

PEBA The Planning & Environment Bar Association

RESPONSE TO DLUHC CONSULTATION ON “AN ACCELERATED PLANNING SYSTEM”

Introduction

1. This paper is the response of the Planning and Environment Bar Association (PEBA) to the consultation on “An Accelerated Planning System”.
2. PEBA comprises practising barristers who specialise in planning, local government, environment and related subjects including compulsory purchase and compensation. PEBA members advise and act for both local planning authorities and developers at all stages of the planning process and are able to provide views based on considerable knowledge and experience. PEBA does not represent any sectional interest.
3. This response to consultation has been prepared with the assistance of members with significant experience both advising on, and advocating for parties in connection with, planning appeals before the Secretary of State’s Planning Inspectors across the full spectrum of procedures, including post decision statutory challenges.
4. Answers to the Questions in the consultation paper are provided in Annex 1. However, PEBA considers that there are fundamental issues which need to be considered but are not raised by those Questions.
5. In summary, it is acknowledged that changes are required to improve and accelerate the current planning system. However, serious concerns are raised as to whether the particular proposals are workable in practice, particularly given well known resourcing issues of local planning authorities, and whether they may end up being counter-productive and lead to further delays overall.

The Accelerated Planning Service

6. The proposals require all local planning authorities to offer an Accelerated Planning Service for major commercial applications, subject to a number of exceptions. The

applicant would pay a higher planning fee to the authority which, in exchange, would be required to determine those applications within 10 weeks rather than the 13-week statutory time limit, with a guarantee that the fee would be refunded if the application was not determined within that timescale.

7. The proposals would affect relatively limited numbers of applications at the outset given that they would not apply to EIA development; to applications subject to Habitats Regulations Assessment, to applications within the curtilage or area of listed buildings and other designated heritage assets, Scheduled Monuments and World Heritage Sites; to retrospective development; nor to minerals and waste development. However, it is noted that it is intended to subsequently explore the extension of the Accelerated Planning Service to similar major infrastructure and residential developments which would have far wider implications.
8. The fundamental objective of accelerating the planning service provided by local planning authorities is undoubtedly a laudable aim. Nonetheless, we have concerns as to the practical workability of the present proposals in a number of important respects and, most importantly, due to the continuing lack of resources available to authorities to deliver them.
9. It is noted in paragraph 7 of the consultation document that the current average time to determine a major planning application is approximately 28 weeks. The reduction to a mandatory 10 week period would amount to a dramatic decrease in present timescales. No particular justification is given for that particular period being proposed, which would evidently have significant resource implications on local planning authorities in order for them to achieve that huge reduction in present timescales.
10. Moreover, the proposals take no account of the implications on the timescale for determination of applications arising from the delivery of consultation responses, particularly from statutory consultees which are frequently not received promptly. Several public bodies are likely to be consulted on major applications, such as National Highways, the Environment Agency, Natural England and/or Historic England, and their responses and input to individual applications are of utmost importance. Yet, their timely responses cannot be guaranteed. There is nothing in the proposals to address

such circumstances, which in practice are commonplace. The local planning authority would then either be penalised over a matter outwith its control or risk determining the application without taking into account material planning considerations. In reality, that may result in the authority refusing the application in many such instances in order to ensure the fee was not refunded, an option which planning authorities simply cannot afford to arise.

11. The ability of local planning authorities to determine an application in such a short time frame is dependent upon the quality of the application. It cannot be pre-supposed that an applicant has provided everything required prior to the statutory time period commencing which, in practice, frequently does not arise, often due to matters only arising upon detailed consideration of the application by planning officers. A likely consequence is delays would instead arise prior to the validation of such major planning applications until the information to support the application was 100% complete. Thus, delays in determining a planning application would simply move to the front of the process arising at the stage of validating the application. That is further concerning given that validating planning applications are frequently not qualified planning officers which could lead to further delays in validation.
12. There is also the risk that applicants may deliberately delay providing information after validation of an application in the hope that they would be entitled to a full refund.
13. The proposals take no account of committee cycles which is a particularly relevant issue for major applications. The statutory time limits may in practice be even shorter when the period awaiting the next relevant committee date is factored in.
14. A further concerning implication is the proposals are likely to result in more refusals of planning permission if planning authorities are required to meet the reduced statutory time limits. A scheme which may well have been capable of amendments to make it acceptable if further time was available for discussions would instead be refused consent. An application which may have been able to acceptably address statutory consultee concerns if further time was available would instead be refused. That in turn will result in an increased number of planning appeals involving additional resources and a materially longer period of delay before the grant of planning permission. It is in

the interests of both developers and local planning authorities to work collaboratively to seek to overcome planning harm rather than having planning permission refused due to concerns over the consequences of not meeting statutory time limits.

15. Significantly, there is nothing in the proposals to address the ongoing seriously insufficient resources of local planning authorities, both in terms of staff and budgets, which is a substantial element of the underlying problem resulting in authorities not meeting the present statutory time limits. Local planning authorities are struggling to recruit and retain planning personnel. Many of us are aware of stretched teams and a high turnover of staff. The accelerated time limit would place further burdens on planning officers and planning teams affecting the quality of decision making and morale. There are insufficient numbers of individual planning officers available with the capacity to ensure all the proposed major applications can be dealt with within the statutory time limits. Unless and until local planning authorities are properly resourced, the present proposals are unworkable in practice.

Planning performance and extension of time agreements

16. Paragraph 35 of the consultation document acknowledges the benefits extension of time (“EOT”) agreements can offer to both local planning authorities and applicants. However, concerns are expressed over such agreements being used by authorities to “compensate for delays in decision-making, which masks poor performance and does not incentivise local authorities to determine applications within the statutory time limit”.
17. In our view, the evidence base presented underlying such concerns is somewhat lacking and does not serve to demonstrate the allegations made. In paragraph 36, the statistics note the increase in use of EOT agreements for major applications from 42% in the 2 year period ending in March 2016 to 75% in the 2 year period ending in March 2023, and from 9% to 41% during the same period for non-major applications. It is further stated that approximately only 10% of local planning authorities determined 70% or more non-major applications within the statutory 8-week time limit, and 1% of authorities determined 60% or more of major applications within the statutory 13- or 16-week time limits.

18. Yet, those bare statistics do not distinguish between applications where only one EOT agreement has been made and those where there were repeat EOT agreements. Indeed, it is pointed out in paragraph 37 that the new Planning Performance Dashboard displays performance figures over a 12-month period and includes performance within statutory time limits, but excluding *all* EOT agreements.
19. They also do not indicate the reasons for the EOT agreements in specific cases, such as to enable further amendments to be made to a scheme or to await the provision of further supporting information from the applicant or to await consultee responses which have not been delivered within the statutory time limits. It cannot be assumed that EOT agreements are being used inappropriately merely in order to compensate for delays.
20. Moreover, EOT agreements can be highly beneficial to both applicants and local planning authorities, particularly for more complex applications. They enable further material information to be forthcoming; amendments to be made to result in improved schemes which would otherwise have been refused planning permission; and enable all consultee responses to be delivered and taken into account. Importantly, both the applicant and local planning authority enter into any such agreements. It is not a unilateral mechanism which an authority is able to employ as a delaying tactic. Rather, it is an extremely important tool promoting collaborative working between both parties. If an applicant and authority are both prepared to agree an EOT to achieve a pragmatic and beneficial outcome to them both, that should not be precluded and should not be limited to use “in exceptional circumstances” as proposed at paragraph 42.
21. Indeed, somewhat inconsistently, paragraph 42 goes on to acknowledge that EOT agreements may still be required in more instances for major applications. The evidence does not justify restricting EOTs to only “exceptional circumstances”. Many major applications involve numerous and complex planning issues which need to be addressed before they can be determined, such as highway considerations, flooding, heritage and biodiversity to name, and many are subject to a planning performance agreement. The quality of decision-making would be significantly reduced if such issues were not given due consideration due to the restriction on the use of EOT agreements.

22. In addition, there would be significant difficulties arising in practice if EOT agreements were restricted as proposed. No account is taken of consultee responses not being received promptly, particularly from statutory consultees. A number of bodies are likely to be consulted on major applications, such as National Highways, the Environment Agency, Natural England and/or Historic England, and their timely responses cannot be guaranteed. There is nothing in the proposals to address such circumstances, which in practice are commonplace. The local planning authority would then either be penalised over a matter outside its control or risk determining the application without taking into account material planning considerations. In reality, that would no doubt result in the authority refusing the application in many such instances if an EOT agreement could not be made.
23. Crucially, there is nothing in the proposals to address the ongoing seriously lack of resources of local planning authorities, both in terms of staff and budgets, which is a substantial part of the problem resulting in authorities entering into some EOT agreements due to having been unable to determine an application within the time limits. Planning officers are already over-worked and struggling to meet statutory time limits, with a number of authorities facing bankruptcy. A streamlined and efficient pre-application service would need to be provided to address as many issues as possible in advance of the submission of an application. The resources are simply not available for that. Similarly, there are insufficient numbers of individual planning officers available with the capacity to ensure all applications can be dealt with within the statutory time limits. Unless and until local planning authorities are properly resourced, the present proposals are unworkable in practice.
24. The proposals also fail to take into account that for many applications, especially major ones, all of the requisite information is not provided at the time of the application. They pre-suppose that an applicant has provided everything prior to the statutory time period commencing which, in practice, frequently does not arise, often due to matters only arising upon detailed consideration of the application by planning officers. A local planning authority should not be placed in the situation where they either request the information and risk the potentially severe consequences of not meeting the statutory time limits, or they determine the application in the absence of such information. Neither of those options are in the interests of proper planning.

25. The proposals take no account of committee cycles which is a particularly relevant issue for major applications. The statutory time limits may in practice be even shorter when the period awaiting the next relevant committee date is factored in. An EOT agreement being made to reflect committee cycles and the next available date for determination of an application would again be an entirely appropriate and reasonable approach to take.
26. A further implication of the proposals is they are likely to result in more refusals of planning permission if planning authorities are to meet the statutory time limits without making EOT agreements. A scheme which may have been capable of amendments to make it acceptable if further time was available would instead be refused consent. An application which may have been able to acceptably address statutory consultee concerns if further time was available would instead be refused. That in turn will result in an increased number of planning appeals involving additional resources and a materially longer period of delay before the grant of planning permission. It is in the interests of both developers and local planning authorities to work collaboratively to seek to overcome planning harm rather than having planning permission refused due to statutory time limits and the restriction on EOT agreements.
27. Ultimately, although the speed of decision-making is important, it should not be prioritised over the quality of decisions. If both an applicant and a local planning authority seek to work collaboratively and to enter into an EOT agreement to achieve a beneficial outcome, that agreed approach ought not to be restricted given that it is an approach which is evidently in the best interests of proper planning. As an alternative, the ten week period might be re-started in certain specified circumstances, such as where amendments are made to the application, or a statutory consultee fails to respond within the requisite timescale.

Simplified process for planning written representation appeals

28. PEBA welcomes the Government's recognition¹ that "*a fair and transparent appeal process is central to the operation of our planning system*". Moreover, that the "*timeliness of appeal decisions is essential to give certainty to developers and other*

¹ Paragraph 56 of the consultation document.

appellants and also to communities that need to know what development is acceptable in their areas”². It is also recognised that one way in which that could be done is to expand the simplified appeals procedure to cover more written representation appeals. However, PEBA does not agree that expansion in the manner described is the correct way to strike the balance between opportunities in the appeal process to provide relevant evidence to the Planning Inspectorate and the need for timely decision making.

29. It is understood³ that where appeals are considered under the simplified appeals procedure, they would be based on the appellant’s brief appeal statement plus the original planning application documentation and any comments made at the application stage (including those of interested parties). There would be no opportunity for the appellant to submit additional evidence, to amend the proposal, for additional comments to be made from interested parties or for the main appeal parties to comment on each other’s representations. This would be particularly iniquitous in non-determination appeals – where the exact basis of a Council’s opposition to the scheme may not be known until after the appeal has been lodged.
30. The Government considers that the expansion of the simplified appeals procedure would reduce pressure on local planning authorities by removing the need for them to submit an appeal statement and final comments (as set out a paragraph 59 of the consultation document). In our view that is misguided. Rather, it could result in increased pressure, albeit in different areas of work.
31. The consultation document suggests that local planning authorities could place reliance on the decision notice or officer’s report (paragraph 59). It is acknowledged that article 35(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 requires a decision notice to “*state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision*”. However, as they are necessarily precise, reasons for refusal do not include sufficient detail and written argument in support of a local planning authority’s decision such as to be an adequate replacement for a statement of case. Nor should more convoluted reasons for refusal be encouraged. With

² Also at paragraph 56.

³ As set out at paragraph 65 of the consultation document

local planning authorities under so much pressure already, mainly through a lack of adequate resourcing, many authorities produce Officers' reports which are very short⁴. That is not necessarily an issue at application stage; however, if there is the potential for an officer's report to become, in effect, the local planning authority's appeal statement, they would need to be more detailed.

32. At present, because local planning authorities can produce an appeal statement, they can more appropriately focus their time and resources to producing the additional detail required for an appeal when it becomes clear that one has been made. If more appeals are to be considered under the simplified procedure with that opportunity to be removed, local planning authorities would need to spend more time and resources producing much more detailed officers' reports as a matter of routine on the majority, if not all, applications just in case they go to appeal and are decided under the simplified route. Moreover, it might encourage local planning authorities to more frequently seek legal advice at the point of drafting officers' reports to ensure that any legal submissions they might otherwise have made in an appeal statement are covered in the officers' report at application stage, costing more money and requiring more time. As many decisions are not, in the event, appealed this additional pressure on time and resources could prove problematic for already stretched local planning authorities unless the Government has realistic plans to ensure that they are more adequately funded. Determining every application is if it might be appealed risks disproportionate officer time at a time when most local authorities operate under severe resource pressure.

33. Pause for thought should also be given in respect of cases whereby the local planning authority's Committee overturned a recommendation for approval. In such circumstances, the local planning authority would still have no opportunity to submit an appeal statement under the proposals and the only real indication of the basis for the decision would be the decision notice. It is difficult to see how such a document, which should be concise, can be seen as a suitable alternative for an officer's report or appeal statement. The risk is that such decision notices will become overly detailed to compensate for the lost opportunity to provide further information should an appeal be brought.

⁴ Particularly when decision making is delegated.

34. An increase in front-loaded pressure is not confined to local planning authorities. Though appellants would be able to produce a '*brief appeal statement*', it is unclear from the consultation paper what exactly that means. It is understood that, at present, the householder appeals service does not allow for appeal statements from either party and therefore the reference to a '*brief appeal statement*' is likely to mean a statement of grounds. If that is so, appellants would lose the opportunity to respond in any detail to the specific reasons for refusal. That is particularly problematic where the decision notice includes as or in reasons for refusal matters which were not raised with appellants or in clear contention during the progress of the application. Not only could this result in appellants writing detailed grounds of appeal which in effect amount to a detailed appeal statement but local planning authorities would not have a fair opportunity to produce their own appeal statement or respond in any other way.
35. It is highly likely that applicants will attempt to address this issue by front-loading information at application stage as they will need to try to pre-empt potential reasons for refusal at that point unknown. Though the Government appears to welcome this in the consultation document⁵, it is our view that it will likely encourage the submission of an unnecessary level of detail at application stage to pre-empt possible issues which could arise at any appeal. That not only means more work and effort for applicants but also for local planning authorities in considering and processing the same. Both sides may incur significant additional costs, including in respect of legal representation to the extent that they consider input is required at application stage to deal with anticipated legal points which might otherwise be left to appeal.
36. The consultation document suggests that expanding the simplified process would encourage applicants to submit amended proposals instead of appealing⁶. However, that too is unrealistic. Pursuant to the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2023, which came into force on 6th December 2023, the previous fee exemption, which allowed applicants to submit a second application without paying a fee, in certain circumstances, has been removed for any valid application submitted

⁵ See paragraph 59 bullet point 2 of the consultation document.

⁶ See paragraph 59 bullet point 2 of the consultation document.

after 5th December 2023. Accordingly, rather than an applicant being encouraged to resubmit should an application be refused, it has arguably become more attractive appeal the decision and take the chance. They could win; but even if they did not, they would have an appeal decision providing an effective blueprint for what needs to be done to rectify their submission. Such a perverse incentive is unfortunate.

37. The Government should also be mindful of the consequences of expanding the simplified process insofar as it would impact interested parties. It must be remembered that planning is supposed to be publicly accessible, with the ethos behind the Localism Act 2011 and the legislative approach since being to give local communities more control over housing and planning decisions. PEBA has real concerns that excluding interested parties from involvement in more appeals through the expansion of the simplified process could risk infringing the principles of natural justice, removing their fair opportunity to comment at the appeal stage. This is particularly important because it is the experience of our members that frequently issues arise which could not have been seen at the application stage; be that through unanticipated reasons for refusal or other changes in circumstance.
38. Moreover, local planning authorities would be left with the additional burden of ensuring that interested parties are properly notified at the application stage that they may not have any further opportunity to comment should the application be refused, and of ensuring that adequate opportunities are made for interested parties to provide additional representations should proposals be amended during the application. Though to some extent this can be done through the amendment of standardised documents, it is anticipated that local planning authorities will still be left fielding queries and potentially complaints adding to their workload.
39. If there is an expansion of the simplified process, PEBA has concerns as to the suggested scope⁷, particularly the inclusion of appeals relating to refusing lawful development certificates. Such appeals often require the formal testing of evidence for an Inspector to reach an appropriately informed and sound decision. That is particularly so where lay evidence is provided as to the nature, extent, and duration of a use. The

⁷ As set out at paragraph 61 of the consultation document

Government acknowledges that such testing of evidence is more suitable to hearing or inquiry⁸. On the other hand, the proposed list does not include appeals in respect of prior approval applications which the Government may wish to consider as candidate where there is limited complexity in the issues concerned.

40. The Government acknowledges⁹ that “*there may also be other limited scenarios where the Planning Inspectorate may decide that the simplified route is not appropriate, such as where evidence needs to be tested. In such cases, the appeal would continue by the current process*”. It is right that the Planning Inspectorate should retain the power, where they have it now, to change the appeal procedure to a hearing or inquiry or to follow the current non-simplified written representation procedure¹⁰. That is a necessary and important protective factor. However, it is difficult to see how there would not be significant workload implications because of the expansion of the simplified procedure where, for the reasons already stated, it is likely that detailed submissions may be made as to why the same would not be the most appropriate procedure, possibly with the assistance of legal representation. Those submissions will need to be considered and responded to by the Planning Inspectorate, including the consideration of any documentation on file to inform such a decision, which is a time-consuming task.

41. Also relevant to the effect of an expanded simplified process on Inspectors is the loss of bespoke appeal statements from each party focused purely on the reasons for refusal. Instead, Inspectors would instead have to closely review the application documentation to discern for themselves what the respective parties’ positions might be on each particular point.

42. PEBA agrees that all existing time limits for lodging an appeal should remain unchanged. Given that the consultation document refers to the hope that the applicants may choose to resubmit over appeal¹¹, it would seem counterintuitive not to provide

⁸ <https://www.gov.uk/government/publications/criteria-for-determining-the-procedure-for-planning-enforcement-advertisement-and-discontinuance-notice-appeals/criteria-for-determining-the-procedure-for-planning-enforcement-advertisement-and-discontinuance-notice-appeals>

⁹ At paragraph 62 of the consultation document.

¹⁰ See paragraph 60 of the consultation document.

¹¹ See paragraph 59 bullet point 2 of the consultation document.

sufficient time for sensible discussions between the parties to take place. The alternative is that applicants may well appeal just in order to preserve their position.

43. Pulling together our concerns as set out above, PEBA see a real risk that, rather than resulting in a more streamlined procedure, the proposals would lead to an increased number of refusals of planning permission at a local level, a greater number of planning appeals and potentially an increased number of High Court challenges. The country is amid a housing crisis and local planning authorities are under resourced both financially and in terms of numbers of planners available to service work. By requiring decisions to be made within a shorter timeframe and cutting down local planning authorities' use of extension of time agreements, but also expanding the number of appeals to be considered through a simplified process where appeal statements are not completed, local planning authorities may feel it prudent to simply refuse applications when pressured. Not only that but the simplified process in failing to allow parties¹² to fully set out their positions concentrated on the reasons for refusal, and requiring Inspectors to seek out information for themselves, could understandably result in an increase in High Court challenges in respect of both procedure and the substance of decisions.

Implementing section 73B

44. Paragraphs 69-72 of the consultation document sets out why the ability to vary planning permissions in a proportionate, transparent and timely manner is an important and desirable feature in the planning system. It sets out the two legislative routes which are currently available under the Town and Country Planning Act 1990 to allow applications to vary planning permissions: section 73 for variation of a planning condition on a planning permission and section 96A for non-material amendments to a planning permission. The consultation document refers to recent caselaw (*Finney v Welsh Ministers* [2020] 1 All ER 1034) relating to the scope of s.73; and *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30 relating to drop in planning permissions.

¹² Including interested parties.

45. The purpose of introducing section 73B is therefore to ensure there are “effective, proportionate and transparent routes to manage post-permission changes to development” and to “replace” s.73.
46. In 2010, guidance was introduced on “Greater Flexibility for Planning Permission¹³”. Section 96A was introduced to allow for non-material amendments to existing planning permissions. The guidance envisaged that section 73 could be used for minor-material amendments by varying a condition that listed the approved plans by substituting new plans that showed the varied scheme.
47. The effect of caselaw is that the grant of a consent under s.73 creates a new free standing planning permission (*R. (Reid) v Secretary of State* [2002] EWHC 2174 (Admin)) that sits alongside the original permission, whereas a consent under s.96A amends the pre-existing planning permission.
48. As a result of case law, particularly *Finney*, it is now clear that s.73 cannot be used to vary the description of planning permission and a planning permission granted under s.73 cannot have a condition in conflict with the description of development. That position is reflected in national Planning Practice Guidance which states that there “is no statutory limit on the degree of change permissible to conditions under s.73, but the change must only relate to conditions and not to the operative part of the permission”.
49. PEBA is aware that this has led to a practice whereby descriptions of planning permissions minimise the level of details provided to reduce the potential for future scheme amendments to conflict with the description.
50. We are of the view that this results in vague descriptions and a lack of transparency (for example the number of dwellings). It is therefore agreed that guidance should encourage clearer descriptors of development for planning permissions.
51. The Levelling up and Regeneration Act 2023 (LURA) has introduced a further option for ‘varying planning permissions’. Section 73B allows for changes provided that they

¹³ <https://assets.publishing.service.gov.uk/media/5a78b4e940f0b62b22cbc245/1729942.pdf>

will not be “*substantially different*” from the existing planning permission. It attempts to provide an answer to the limitations of s.73 by allowing consideration of applications to modify both the conditions and the description of development. Like s.73, section 73B also does not amend the original permission, but creates a new free-standing permission which sits alongside the original permission but with varied terms.

52. Section 73B may deal with the limitations of s.73 to certain applications but it should be recognised that the current legislative framework allows applications to vary existing planning permission using a combination of s.73 and s.96A. Unlike s.73, s.96A enables a non-material amendment to be made to the grant or operative part of a planning permission and not merely the conditions. An amendment under s.96A has the effect of amending the permission which has previously been granted which s.73B will not. It should be noted that the consultation does reference the cases of *Armstrong* and *Fiske* and states that it acknowledges that “*section 73 is not limited in scope to minor material amendments*”. In some circumstances it may be that the scope of s.73 is not limited and that may need to be considered if flexibility is the desired outcome.

53. As set out above, the section 73B route will be subject to a test to ensure that the new planning permission is not “*substantially different*” to the existing planning permission but without defining “*substantially different*”.

54. We note that there will be little guidance on the definition of “*substantially different*” and that factors such as location, scope of existing permissions on the site and the nature of the proposed changes could all be relevant. There are obvious problems with guidance being too prescriptive. However, unless there are some parameters, we are of the view that the likely result is litigation which will have financial consequences and leads to uncertainty for both local planning authorities and applicants.

55. It is understood from paragraph 83 of the consultation document that the aim is for the procedural requirements set out in regulations for a section 73B application to be “*proportionate reflecting the position that the development proposed in the application is a material variation to an existing permission while still ensuring there is transparency about the proposed variation*” and that “*Local communities should be*

aware of proposed variations so they can make representations: the section 73B route is not a mechanism to undermine scrutiny.”

56. Our comments on the procedural requirements proposed are as follows:

- a. information requirements – *this is agreed as if the variation is not “substantially different”. However, this does depend on what “substantially different” means in practice.*
- b. publicity requirements – *this is agreed to ensure those potentially affected are aware that there are variations being applied for.*
- c. Consultation with statutory consultees– *this is agreed on the basis of the not “substantially different” test although, again, it depends what this means in practice and it is further noted that the scope for decision making on consultation being left to LPAs could lead to challenges.*
- d. EIA and HRA requirements would apply as for section 73 permissions and a similar approach would be taken to Biodiversity Net Gain – *this is agreed as legally necessary.*

57. The consultation document sets out that the application fee for a section 73B application should be the same as the application fee for a section 73 application. There is a concern highlighted at paragraph 86 of the consultation document that if the fee is not aligned to the fee for a s.73 application it could encourage applicants to continue to use s.73, thus undermining the purpose of the reform. However, if s.73 is to remain then it could continue to be used and may be the more appropriate route in many circumstances, potentially in conjunction with s.96A in the event that an amendment to the description is required.

58. Paragraph 87 of the consultation document recognises that the current flat fee for a section 73 application does not capture the amount of work often undertaken in relation to a section 73 application for a major development. It proposes 3 separate fee bands for section 73 and 73B applications related to householder applications where the fee would be set lower at £86, non-major development (other than householder applications) where the fee would remain at £293 and major development where there would be a higher fee (less than the fee for the original planning application and

proportionate to the work necessary to consider the proposed variations but not exceeding full cost recovery).

59. We are of the view that the fee should recognise that s.73B could be the default route for general material variations rather than simply variation of a specific condition. Such applications could be significantly more time-consuming. There are well-known issues in resourcing planning departments and we are aware of such constraints. Imposing further burdens without proper charging may have knock on effects in, for example, quality of decisions made. This could lead to appeals or challenges and/or further financial consequences. Ultimately this further undermines resourcing of planning departments.

60. The fee should ensure that it reflects the work involved with dealing with such an application. It is noted that local planning authorities have been asked for evidence as to work involved in an average s.73 application for a major development. However, it must be recognised that the work involved in a s.73B application could be more time-consuming and it may not be possible to simply extrapolate average timings for different applications across to s.73B. If fees do not adequately cover the costs involved in dealing with such applications, this imposes burdens on planning departments with possible detrimental effects e.g. poorer quality decision-making leading to appeals and/or challenges.

61. It is proposed that the Community Infrastructure Levy would apply to section 73B in the same way as the levy applies to section 73 as set out at paragraph 88 of the consultation document and we see no legal or practical issues with this approach.

Overlapping planning permissions

62. The consultation document includes a section on “Overlapping planning permissions” and sets out at paragraphs 89-93 the effect of case law such as *Hillside Parks Limited v Snowdonia National Park Authority* [2022] 1 WLR 5077 and *Aysen Dennis v London Borough of Southwark* [2024] EWHC 57 (Admin). It summarises *Hillside* as confirming existing caselaw that “full planning permissions are not usually severable. That is to say, parts of the permission cannot be selectively implemented and that, if a new permission which overlaps within an existing permission in a material way

commences, should the carrying out of the new permission make it physically impossible to carry out the rest of the existing permission, it would be unlawful to continue further development under the existing permission". The ability to use 'drop in' permissions where a subsequent permission is granted for an alternative development on a section of a larger development previously granted permission and still being implemented is now questioned. It is suggested in the consultation that such drop in permissions have been a flexible way of enabling changes to a specific phase to be managed without having to seek a new planning permission for the entire development.

63. The government believes that the new section 73B route provides a new way of dealing with such changes to a specific phase of a large scale development granted through outline planning permission in many cases. The consultation document provides examples and also recognises that there could be circumstances where the section 73B route may not be appropriate. It could be used to vary underlying outline permissions for master-planned schemes.
64. To the extent that both section 73B and a drop in permission might be used to modify/vary aspects which were not "*substantially different*" to the original planning permission, the end result should be the same for both routes and section 73B could provide an alternative and may well reduce the use of drop in permission applications.
65. However, it would not be a complete alternative to all drop in permissions because, for example, the result would be a new planning permission with a variation on one part of the original planning permission which may not be as focussed as a drop in permission which may, for example, deal with a specific area of a large site with several phases. It would also be constrained by the "*substantially different*" test.
66. There may be complications in obtaining a new planning permission for an entire site where development has started and different plots are being developed by different developers, particularly if s.106 agreements have to be amended and/or re-negotiated.
67. The consultation document also seeks to explore an alternative procedure if the section 73B route cannot address all the circumstances where there are issues with overlapping

planning permissions. One option being considered is a framework through a new general development order.

68. There is little information provided as to how this might work and so we make the following preliminary observations:
69. If s.73B cannot address all circumstances, there are a number of routes available to modify a grant of planning permission: s.73, s96A (and s.73B). There is also the option of applying for a fresh planning permission. It is not immediately obvious whether a general development order is necessary.
70. No information has been provided as to the scope of the possible general development order or possible wording.
71. No information has been provided as to how it might be possible, via a general development order, to address the legal effect of overlapping planning permissions – the original planning permission and the drop in planning permission.
72. No information has been provided as to the triggers or limitations of the general development order.
73. No information has been provided as to which planning permissions it would apply and what it would allow.
74. It is foreseeable that there could be issues regarding lack of consultation.
75. It is foreseeable that such a procedure could lead to applicants applying for the minimum to be caught by the general development order knowing that they could then take advantage of the general development order.
76. It is not clear how the general development order would interact with, for example, EIA requirements.

77. It remains opaque as to why the power in s.96A was not extended so as to allow amendments to the pre-existing planning permission which are not ‘substantially different’, and which would have provided a more straightforward way of addressing the issues of drop in permissions raised in Hillside.

Public Sector Equality Duty

78. PEBA notes that the consultation document requests comments in respect of ‘*the Equalities Act 2010*’¹⁴, by which it is assumed the Government is referencing the Equality Act 2010.

79. Increased public participation is a fundamental part of localism and understood to be a desired Government objective. Encouraging public participation should mean encouraging the participation of all members of the public. It can be difficult enough to encourage comments on applications for planning permission from representatives from all facets of society who might be impacted, or indeed benefited, by the same. It requires being able to locate and understand the contents of an application and then to put together a submission in writing. The benefit of hearings and public inquiries is that members of the public can choose to attend the public events and provide their own thoughts orally for the Inspector’s consideration. That is even more important for applications which are less straightforward.

80. Should more appeals be dealt with by way of written representations, particularly through the simplified process, there is a real risk that the Government will see less engagement by members of the public from the communities most impacted (positively and negatively) by development and that people may be excluded from participation.

81. Linked to the Equality Act 2010, this is particularly true of those with protected characteristics which might make engaging with applications more difficult. In particular, the ability to attend and present orally might be preferred by members of the public who are disabled within the meaning of section 6 of the Equality Act 2010, particularly where they are learning disabled or have a condition such as ADHD which can make executive functioning difficult. Even in the context of written representation

¹⁴ Paragraph 94 of the consultation document.

appeals, the ability to be able to consider appeal statements confined to the issues in dispute and respond directly to those can be extremely helpful to enable better comprehension, and in turn valuable responses, from the public but particularly those with a disability.

82. The Government should also bear in mind the need to consider the potential for indirect discrimination on grounds of race in respect of groups such as the Gypsy and Traveller community who are often impacted by planning decisions and are recognised to have the lowest educational attainment out of any ethnic groups in the UK¹⁵. Plainly, removing the ability for further comment and increasing the pressure to respond only in writing at application stage may disproportionately impact such groups.

Conclusion

83. PEBA supports proposals for an Accelerated Planning System in principle, but it has real concerns regarding the financing and resourcing necessary in order to successfully deliver the desired outcomes, and it questions whether some of the proposals will achieve the objectives sought.

ANNEX 1: ANSWERS TO CONSULTATION QUESTIONS

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

In principle, yes, but not the particular proposals.

¹⁵ <https://www.gypsy-traveller.org/wp-content/uploads/2023/10/Education-inequalities-faced-by-Gypsies-Roma-and-Travellers-in-England-briefing.pdf>

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

Yes for the reasons set out at paragraphs 9-15.

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

No. For the reasons set out at paragraphs 9-15 above, there are risks associated with the Accelerated Planning Service and widening the scope increases the risks before the limited service has been tested and monitored.

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?

Yes. For the reasons provided at paragraphs 9-15.

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

No. For the reasons set out at paragraphs 9-15 above, we have concerns about the resourcing of this proposal and the practical realities of implementing it.

b) encourage pre-application engagement

Yes this should lead to better quality applications, but additional resourcing for it is required.

c) encourage notification of statutory consultees before the application is made

No. If an application is not made then there is no trigger for notification of statutory consultees and they would not know the details of the application to assess. This could lead to duplicating work.

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

Don't know. Proper consideration needs to be given to the length of time taken to determine such applications. PEBA does not have evidence in this area.

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**

Please give your reasons

Don't know. We have concerns regarding fee refunds as this will have an impact on resourcing which will have an impact on the ability to provide an accelerated service. Furthermore, delays are not always the fault of LPAs.

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

Statutory consultees also need proper resourcing with a dedicated officer/team to deal with consultation responses.

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

- a. major infrastructure development**
- b. major residential development**
- c. any other development**

If yes to any of the above, what do you consider would be an appropriate accelerated time limit?

In principle yes to all of the above. However, for the reasons provided at paragraphs 9-15, the current proposals, if implemented, should be monitored before further proposals are considered.

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)**
- c. neither**

d. don't know

The discretionary option provides more flexibility.

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 need to be assured that all supporting information to be taken into account was provided with the application.

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?

No - for the reasons set out in the text in paragraphs 16 to 27 above.

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)?

No. In addition to disagreeing with the principle of imposing the suggested performance thresholds for the reasons set out in paragraphs 16-27 above, 50% or more for major applications would in any event be far too high given the complexities generally involved in well over 50% of such applications.

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

Neither. Designation decisions in relation to performance for speed of decision-making should be made based on the current criteria, namely the proportion of applications determined within the statutory time limit or an agreed extended time period for the reasons set out in paragraphs 16-27 above.

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, for the reasons given in paragraph 47 of the consultation document.

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

No as we do not support the proposed new measure for assessing speed of decision-making performance.

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

Yes.

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

No. There may be circumstances on a case-by-case basis where EOT agreements are entirely justified for a householder application and their prohibition for such applications in all circumstances is inappropriate. A preferable approach would be to prohibit repeat EOT agreements.

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?

No for the reasons set out in paragraphs 16-27 above.

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

No, not in the way in which they have been presented. Please refer to paragraphs 28-43 above.

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 from the simplified written representation appeal route?

No. In particular, see paragraph 39 above.

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

Yes, it may be possible to include prior approval appeals. See paragraph 39 above.

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?

Yes. Please see above, in particular paragraphs 29-35, 37-38 and 41.

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, although please note our concerns as to the additional workload to be placed upon the Planning Inspectorate and the parties in making and considering representations. Please see above, in particular paragraph 40.

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. Please see paragraph 42 above.

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)?

Yes, subject to the comments set out in paragraphs 47-49 above.

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

Yes – please see paragraphs 52-53 above.

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

Yes, for the reasons set out in paragraph 55 above.

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?

No, for the reasons in paragraphs 56-59 above.

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

Yes, subject to the comments at paragraphs 56-59 above.

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

Please see comments at paragraph 57-59 above.

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

Yes please see paragraph 60.

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

No, the Planning and Environmental Bar Association does not have such evidence.

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

Please see paragraphs 63-65 above.

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?

Please see paragraphs 66-75 above.

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?

Yes – please see paragraphs 76-80 above.