

Planning for a better future

Our planning manifesto for the government

Manifesto Background Paper 14

Dealing with Overlapping Consents

The modern planning system, when it was put in place via the 1947 Act, was not designed to deal with amendments to planning permissions. The provisions put in place later, and the custom and practice that has grown up, are far from satisfactory. The main difficulty created by the “Pilkington/Hillside” caselaw is, how do you amend part of a planning permission without risking losing the original consent? We need a new comprehensive regime that is specifically designed to deal with amending planning permissions effectively and efficiently. This paper sets out such a system and POS welcomes views on it so it can be refined to meet the needs of the sector.

Planning Officers Society

POS is the single credible voice for public sector planners, pursuing good quality and effective planning practice. The Society's aim is to ensure that planning makes a major contribution to achieving sustainable development in ways that are fair and equitable and achieve the social, economic and environmental aspirations of the community.

We operate in three main ways:

- As a support network for planners in the public sector
- As promoters of best practise in planning
- As a think tank and lobbying organisation for excellence in planning practice

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: landowners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development. It is within this context that we have set out this advice to Government so we can plan together for a better future.

POS Manifesto

This started in early 2014 when we looked ahead to the national parliamentary elections in May 2015. The main parties were drafting their manifestos, so we thought about what we could do to help them. This resulted in Planning for a better future: Our planning manifesto for the next government. The time since then has seen an unprecedented amount of change to the planning system, so our initial planning manifesto for the next government has morphed into an on-going planning manifesto for government.

These are think pieces that tackle a topical area within planning practice and sets out our recommendations for improvement. They comprise a growing series of Manifesto Background Papers that look in detail at specific issues. Those that are still current are summarised in our main Planning Manifesto paper that sets out the current ask from POS to the government.

The views expressed in these documents reflect the initial view of POS. It is a consensus position. It should not be taken as a final position; rather an informed starting point to debate the issues. It is expected that the recommendations will evolve as the debate progresses.

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: landowners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development.

Other titles in the series can be viewed from our website.

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Summary

The modern planning system, when it was put in place via the 1947 Act, was not designed to deal with amendments to planning permissions: the first provision (§73) only made an appearance as an amendment to the 1971 Act, with §96A and §73B following as amendments to the 1990 Act over 75 years later. Custom and practice has grown up over the decades to deal with the challenges, with varying degrees of success. How these procedures should operate has also been finetuned by the courts. The main difficulty created by the “Pilkington/Hillside” caselaw is how do you amend part of a planning permission without risking losing the original consent?

Central to most of the problems faced by the sector is the fact that a planning permission is not severable; it must be implemented “fully”, and a “holistic approach” should be taken. This makes amending part of a planning permission extremely challenging and the only 100% safe way to do it is to apply for the whole thing again. This is excessive and opens up already determined elements to redetermination, with all the risks associated with that.

We need a new comprehensive regime that is specifically designed to effectively deal with the full range of amendments that might need to be made to a planning permission but is designed so that the processes are efficient and only examine the new elements and do not open up already determined and unaltered elements for re-examination.

This paper sets out such a system and POS welcomes views on it so it can be refined to meet the needs of the sector.

1 Introduction: Principles and Mechanisms

- 1.1 In considering amendments to planning permissions, there are two elements at play: legal principles and application mechanisms. We need to understand the former and make sure the latter are in place and operate well. This Manifesto examines the statutory provisions, case law and the implications of making amendments to planning permissions, particularly on larger developments where consents are potentially overlapping. The paper concludes with recommendations for changes that are designed to make the system work better for everyone.

2 Legal Principles

- 2.1 This caselaw¹ saga starts at least 58 years ago in 1966 with a case known as Lucas². This decision had been relied on by developers to argue that two different permissions can be built out on the same site. In this case there were two permissions relating to the same site: one for six larger houses and another for 28 smaller ones. The court held that it was possible to build out two of the larger dwellings according to the first permission and 14 of the smaller ones according to the second.
- 2.2 Caution should be taken before applying this case too widely, as it seems it was determined very much on the particular circumstances of the planning permissions and developments involved. Its wider application may be very limited, as we will see later in Hillside.

Pilkington

- 2.3 The main caselaw principle was established seven years later in 1973 with Pilkington³. In that case, Lord Widgery CJ set down the Pilkington Principle:

“One looks first of all to see the full scope of that which is being done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented.”

- 2.4 The case related to a simple set of circumstances where two planning permissions were granted for the construction of a bungalow on the same plot of land, one had the bungalow located in the centre of the site and the other had it in a corner. Whether the applicant was trying to (underhandedly) get two houses on the one piece of land or not is lost in the mists of time, but it seems likely that the courts were making sure that he couldn't!

¹ Our gratitude to Town Legal's [The Town Library Archive](#) must be record for providing very helpful caselaw summaries which enabled this part of the document to be drafted without having to reread all the cases involved.

² F. Lucas & Sons Ltd v Dorking and Horley Rural District Council (1966) 17 P & CR 111

³ Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527

Hillside

- 2.5 The next significant case is Hillside, a full planning permission granted in 1967 for a masterplan of 401 dwellings in Aberdyfi within the Snowdonia National Park Authority area. Following the grant of planning permission, it was discovered that part of the site was an old quarry which presented implementation problems. Accordingly, eight additional permissions were sought, granted and implemented for dwellings which were substantial variations from the masterplan attached to the original 1967 permission. These additional planning permissions overlapped with the 1967 permission and in 1985 the LPA adopted the position (post Pilkington) that it was no longer valid, plus they also claimed that it had never been lawfully implemented and therefore had expired (in 1972). This was challenged in 1987 and the High Court declared that the permission had been lawfully implemented and could be lawfully completed at any time.
- 2.6 Hillside acquired the site in 1988. There was a gap in any work on site until 1996 when a further eight permissions were granted and subsequently implemented. These also overlapped with the 1967 permission.
- 2.7 In 2017 the LPA again claimed that the 1967 permission could no longer be implemented because the developments carried out in accordance with the later planning permissions rendered it impossible to implement the original consent because of the Pilkington Principle. This was contested in the High Court⁴ and subsequently taken to the Supreme Court⁵. The LPA's position was supported, and the original 1967 planning permission was set aside by both courts as now being unimplementable because of Pilkington incompatibility.
- 2.8 The Court of Appeal rejected Hillside's reliance on Lucas (see paragraphs 2.1 & 2.2 above) as part of its argument, that new development pursuant to the 1967 permission on parts of the site was not incompatible with development on other parts of the site pursuant to the other permissions. Instead, the Court of Appeal referred to Sage⁶, which held that a planning permission must be implemented "fully" and that a "holistic approach" should be taken. Essentially, the Court confirmed the principle in Sage, but did not overrule Lucas, but only because it did not have the precise terms of the planning permissions which were granted in that case and therefore could not be satisfied that it had been wrongly decided on its particular facts.

Legal Principles Summary

- 2.9 From this chronology of caselaw, the main legal principles seem to be:
- A PP that is incompatible with an earlier PP, if implemented, renders the original PP unimplementable – incompatible means physically incompatible.
 - PPs must be implemented in full – you can't pick and choose what you implement – they are not severable.
 - Where a PP is unimplementable it means that any further development under it would be unlawful but development that was completed lawfully does not become unlawful in these circumstances.

⁴ Hillside Parks Ltd v Snowdonia National Park Authority [2020] EWCA Civ 1440

⁵ Hillside Parks Ltd v Snowdonia National Park Authority [2020] UKSC 30

⁶ Sage v Secretary of State for the Environment [2003] UKHL 22; [2003] 1 WLR 983

- 2.10 It is regrettable that these legal principles were set in the context of cases that were either relatively small scale or unusual, in that we very rarely grant detailed planning permissions for large numbers of dwellinghouses these days. This caselaw is now being applied to large, multi-phased outline planning permissions and it feels that the legal caselaw journey is far from over.

3 Application Mechanisms

- 3.1 The difficulty created by the “Pilkington/Hillside” caselaw is, how do you amend a planning permission without risking losing the original consent? The problem with statute is that it was never designed to deal with amending planning permissions: none of the tools we now have were in the original 1947 Act and the first (§73) only made an appearance as an amendment to the 1971 Act. Accordingly, custom and practice has grown up over the decades to deal with the challenges and some of this has found its way into the Planning Acts, with varying degrees of success. How these procedures should operate has also been finetuned by caselaw.

Legislative Provision

- 3.2 A planning permission is made up of three elements: the description of development, its conditions and any approved plans or other documents. Depending on the amendment required, one, two, or all three of these elements may need to be amended. There are three powers available (or shortly will be) for this.

§96A

- 3.3 This was introduced into the 1990 Act by the Planning Act 2008 and brought into force on 1 October 2009. Hitherto, such non-material amendments (generally referred to as minor amendments at the time) were dealt with informally by an exchange of letters. The tests applied by LPAs varied between, no reasonable person could possibly hold a different view about the proposed changes, through to, it wouldn't be expedient to take enforcement action against the changes. It was seen as desirable to get the practice of dealing with these matters on a consistent, legal footing and so §96A was born.
- 3.4 The new power has operated fairly successfully, the only notable caselaw was confirmation that it could be used to amend conditions, provided, of course, the changes met the test in §96A(1)⁷.
- 3.5 The legislation makes it clear⁸ that all previous §96A changes must be considered in making a new §96A determination. This leaves it as unclear if an applicant intends to implement some, but not all §96A changes, particularly in circumstances where the cumulative impact of all the changes is considered to amount to a material change. POS considers that this could easily be addressed by changing existing procedures under the power to require all desired (non-material) changes to be included in each application and either:
- the latest §96A consent is the only consent that can be implemented (ie each new consent supersedes all previous consents); or

⁷ The LPA must be satisfied that the change is not material.

⁸ §96A(2)

- only one consent can ever be implemented (which would require a declaration as to implementation to enable transparency).
- 3.6 These changes would make reading the statutory register of planning applications much clearer than it is at present. The entry for a development site can show a myriad of separate NMA (and MMA) consents plus alternative planning permissions with no indication as to which ones have been relied upon. Addressing this issue, at the same time as dealing with the amendment challenges, would be worthwhile and forms part of our recommendations.

Killian Pretty & §73

- 3.7 The Killian Pretty Review was an independent review of the planning application system in England, commissioned by government in March 2008. Its terms of reference were: "To consider how, within the context of the Government's objectives for the planning system and building on the reforms already announced, the planning application process can be improved for the benefit for all involved."
- 3.8 In November 2009 CLG published guidance⁹ which, inter alia, followed the Killian Pretty Review recommendation¹⁰ that "Government should take steps to allow a more proportionate approach to minor material changes in development proposals after permission has been granted".
- 3.9 The recommendation, given that there was no legislative vehicle to do it properly and make changes to primary legislation at the time, was that the existing route under §73 of the 1990 Act (which allows changes to the conditions applying to existing planning permissions) should be utilised as the best short-term¹¹ solution.
- 3.10 LPAs were advised to add a condition to planning permissions listing the approved plans (and any other approved documents) so that an application under §73 could be made to vary that condition and thereby substitute the amended plans or other documents facilitating an amendment to the development that was greater than a §96A amendment, but not so great that a new planning permission would be required. These amendments were called minor material amendments by CLG, and they were defined in the document as:
- ... one whose scale and nature results in a development which is not substantially different from the one which has been approved.*
- 3.11 It was made clear that this was not a statutory definition.
- 3.12 This sticking plaster solution has been subject to a trio of legal cases (Finney, Armstrong and Fiske – see below) which have all tested the limits of using a power put in place for one purpose (amending conditions) and, by adding an (arguably) unnecessary condition to a permission, enabled it to be used for something else (amending the development). Lobbying from POS and industry, following Finney, eventually persuaded government to put in place the permanent solution implied, if not explicitly promised, back in 2009.

⁹ Greater flexibility for planning permissions

¹⁰ Recommendation 8, paragraph 3.5 of the Killian Pretty Review: Planning Applications – A Faster and More Responsive System: Final Report, published by CLG on behalf of the Killian Pretty Review, November 2008

¹¹ As the proper legislative long-term solution (s73B) is still not fully in place, short-term in this case has extended to 15 years.

LURA & §73B

- 3.13 The Levelling-up and Regeneration Act 2023, through §110, introduces §73B into the 1990 Act. It is a power to make material variations to planning permissions which are not substantially different from the existing permission.
- 3.14 This new power has not yet been activated, but it is likely to operate in a similar way to §73. The consultation on the enabling legislation was ongoing at the time of drafting this document.

Legislative Provision Summary

- 3.15 The elements of a planning permission that can be amended using existing and forthcoming legislative provisions are as follows:

POWER	§96A	§73	§73B
Description	Yes	No	Yes
Conditions	Yes	Yes	Yes
Approved plans etc	Yes	Yes, only if listed in a condition	Yes
LEGAL TEST	The LPA must be satisfied that the change is not material (§96A(1))	Nothing explicit in statute – emerging in caselaw (see next section)	The LPA must be satisfied that its effect will not be substantially different from that of the existing permission (§73B(5))

Caselaw

- 3.16 The way these various statutory mechanisms work in practice has been refined over the years in a series of cases.

Finney

- 3.17 This case¹² relates to a Court of Appeal decision in which Lewison LJ allowed the appeal and quashed the Inspector’s decision that held that §73 can be used to obtain planning permission with an amended description of development, as well as conditions differing from those on the original permission.
- 3.18 It related to a 2016 planning permission for the installation and operation of a wind turbine of a height of up to 100m. Condition 2 required that the development be carried out in accordance with the approved plans, of which one showed a turbine with a tip height of 100m. The applicant applied under §73 to vary that condition to allow a taller (125m) wind turbine to be erected. The LPA in Wales refused planning permission, and on appeal the Inspector allowed the development after considering the impact of the taller turbine.

¹² Finney v Welsh Ministers & Ors (Rev 1) [2019] EWCA Civ 1868

- 3.19 The Court held that changing the description of a development was outside the powers conferred by §73. Whilst you can amend the development, it is still restrained by the description and the amended development must still comply with that description as it cannot be changed (except if the change was non-material and could be achieved first using §96A).
- 3.20 Following this case, custom and practice developed to use simplified descriptions of development so that the use of §73 could be optimised – the “lost” details would be safeguarded in a parameter type condition. In the case of Finney it would have meant that the description would have been along the lines, “installation and operation of a wind turbine” and a condition would have been used to limit its height to 100m plus one that listed the approved plans and other documents. This would have enabled an application under §73 to increase the height to 125m to be lawfully made and considered.

Armstrong

- 3.21 This case¹³ represents the unintended consequences of both the original CLG advice to use §73 for scheme amendments and the custom and practice of using simplified, high-level descriptions following Finney.
- 3.22 The description of the development on the planning permission was “construction of a single dwelling”. The applicant sought to use §73 to substitute a set of plans for a single dwelling that had a wholly different architectural style from what was approved. Both the LPA and the subsequent Planning Inspector considered that the amended plans were materially different to what was originally approved and refused permission on the basis that they were not minor material amendments and therefore outside the scope of §73.
- 3.23 The Court found in favour of Armstrong, principally because the power in §73 is not limited by the words, minor material amendment. It is a power to amend or delete conditions and the LPA can only consider the question of the conditions subject to which planning permission should be granted.
- 3.24 The decision in Armstrong does leave the question, what are the limits of using §73, unanswered. The outcome leads to an undesirable situation where a wholly different development can be considered through an application designed to just amend or delete conditions. Surely that was not the intention of Parliament when it introduced the §73 power nearly 40 years ago.
- 3.25 The new power in §73B provides a much clearer basis for dealing with these matters and limits the power to amendments where its effect must not be substantially different. As this is the current will of Parliament, LPAs should stop attaching a condition listing the approved plans to planning permissions, once the §73B regulatory changes are in place, for the following reasons:
- You no longer need to impose a condition to enable scheme amendments to be made via §73 – §73B is now in place to deal with such amendments more comprehensively.
 - You do not need a condition to list the approved plans for clarity – you can list them elsewhere on the decision notice: such as at the end of the description, in an informative or in a separate section.

¹³ Armstrong v Secretary of State for Levelling-up, Housing and Communities & Anor [2023] EWHC 176 (Admin)

- You do not need a condition to say that you must build in accordance with the approved plans – you must do that anyway.

3.26 In the new §73B world, such a condition would be likely to fail the statutory necessity test for the above reasons. An LPA could also refuse to impose such a condition under a §96a application because such a condition would be unnecessary. Under §70(1) of the 1990 Act an LPA "may grant planning permission ... subject to such conditions as they think fit" and it is perfectly reasonable to no longer wish to facilitate §73 being used to deal with scheme amendments, especially following the implications of Armstrong, given the new §73B provisions put in place by Parliament.

Fiske

3.27 There is a lot in the Fiske saga of a local resident seeking to thwart a proposed solar farm in Hampshire, but this paper only needs to focus on a small part of it, as much of the case does not take the caselaw forward in any material sense. There are two separate court cases relating to this development: a High Court ruling¹⁴ (that essentially concluded that the removal of a substation from the approved development went beyond §73 powers) and a Court of Appeal decision¹⁵ that, whilst not really taking the procedural caselaw forward, is helpful in clarifying whose responsibility it is to deal with the lawfulness or otherwise of an overlapping planning permission. Lindblom LJ made it clear that this is simply a question for the developer to deal with – it is "not the authority's job". That must be good news for LPAs trying to grapple with this opaque and fluid area of planning caselaw, but it doesn't help the sector generally.

Dennis the Menace

3.28 The final and most recent case, Dennis¹⁶, spans the issues of legal principle and procedural mechanism and provides a good summary of where we have got to and what are the issues we need to grapple with. It's known as Dennis the Menace because the judgement just makes life that more complicated for us all!

3.29 Outline planning permission was granted in 2015 for a large scale mixed-use phased development of the Aylesbury Estate in Southwark, providing dwellings, employment and retail space. The developer (Notting Hill Genesis) applied in 2022 for a new detailed planning permission for Phase 2B of the development to increase residential numbers. This gave rise to a Pilkington Principle risk that if the 2022 permission were to be implemented, the original 2015 consent could then no longer be built out due to the physical incompatibility of Phase 2B. The Council and the developer agreed that, since the original consent was for a phased development, Phase 2B could be severed from the development, allowing both consents to be built out together, circumventing the Pilkington issue. To "formalise" the severability of the 2015 consent, the developer made a §96A application to amend the description, which the LPA approved.

¹⁴ Fiske, R (On the Application of) v Test Valley Borough Council [2023] EWHC 2221 (Admin)

¹⁵ Fiske, R (On the Application of) v Test Valley Borough Council (Rev1) [2023] EWCA Civ 1495

¹⁶ Dennis, R (On the Application of) v London Borough of Southwark [2024] EWHC 57 (Admin)

- 3.30 The question for the Court was whether the introduction of the word “severable” into the description of the development was a “material” amendment, such that the use of §96A to achieve that amendment was ultra vires. The LPA and developer argued that the original consent was always severable in principle since it was an outline permission for a phased development and the purpose of the §96A application was merely to formalise that severability, therefore, the amendment was “non-material”. All parties accepted that if the 2015 consent was in fact not severable prior to the §96A application, then the challenge must succeed. The key issue to be determined was whether the original consent was in fact severable when granted.
- 3.31 Mr Justice Holgate held that the original consent cannot be read as being severable prior to the §96A application because phasing of a development alone is not sufficient to amount to a “clear contrary indication” (as noted in the cases of Sage and Hillside) that a permission is severable. This conclusion would also give rise to unforeseen consequences, such as uncertainty over statutory time limits for implementation, if a phased permission was to be automatically deemed “severed” with separate freestanding permissions. Further, Mr Justice Holgate noted that, although an outline permission does provide a “good deal of flexibility” such that details of a scheme can be determined at a later stage, it still sets the parameters and framework within which details can be approved. Such parameters and the framework are evident from the description of the development, the conditions imposed, and the plans and documents incorporated into the outline permission.
- 3.32 Therefore, the phased nature of a development alone will not be sufficient to conclude that a permission is severable and indeed, in this case, it was not. Mr Justice Holgate also doubted the legality of the introduction of the term “severable” on its own into the planning permission, without clear limitations as to the manner of severability. Thus, the Court held that the use of §96A to introduce the word “severable” into the planning permission was ultra vires since this would provide a new and much larger bundle of rights to the developer amounting to a “material” amendment.
- 3.33 What is most interesting about this case is the commentary that followed, as KCs and others pondered as to how such a planning permission could be made severable. Trying to retrofit severability into an existing planning permission was universally considered all but impossible. Making a planning permission severable at the point of granting it, was also considered to be challenging to the point of being almost impossible except in very limited circumstances. In effect each element would need to be justified on its own planning merits and capable of being granted as a stand-alone planning permission, with its own planning balance, set of conditions, §106 obligations etc. The conclusion therefore seems to be that most planning permissions are not severable and are rarely likely to be capable of being so. The clear lesson is that we must learn to live with and operate in a world of non-severable planning permissions.

Caselaw Summary

- 3.34 These cases make it clear that with respect to application mechanisms:
- §73 is limited in what it can amend: conditions and, if listed in a condition, approved plans/documents;

- §73 is not limited to minor material amendments, but what its limitations are is not yet clear from caselaw;
- When §73B is operative, the use of §73 to amend developments should cease;
- Whether a new planning permission is lawful or otherwise from an overlapping consent perspective is “not the authority’s job”; and
- Planning permissions are not severable and the circumstances where they could be, are very limited.

Application Mechanisms Summary

- 3.35 These legislative provisions and caselaw principles are now routinely applied to much more complex situations, such as where an outline planning permission has been granted for a large multi-phase development. A “drop-in” planning permission is often secured for a different form of development on part of the site and permission secured under §73 for any necessary amendments to conditions attached to the main permission to ensure that if development is carried out on part of the site under the drop-in permission rather than the main permission, there will be no breach of any conditions attached to the main permission. These approaches are complex and can only minimise the “Pilkington Risk”, they cannot eliminate it.
- 3.36 This makes dealing with amendments to planning permissions very challenging. The safest option, under current law, is to apply for the whole planning permission again with the amendments included. This does seem excessive and opens up already determined issues for redetermination. The risk of getting a refusal or a very different planning permission for the remainder of the development (which already has planning permission) is one that developers are understandably reluctant to take.

4 Key Findings

- 4.1 This review of the legal principles and application mechanisms can be distilled into the following findings with respect to the extent to which the Development Management system is fit for purpose in its ability to deal with amendments to planning permissions in an efficient and effective way.
- The planning system was never designed for planning permissions to be amended and the three main tools we have to deal with amendments were introduced as amendments to the 1971 Act (§73) and the 1990 Act (§96A and §73B).
 - This ad hoc approach has led to unintended consequences and a lack of clarity as to the limits of some powers (Armstrong).
 - Amending planning permissions is a common and important part of the development process and the Planning Act needs to be changed to provide a single, comprehensive mechanism for this and one which deals with the challenges we now face.
 - The new mechanism needs to be flexible and scalable to deal with the wide range of amendments to planning permissions that can be required.
 - Planning permissions are non-severable and there are many advantages to that. Devising a system that makes multi-phased developments automatically

severable would have significant unintended consequences and POS does not consider that it is where a solution lies.

- When dealing with proposed changes to existing planning permissions, the issues that need to be dealt with will be different if the development has not yet commenced, is partly implemented, or has been completed. Any new system must recognise these realities and make clear provision for them.
- The current system often results in the Statutory Register for a site being littered with a myriad of planning permissions, NMAs, MMAs, §73s etc with no indication as to which have been relied upon. It makes working out whether something is lawful for the public (and even for planning or legal professionals) a very challenging and, in some cases, almost impossible task. In designing a new regime for dealing with amendments, the opportunity should be taken to also tackle this area so that our Statutory Register database is one that is fit for purpose.

4.2 In the next section we set out a system that seeks to address these findings.

5 A New Regime for Amendments

5.1 It is proposed that any amendment to a planning permission should be subject to a single legislative regime: an application for an amended planning permission. The procedures involved in the new process are designed to be flexible and scalable so that LPAs only look at the matters that are raised by the amendment being sought and only undertake consultation, notification or publicity that is commensurate with the nature of that amendment.

5.2 The range of planning permissions that result from both the existing application for planning permission regime (including Permissions in Principle) and a new application for an amended planning permission regime need to be managed better as a database via the Statutory Register.

Development Stages

5.3 The stage at which a development has reached is important when dealing with amendments because it defines the matters that need to be considered and how they should be dealt with. The applicant should therefore be required to identify these elements when making an application for an amended planning permission, including by reference to a map, so that there is clarity as to the nature and status of the components of the new planning permission that is being sought.

5.4 With respect to the stage a development has reached, the following terms have been used:

- Development not commenced: a §56 material operation has not yet begun to be carried out and, if our recommendations below are followed, a Commencement Notice has not been issued.
- Development part implemented: the development has commenced but has not yet been completed.
- Development completed; The development is complete and, if our recommendations below are followed, a Completion Certificate has been issued.

5.5 Explicit provision should of course be made to enable amendments to planning permissions to be authorised retrospectively.

Descriptions of Development

- 5.6 POS recommends that a standard description of development convention should be established to make sure that applications for an amended planning permission are clear, as some applicants and LPAs currently struggle with descriptions for §73 applications where they are amending developments. It is recommended that the description of the original planning permission should be set out and then, separate to it, the description of the application to amend the original planning permission, detailing the proposed changes.
- 5.7 It is not explicit in statute that an LPA has the power/right to amend a description of development and it might be sensible, when putting this regime in place, to make the position clear for both regimes (applications for planning permission and applications for an amended planning permission). The description is obviously very important, particularly at the processing stage where the public (who may struggle to read plans) will often base their initial views on the description and therefore it must not be misleading and should be informative.
- 5.8 There are two separate circumstances where an LPA might want to change the description that the applicant has given to their application:
1. It is legally incorrect (a two-storey extension has been described as a first-floor extension to a theoretical ground floor PD extension) or materially misleading (windows being inserted into a flank elevation have been described as high level when the plans show that they are not); or
 2. It is accurate but not sufficiently clear (an extension to a house has merely been described as “extension”) and could be improved.
- 5.9 The former could be dealt with in one of two potential ways:
1. As a validation issue where the LPA points out the problem and suggests a correct description, but they should not process the application until a correct description is agreed. There are rights of appeal against invalidation and the role of the Inspector should be to judge whether the application description (by the applicant) was correct or not. It should not be an opportunity to correct it.
 2. The LPA could have the right to correct the description (where that is possible) and continue to process the application. An aggrieved applicant could raise their concerns with the LPA, but ultimately do so as part of an appeal (a new specific right of appeal might be needed) and an Inspector would adjudicate.
- 5.10 POS considers that, on balance, the second approach is better.
- 5.11 The latter circumstance (unclear descriptions) is an area where, frankly, both LPAs and Inspectors currently fudge it. LPAs will generally set out improved descriptions in their validation letters, alongside standard wording that points this out and states that this will be the description unless the applicant requests otherwise. Similarly an Inspector, particularly on written representation appeals where there are different descriptions from the appellant and the LPA, will select the description that they prefer and state something along the lines that, nobody is prejudiced by using that description and they will therefore adopt it.
- 5.12 POS considers that the legislative position should be clear so that, where possible, it is the LPA’s responsibility (and where necessary an Inspector’s) to ensure that the proposed development is properly described in a way that assists consultation, notification and publicity and, ultimately, enforcement.

Form of Application and Processing

- 5.13 In all cases, if an application for an amended planning permission is being made, our clear recommendation is that the application should relate to the whole of the planning permission that is being amended to enable the severability challenges to be met. The decision, if granted, will be a new planning permission, as is the case with existing §73 and proposed §73B provisions.
- 5.14 With respect to the nature of an amendment, we have used the following shorthand:
- NMA: an amendment that is akin to what is currently dealt with under §96A.
 - MMA: an amendment that is beyond a NMA but does not constitute a Material Amendment.
 - Material Amendment: an amendment that requires a new application for planning permission to be made.
- 5.15 The current mixing of definitions between Minor Material Amendment (§73) and Not Substantially Different (§73B), have been set to one side in this paper to avoid unnecessary confusion in designing a new system.
- 5.16 In the system we have recommended, the difference between a NMA and a MMA is only relevant from the point of view of whether the LPA carries out any consultation, notification or publicity. The legislation should clearly set out:
- If the amendment is an NMA – no consultation, notification or publicity would be needed.
 - If the amendment is an MMA – LPA to only carry out such consultation, notification or publicity that they consider necessary.
- 5.17 Essentially these are the current requirements. In the new regime, we therefore only need to concern ourselves with (and potentially define in law) those amendments that can be dealt with under the new system and those that are so significant that they cannot and require a fresh application for planning permission. The NMA/MMA distinction becomes a planning judgement exercised by the LPA in relation to consultation, notification or publicity decisions.
- 5.18 A further reason for not dealing with NMAs and MMAs separately is to maintain a single amendment process which enables the better management of the Statutory Register to be delivered.

Determination Considerations

- 5.19 In determining an application for an amended planning permission under this new regime, the LPA would need to consider the merits of the amended elements both within the context of the development plan (like all planning application decisions), but also in the context of the original planning permission. These latter elements would be fixed material considerations that cannot be altered by the LPA and therefore set the context for considering the slot-in amendments. In dealing with the slot-in amendment the LPA would be required to make sure that it was compatible with the other elements. This approach is vital to maintain the integratory of the original consent and the principle of non-severability.
- 5.20 There are however three important key principles that should be part of the new regime for dealing with such applications. Where an amended planning permission is granted and part of the original consent:

3. has already been implemented, the relevant ongoing conditions should be “copied across” into the new consent without any alteration or consideration by the LPA.
 4. is in the course of being implemented, the relevant operative and ongoing conditions and approved plans/documents should be “copied across” into the new consent without any alteration or consideration by the LPA.
 5. remains to be implemented, but they are not affected by the amendment(s), they should be “copied across” into the new consent without any alteration or consideration by the LPA.
- 5.21 These procedural provisions ensure that any application for an amendment deals only with the changes (in a slot-in sense) and does not consider the other elements of the original planning permission. This is a reasonable approach because not only are they a “fall-back” position for the developer, and therefore could be implemented, but adopting these procedures brings about clarity as to what the current position is with respect to the original planning permission elements and picks up current best practice in dealing with §73 applications.

Form of Decision Notice

- 5.22 For clarity, the results of the above provisions should appear clearly as separate sections within a single new planning permission so that each clearly relates to separate spatial areas within the site: ongoing conditions relating to the completed parts of the development, operative and ongoing conditions and approved plans/documents relating to the parts of the development still being implemented, the slot-in approval, and the conditions and approved plans/documents relating to the other unimplemented part of the development.
- 5.23 It would also be good practice to list on the decision notice, in an appropriate way, the other outstanding planning permissions relating to the same area of land and those planning permissions that have been superseded by later amendments.

Planning Obligations

- 5.24 The way §106 agreements work in the context of amendments would benefit from a review of best practise. The production of standard proformas (both the main body and obligation schedules) that avoid the need for a new agreement with an amended planning permission, unless changed or new obligations are required, would be worthwhile.

Rights of Appeal

- 5.25 The application for an amended planning permission regime should have the same rights of appeal as an application for planning permission: non-determination, refusal and the imposition of conditions. Rights of appeal against invalidation issues, particularly descriptions, have been dealt with earlier.

Statutory Register Considerations

- 5.26 To deal with the Statutory Register confusion identified earlier, the following provisions are recommended:
- Before any development takes place, there can of course be alternative planning permissions for a site on the Statutory Register.

- Once development commences and a planning permission begins to be implemented, the other alternative planning permissions should fall away (ie removed from or moved to another part of the Statutory Register) – this is the logical consequence of a non-severable world and to formalise it helps tell a better Statutory Register “story”.
 - Where an amended planning permission is granted, the old permission should be superseded by the new one. This again is the logical consequence in a non-severable world and ensures clarity as to what is approved and what can be implemented.
- 5.27 To enable there to be transparency around this area, we suggest that a requirement for a Commencement Notice and a Completion Certificate is worth considering. These would be issued by the developer as a declaration, rather than by the LPA. They would probably need to relate to a construction operation rather than a development phase. The Commencement Notice provisions should coordinate with the existing provisions in the Building Regulations. An LPA should be able to issue a Completion Certificate where it believes that a development has been substantially completed but the developer has not issued (or refuses to issue) a Completion Certificate. A right of appeal could be provided for circumstances where there is a legal or factual dispute.
- 5.28 These changes should also include improvements to Completion Notices to make them operate better – that is to ensure that only the properly completed parts of a development become lawful after a Notice becomes operative, rather than all development that is constructed, whether completed or not. POS has been asking government to fix this area of law for years¹⁷, but they have failed to do so.
- 5.29 The circumstance where a development is granted for, say, a housing estate or shopping centre and, following completion, the new planning units (ie individual houses or shops) apply to vary or delete conditions, needs to be considered. The original planning permission obviously remains as it provides the ongoing controls for the rest of the development. The reality is that its ongoing provisions are in effect atomised and implicitly distributed, as appropriate, to every planning unit that is comprised in the development. Those virtual, mini, ongoing planning permissions do exist in a legal sense and are, now and should be in any new regime, capable of amendment by way of varying or deleting the ongoing conditions. The post completion period represents a new chapter in the planning history of any particular planning unit and the Statutory Register needs to capture that in the way it holds the records, so it is clear to those needing to use the database.

New Regime Summary

- 5.30 A table diagram is set out below to summarise and illustrate how a new system of applications for an amended planning permission could work.

¹⁷ <https://www.planningofficers.org.uk/uploads/pdf/POS-MBP11-Enforcement.pdf>

AMENDMENT(S) REQUIRED TO A PLANNING PERMISSION								
Development not commenced			Development part implemented				Development completed	
Is/are the amendment(s) material?			Is/are the amendment(s) material?				Amendments no longer possible	
No		Yes	No			Yes	Amendments no longer possible	
PROCEDURES TO BE FOLLOWED BY LPA								
Deal with amendment as a slot-in If NMA – no consultations If MMA – consult as necessary	Copy across any unamended parts of the PP, making sure that they are compatible with slot-in	Not possible to use new application for an amended planning permission procedure. Make new application for PP	Deal with amendment as a slot-in If NMA – no consultations If MMA – consult as necessary	Copy across any ongoing conditions for any part of the development that has been completed	Copy across any relevant conditions, plans etc for any part of the development being implemented	Copy across any unamended parts of the PP, making sure that they are compatible with slot-in	Not possible to use new application for an amended planning permission procedure. Make new application for PP	Only change(s) to ongoing condition(s) possible
DECISIONS THAT CAN BE ISSUED BY LPA								
If slot-in acceptable, issue a new PP (potentially in two parts) that sits alongside previous PP(s)	If acceptable, issue a new PP that sits alongside previous PP(s)	If slot-in acceptable, issue a new PP (potentially with up to four parts) that supersedes previous PP				If acceptable, issue a new PP that supersedes previous PP	If change(s) to ongoing condition(s) acceptable, issue a new PP that supersedes previous PP and sets out change(s) to ongoing condition(s) and copies across any other ongoing conditions	
OR								
Refuse if slot-in unacceptable	Refuse if unacceptable	Refuse if slot-in unacceptable				Refuse if unacceptable	Refuse if change(s) to ongoing condition(s) unacceptable	

5.31 The new procedures are in light grey. The procedures in blue would be the current application for planning permission process. The procedures in yellow are based on the current §73 process to amend conditions.

- 5.32 The obvious criticism of the POS proposals is likely to be that, whilst it might address the complex issue of a large slot-in application replacing a phase in a multi-phased regeneration development, it is overengineered for the simple NMA, MMA (current scheme amendment via §73 or future §73B) or §73 condition change? The way the new regime has been designed, such applications should not be any more complicated to make or determine than they are now.

Non-Material Amendments

- 5.33 The simple NMA (such as adding a window into a rear elevation on a new house) would be submitted with the same set of plans/documents as now. As now, no consultations would be carried out due to the non-material nature of the amendment. If the development hasn't commenced and the amendment was acceptable, a new planning permission would be issued that would be identical to the previous planning permission, save for the appropriate reference to the amendment. If the development was in the course of construction and the amendment was acceptable, again a new planning permission would be issued, but this time it would only contain the relevant conditions, plans etc for those parts of the development being and still to be implemented, plus contain the reference to the amendment.

Minor Material Amendments

- 5.34 A current §73 MMA type proposal (such as altering the position of an access) would again be submitted with the same plans as now. Consultations would be carried out with the highway authority and any impacted properties would be notified by letter or via a site notice. Any other consultation (such as a resident association, amenity society, parish council etc) would depend on the protocols that the LPA operates. If the proposal was acceptable, then the form of the consent would be the same as the NMA depending on whether development had commenced or not.

Variation or Deletion of Conditions

- 5.35 Applications that are just concerned with amending conditions (such as altering the timing for the submission of a detail from before the development commences to a specified point during construction or to varying hours of use once a development is complete) would be dealt with in the same way as §73 applications are currently dealt with. Consultation would only be undertaken if the LPA considered it necessary. The planning permission for the altered timing would contain the amended condition and such of the other existing conditions/plan(s) references that are still relevant, as is current best practice. The varying of hours of use once a development is complete planning permission would contain the amended hours of use condition and such other ongoing conditions that remain relevant, as is current best practice.
- 5.36 In designing this new regime POS has tried to ensure that it is both flexible and scalable. For a given amendment, the developer would only have to submit what is necessary (ie only the matters relating to the amendment) and consultation, notification and publicity would only be carried out when the LPA judge that it is necessary. Finally, and most importantly, the planning permission that is issued would be very clear as to what has been approved in the context of the amendment and what is unchanged from the original consent. The planning permission remains unsevered, with all the relevant material planning considerations having been properly considered.

6 Conclusions

- 6.1 The recommendations in this Manifesto should be seen as a starter for ten. As we state at the general introduction on page 2, the views expressed reflect the initial consensus view of POS and should not be taken as a final position, rather an informed starting point to debate the issues. We do hope the recommendations evolve as the debate progresses on this very significant and important area of planning law.
- 6.2 As always, POS stands ready to work with government to develop these proposals so that a planning system that can deal with amendments to planning permissions in a comprehensive and effective way can be delivered.