. It is for this reason that HBF engaged with Government in the consultation stages leading up to Levelling Up & Regeneration Act 2023 and suggested amendments to the Levelling Up & Regeneration Bill (as it was at the time). It may well though be possible to achieve the same result via a development order/development order amendment.

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Question 35. If section 73B cannot address all circumstances, do you have views about the use of a general development order to deal with overlapping permissions related to large scale development granted through outline planning permission?

The Secretary of State's power to make a development order under S59 of the Town & Country Planning Act is broad. A development order could grant permission for specific development or classes of development, or it could provide for the grant of permission by the LPA in accordance with the provisions of such an order. It could be a general order applicable to all land or be specific to certain land.

Without greater clarity as to what is being suggested in this consultation, it is difficult to provide any meaningful or detailed response.

Noting the flexibility allowed by development orders, however, and the need for an early solution to a problem that is delaying and causing uncertainty with the delivery of much needed homes and other forms of development, it may be possible to achieve the objective set out above in answer to Question 34 via such secondary legislation.

The key is to allow LPAs to determine "drop in" applications (having regard to the wider approved scheme and the effects on it) without the concern of such an approval then having the effect of cancelling the ability to rely on the existing permission for the rest of the site.

This may be able to be achieved through a development order, or an amendment to existing orders. If the objective that is set out above in relation to the answer to Question 34 is achieved via a development order, it would be very welcome and HBF would also welcome the opportunity of discussing the details of this in due course.

It will be important, however, to make sure that a development order is able to deal with all sites where Hillside issues now arise. This is not just large sites, or just sites with outline permissions, but extends to smaller sites with detailed permissions.

It is important that any development order solution does not become a blunt tool that would struggle to address the specific facts and circumstances of the planning issues in individual cases. Smaller sites have their own particular facts and circumstances but can be just as much be affected by Hillside issues. A significant part of new homes delivery is on smaller or medium sized sites, not just those that are for many hundreds or thousands of homes.

The consultation specifically asks if the focus should be on outline permissions and for large scale phased developments. If the matter was focused on such permissions, it would fail to address many of the real issues that occur in particular:

1. Re-plans for housing layout on sections of a site that has full permission, or reserved matters are approved and no opportunity for more to be submitted regardless of the overall scale of the site.

2. Smaller or medium sized sites that provide for a significant part of overall delivery and also have Hillside-related issues.

For these reasons whilst HBF welcomes the possibility of new development orders to address Hillside issues, the detail of what is suggested will be critical and HBF would welcome the opportunity to discuss this matter further.

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Question 36. Do you have any views on the implications of the proposals in this consultation for you, or the group or business you represent, and on anyone with a relevant protected characteristic? If so, please explain who, which groups, including those with protected characteristics, or which businesses may be impacted and how. Is there anything that could be done to mitigate any impact identified?

HBF offers no comment.

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