Response to Competition & Markets Authority Housebuilding Market Study Invitation to Comment

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Background to response

Over the last two years, Foye and Shepherd have been studying the three largest housebuilders by volume (Taylor-Wimpey; Persimmon and Barratt) - the 'big-three'. Through comprehensive analysis of these publicly listed companies' earnings call transcripts, annual reports and performance metrics (via Refinitiv), we have gained a detailed understanding of their business model, and how this has changed over the decade post-Global Financial Crisis (GFC). Some of the quotes provided (in footnotes) are freely accessible on the respective housebuilder's website, others were accessed via Fair Disclosure Wire.

Through analysis of government policy documents and media reports, we have also explored the power-dynamic between the state and these three housebuilders, and its implications for policy and market outcomes. Finally, we have had conversations with several market analysts to get their perspective. Our findings will be published in a report for the UK Collaborative Centre for Housing Evidence (CaCHE) in early-Summer 2023.

This response has been written in collaboration with Prof. Yiquan Gu, an expert on industrial economics who has published extensively on the economics of land markets, and Neal Hudson, who has researched extensively on land markets and the housebuilding industry.

1. **Do you agree with our proposed geographic scope for the market study, as set out in paragraph 2.32? If not, why not? In particular, do you think that Northern Ireland should be included in the scope of the market study?**

Given that Northern Ireland has higher rates of housebuilding (see CMA Scoping Report), and a more diverse housebuilding industry, we think it could potentially provide a useful comparator. For example, it could be hypothesised that the diversity of the housebuilding industry potentially explains why supply is greater there (although differences in the planning system/local politics and economy could also be explanatory factors).

More broadly, if resources allow, we would encourage the CMA to adopt a more internationally comparative approach. Specifically, the US housebuilding industry is also becoming more concentrated, leading to slower build-out rates in certain areas (Cosman and Quintero, 2019). It may therefore be that there are broader global trends, such as access to finance, that are (partly) driving concentration in the industry.

One challenge with a broader geographic scope is the quality of the available data. Some of the most used housebuilding data sources, including in the CMA scoping document, undercount actual housebuilding numbers. There are better data sources available for England but not in Wales. It is unclear whether the same issues exist in the Scottish and Northern Irish data. For a brief discussion and possible explanation for the undercount, please see this BuiltPlace document and charts for comparing housebuilding and net supply data sources for local authorities across England.

Finally, we would note that a theoretically sound definition of the relevant market is crucial to conduct an effective market study. Although it may appear that defining the geographical market using local authority boundaries is a logical approach, it is important to consider demand-side factors such as household migration and search patterns, as well as other contextual data such as commuting patterns and catchment areas for retail and schools. Additionally, it is essential to comprehend the perceived relevant market by housebuilders on the supply side. In this regard, it is helpful to explore the heterogeneity in the geographical reach of volume and SME housebuilders.

2. **Do you agree with our areas of focus for the market study, as set out in paragraphs 2.1 to 2.31? If not, what other matters should we focus on and why?**

Broadly speaking, we agree with these areas of focus.

However, we would encourage the CMA to more expressly consider the role of government -both local and national- in structuring the housebuilding market. In Britain, the government plays a crucial role in structuring the housebuilding industry in two key ways.

First, it controls the supply of developable land, most notably through the planning system and through the selling-off of public land (among other mechanisms). It would be useful to examine the degree to which the government's (local and national) planning policies and disposal strategies favour larger housebuilders over smaller ones. For example, in England at least, the proportion of planning permissions for large greenfield sites (>150 units) has increased due, in part, to the presumption in favour of sustainable development in the original version of the National Planning Policy Framework (NPPF) which was introduced in 2012. This so called 'tilted-balance' policy had the effect of making it easier for speculative planning applications to be granted planning permission in local authority areas that are not able to demonstrate a sufficient supply of deliverable housing land. Even if these applications were refused permission at local level, the applicant could (and still can) appeal in the hope that the Planning Inspectorate agrees with them that the NPPF in combination with a local shortfall in housing land would mean that permission should be granted. Because of the expense incurred via the planning appeal process, this route favours larger and better resourced housebuilders and larger sites. Potentially, the NPPF has also incentivised some local authorities to grant planning permission on larger sites in order to assist with their housing land supply positions (HM Government, 2017: 6). Such large sites are generally only deliverable by larger housebuilders. In doing so, the interaction of national policy requirements intended to discipline local authorities into granting planning permission for new homes, and local planning policy and politics, may have tilted the land market towards the interests of larger housebuilders and the kind of sites they prefer (see Q4 for more detail).

Second, through mortgage market support schemes, the state structures demand for housing, again in a way that advantages some housebuilders over others. This was most notable in the years immediately after the Global Financial Crisis (GFC), when the (Labour) government introduced a range of mortgage market support policies that were *explicitly* and *intentionally* targeted at the

largest housebuilders (see DCLG, 2008). It is well recognised that small/medium housebuilders are less likely to survive housing market downturns than larger housebuilders, but it is much less well recognised that in the case of the GFC, the state played a significant role in their relative decline (see Griffiths, 2011). While Help to Buy (by design) has been much more accessible to smaller housebuilders, there have been no studies to date of its overall effects on industry concentration.

Finally, the state also structures the housebuilding industry through a range of other forms of regulation (e.g. building regulations) and subsidies which are likely to affect some sections of the housebuilding industry more than others.

Because the state plays such an integral role in structuring the housing and land markets – much more so than other markets – it is important that the report looks at how their interventions (or lack thereof) affect the competitiveness of the housebuilding industry.

3. **We may carry out case studies during the course of the market study. Can you suggest any local areas across the UK we should look at where you consider:**

    c. There is a high degree of concentration in housebuilding activity;

We would point you toward the work of Yu et al (2021). To our knowledge, they are only academics who have accessed and analysed the NHBC dataset. Their analysis (p.158) suggests that "largest developers in the North of the country tend to have more market power." This would suggest that a local authority in the North, with one or two of the volume housebuilders present, would be a good case study.

We would recommend getting hold of this NHBC data if possible to identify appropriate case studies, whilst recognising that the market coverage of this dataset has been declining and, based on anecdotal data, currently sits at about 60%. The supposed collapse in SME housebuilders, which is often evidenced using this dataset, may also be exaggerated given its limited market coverage.

    e. LPAs are more or less proactive in the planning conditions they impose, particularly in relation to affordable housing;

There are various resources available that track supply of housing in local authorities relative to assessed need. For example, Planning Resource maintains a housing land supply tracker for all local authorities in England[1]. This (or another similar resource) could be used to select suitable case studies, taking into account other representations that may be received by the CMA. Further, it may be interesting to select a suitable local authority in Scotland as the supply of social housing is significantly higher there, which could shape the structure of the housebuilding industry.

4. **How can competition in this market be strengthened?**

To understand competition in the housebuilding industry, and how it can be strengthened, we need to understand the strategies and capabilities of the big-three, who have typically produced between a quarter and a third of new supply in Britain since the GFC.

[1] https://www.planningresource.co.uk/article/1814351/housing-land-supply-index-every-english-councils-published-position-plus-document-links-feb-2023-update

Context: volumes vs margins

In setting their strategy, the 'big-three' assume a trade-off between volumes and margins. Before the GFC, the strategy of the big-three was on increasing profits via increasing volumes and revenues[2]. Since the GFC, their focus has completely shifted to increasing margins over volumes[3], and this goes a significant way to explaining why supply overall has remained low.

It is worth dwelling for a moment on why these two objectives are seen as being in tension with each other: why can housebuilders not increase margins and maintain volumes? Ultimately, the answer comes down to two key factors.

- First, because each local market has a finite local absorption rate[4], if housebuilders want to expand output without bringing down prices, then they need to spread themselves geographically (i.e. increase number of sites), thus incurring significant diseconomies of scale (see Letwin, 2018).
- Second, expanding output necessarily involves expanding land supply, which in turn involves three key risks for housebuilders:
    - a) having more sunk capital on the balance sheet means that developers are more vulnerable in the case of a market downturn, which is perceived as more likely post-GFC[5];
    - b) acquiring more land means that, by definition, developers have to be less selective in the marginal land they do acquire, likely implying higher 'hurdle rates' (i.e. the minimum acceptable rate of return on the land investment) to reflect the increased risk, and
    - c) because the supply of land is relatively inelastic, increased demand for land may be expected to feed through into rising land prices in a competitive land market, thus squeezing the margins of the 'big-three'. However, this has not been the case in certain land markets (see Q4). This implies that certain sections of the land market are oligopolistic, possibly involving tacit collusion between the largest housebuilders. Pete Redfern has discussed risks b) and c). It is worth presenting the below quote in full, given his position, experience and the frankness with which he speaks:

"But the land market is pretty balanced, and so I could go out and say, right, we're going to accept 15% margins. And I could probably buy -- sort of have bought 9000 plots in that period. That to me is value destructive both for me and for the sector as a whole. And nobody in the sector is doing that.

[2] Barratt, September 2009 MARK CLARE "It used to be about volume, I think, in the olden days, in a different market. It's now very firmly about did we hit the numbers, did we deliver the prices that we expected";

[3] Barratt, February 2010 "MARK CLARE: I don't think there is any doubt that we could drive more volume, we have clearly demonstrated that, but the reality is that that would not be the best value equation and we are absolutely fixated on value at this time." Persimmon, July 2011 "MIKE FARLEY "I want to re-emphasize this, our focus is on growing those margins, so we're not out for volume for volume's sake. And I think if you follow Persimmon, it's not our sales that we focus on, it is those margins that we are focusing on. So that is a clear direction of the business and we will continue that trend. "; Taylor-Wimpey, August 2009 "PETE REDFERN "we do believe, compared to our history, we sold too fast in the past. It did drive a lower margin. We don't have to cut our business for the next two or three years to drive a sales rate of 0.8 or 0.9; 0.6 or 0.7 is okay."

[4] Barratt, September 2009 "MARK CLARE "the challenge of putting more volume out is -- on so few outlets is that you do start compromising the prices you charge."

[5] For example, Taylor-Wimpey, May 2016 "PETE REDFERN: House building is still a cyclical industry, that hasn't changed. The cycle may be slightly different – we'll talk about that in a second – but targeting maximum growth each year will lead to bad decisions sooner or later."

But I'm -- there's no sort of handshake agreement here, but effectively we're all taking a share -- there's not land sitting out there waiting to be bought. So if I can't take a bigger share of it, then I can get by sort of reasonable means of my existing team or by changing my financial metrics. All I do is drive up the land price across the market. And you know, of course, we're all just pushing to get that bit more and every site you look at does compromise on that one just a bit. And that one is great so I can do that but that one I'm slightly concerned about. We all go through that balance.
But I can't go and buy another 2000 plots at the same prices. It's not that my teams have got land budgets that I'm not letting them spend. It's the balance of land in what's effectively an oligopoly in terms of land buying. But I'm not -- there's no agreement that X will take a particular share. But like any oligopoly, there's a balancing act. If you push -- you try and push your market share and your -up by moving price, you move the whole market and that's going to damage us all."

(Pete Redfern, (former) Group Chief Executive, Taylor Wimpey, 4 July 2013)

This brings us to the question of how the 'big-three' manage to achieve such high margins. State support has been crucial in this respect, but so has market power. Besides any scale or scope economies, which are beyond scope of our analysis, the 'big-three' are likely to wield superior market power compared to smaller housebuilders, thus achieving greater risk-adjusted returns, in two key ways.

Monopsonistic Power in the Land market

It is important to recall that the 'big-three' are primarily land-businesses. As Pete Redfern put it, "*We said that we weren't just a house builder, we were a land portfolio company, that our main driving goal, our main way of adding value was adding value to the landbank, taking it through the planning process. We still believe that today"* (Taylor-Wimpey, May 2016). What happens in the land market is therefore crucial to the profitability and behaviour of these crucial market actors.

From the perspective of economic theory, the land market violates many of the assumptions behind the model of perfect competition: buyers and sellers do not have complete information about market conditions; goods are certainly not identical (to the contrary, every single piece of land is different); there are not a large number of buyers and sellers; and there are significant barriers to entry for particular sites, particularly large, greenfield sites. Given this, from a theoretical standpoint, it is debatable whether, *a priori,* we would expect land markets to be competitive. Our analysis, summarised below, suggests that, since the GFC, the market for large greenfield sites has been far from competitive, and this has been a key driver of the 'big-three's' profitability.

Since the GFC, the land market has been extremely favourable to the 'big-three'

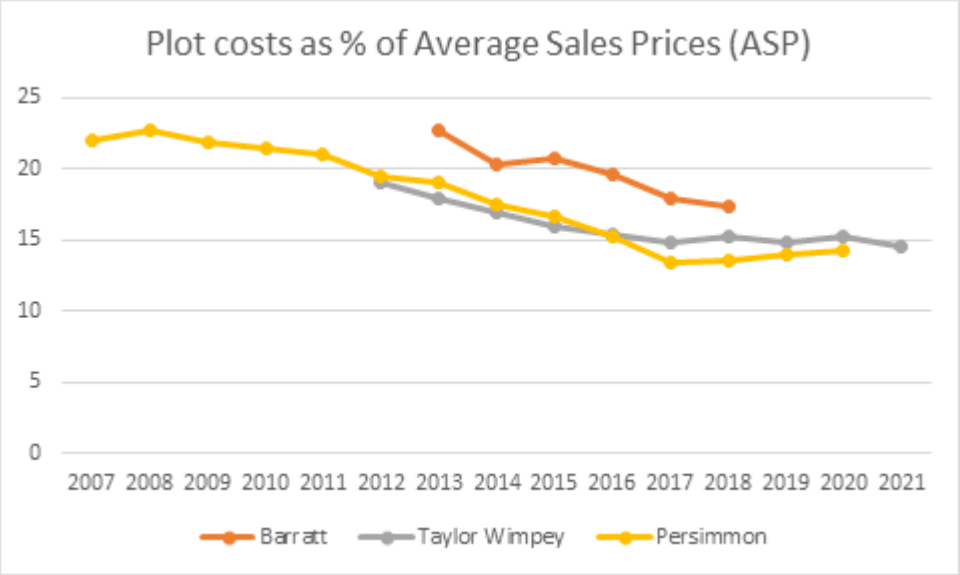
- Post-GFC, the average price that the 'big-three' have paid for their current plots (plot cost) as a proportion of current average sales price (ASP) has steadily declined[6] (see Figures 1 and 2).
- This is both as a result of the 'big-three' buying land at lower prices, *and* post NPPF 2012, being able to build a greater proportion of their supply using their (cheaper) strategic land.
    - For example, Taylor Wimpey increased the proportion of their short-term land bank that came from strategic land from 41% in 2011, to 52% in 2017, while Barratt increased the proportion of their total *completions* from strategic land from 10% in

[6] Taylor Wimpey, May 2018: "PETE REDFERN: land cost, you know, fallen from 25.5% to under 20% on new acquisitions. Actually, if you looked at the land bank proportion the fall is far more significant than that, because you'd seen such a big ramp up in 2006 which you just haven't seen. You know, that sort of 18% to 20% range that we've looked at has been very stable over the course of the last few years."

2014 to 25% in 2017 (see Annual Reports).

- As a result, the volume housebuilders have seen their revenues rise while their land costs have flatlined – this is a major, and under-appreciated, driver of the big-three's super-normal profitability[7]. However, the reduction in land values has varied geographically and according to the type of land.
    - This reduction in land values has particularly steep and sustained for the regional greenfield sites, and strategic land[8], which the largest housebuilders rely upon.
    - The urban land market, which SME's are more likely to rely upon, has been more competitive[9].

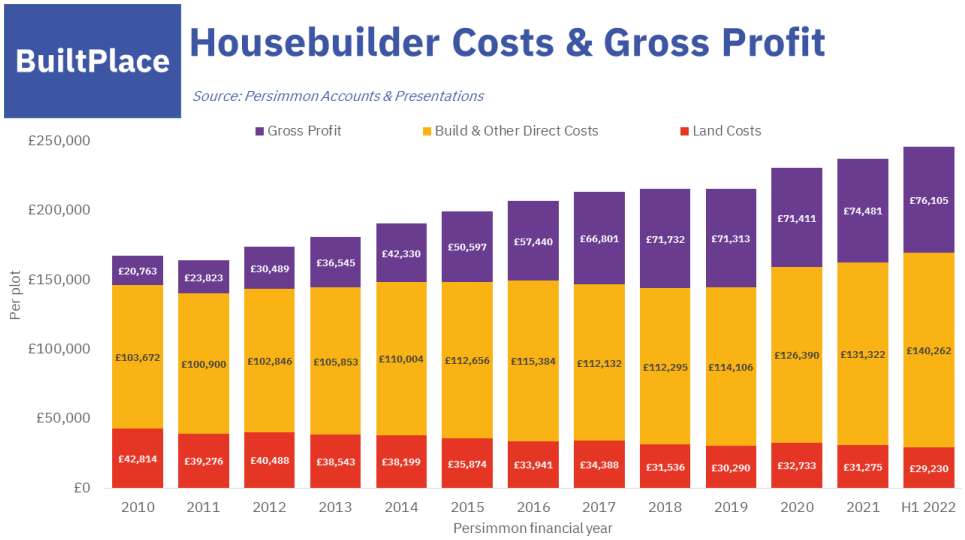
Figure 1: Graph showing average current plot cost as a percentage of average sales price for past year



Note 1: Data has been acquired from respective companies' annual reports and other shareholder presentations.

Figure 2: Persimmon costs and gross profits from 2010 -2022

[7]Taylor-Wimpey, May 2018 "PETE REDFERN: everybody in the industry has been telling you for a number of years how much easier the land environment is, how much, much better the returns are, how much less competition there is... there is enough evidence, that it is far more likely that the land environment will remain as it is today and perhaps get a bit better, and that it won't be the fundamental constraint on the industry going forward, you know, for at least the next five to ten years"
Barratt, February 2017 "DAVID THOMAS "We see that the land market remains attractive and we're seeing very good opportunities across all of our regions. On the left-hand chart, you can see that, in the regional market, land prices have grown at a slower rate than house prices would imply. They still remain well below pre-downturn prices."
[8]Taylor Wimpey, August 2010. "PETE REDFERN: By far the bigger proportion of what we're doing at the moment is closer to the one to one conversations than it's ever been before. The norm is most sellers, unless we have a very strong relationship or an existing ransom strip, or we own part of the site already, most will talk to at least one or two others, to make sure they're not being misled. But there's a big difference between that and a sealed bid competitive process designed to eke out every last penny."
[9] Savills UK | Market in Minutes: Residential Development Land Q2 2019



- This reduction in competition/prices for greenfield (strategic) land is likely to be driven by the following factors:
    - On the supply-side, via the NPPF, the supply of large-scale (>150 units) greenfield sites has risen faster than other sites[10].
        - *"it is patently clear"* the CEO of Taylor Wimpey recently (May, 2022) observed *"that local authorities have a preference for large sites."* Looking at all developments across England, Yu et al., (2021) found that after being remarkably stable between 1996 and 2009, the average size of development site increased markedly after that, to around 25 units.
        - It is unclear exactly what is driving this trend, and more evidence is needed, but the following factors are likely to be significant: i) local authorities see it as politically expedient to concentrate planning permissions in one large site rather than lots of larger sites; ii) since NPPF 2012, housebuilders being better able to win planning for these sites on appeal (although there is evidence that success rates have reduced in recent years (Dewar 2020; Stares, 2021), and iii) local planning authorities being incentivised to grant planning permissions for some large speculative planning applications on greenfield sites in order to assist with their housing land supply positions.
    - On the demand-side, post-GFC, there was a major decline in the overall number of housebuilders leading to reduced competition in the land market *overall*[11]. However, the reduction in demand for larger greenfield sites has been more sustained because:
        - there are major barriers to entry for these sites (due to the length of time it takes to achieve planning permission) and large green-field sites (because of capital intensiveness of developing them). Demand for these sites is

[10] Taylor-Wimpey, May 2018 "JENNIE DALEY "it was really the introduction of the Localism Act, and the NPPF, that saw significant increase in housing consents and housing allocations via the plan process. These have benefited strategic land supply conversions quite materially, such that we are now exceeding our previous 40% target from strategically sourced land."

[11] Persimmon, August 2010 "MIKE FARLEY "what you need to understand in the business is the actual housing market, and the builders in the marketplace, is an entirely different place than it was say two years ago. The capacity of the industry has probably halved. So, land is still there in the same quantity as it was two years ago. I'm not saying there's an over-supply of land in the marketplace, but there's not a radical shortage of land at this stage. We are able to buy as much land as we want at the margins we see"

therefore restricted to the volume housebuilders[12].
        - These VHBs (or at least the 'big-three') have explicitly targeted margins over volumes (see above), and therefore demand for these parcels of land is limited.
- Consequently, the big-three have probably been able to widen their margins more than smaller housebuilders (who have to deal in more competitive land market). However, this remains a hypothesis, and we would advise CMA to collect data (e.g. on profit margins) to test it further.

Monopolistic power over build out rates and pricing

It is well established that housebuilders aim to build out sites in line with absorption rates, so as to maximise their sales price. Moreover, there is robust empirical evidence from both the UK and US that local housebuilding markets with less competition (i.e. greater concentration of market share) tend to build out more slowly (Yu et al., 2021; Cosman and Quintero, 2019). Aligned with this, our analysis also suggests that in less competitive markets, the big-three also achieve higher prices[13]. All other things constant, volume housebuilders are likely to have greater control over build out rates and pricing for the following reasons;

a. Because they focus on large, greenfield sites, almost by definition they are more likely to have greater market power, which will enable them to build out at a rate that maximises their returns (rather than at a rate that will bring down local prices).
b. Because they have more sites under construction at any given time, the largest housebuilders have more capacity to slow build out rates in a particular local market without compromising their immediate cashflow – an option that smaller housebuilders lack.

In sum, if volume housebuilders are able to buy land more cheaply than smaller housebuilders, and to achieve higher sales prices in some circumstances, then it is not surprising that the housebuilding industry has become increasingly concentrated. Given the largest housebuilders are, in theory, more capable of building out slowly, and thus achieving higher sales prices, then it stands to reason that greater concentration of the industry will also lead to an overall slowing of build out rates and, by extension, higher new-build prices. To probe this line of reasoning further, we would advise the CMA to collect data on the profit margins achieved by the largest volume housebuilders, and other smaller SME's, to breakdown their accounts (as we have done for Persimmon - see Figure 2)

Possible solutions

It is beyond the scope of our research expertise to offer *detailed* policy proposals. However, we would offer the following broad recommendation for levelling the playing field:

- Land market data should be made much more transparent, so as to reduce the barriers to entry into the land market.

[12] Persimmon, August 2007 "MIKE FARLEY: "There aren't too many players looking at strategic land, because of the timescales it does take to bring forward"

[13] Persimmon, August 2008 "MIKE FARLEY "depending on the competition in one area, if there's four or five competitors there's obviously a lot more price pressure. If you have a site on its own, Charles Church will have less competition, because they have less price pressure".
Persimmon, August 2012 "MIKE FARLEY "Smaller Charles Church sites, you're less competition so again you're able to demand slightly better pricing in those locations"

- Local authorities should ensure that a mix of site sizes are offered planning permission – in some cases, this may involve the LPA breaking up a large site into several smaller sites. However, this does partly depend on a sufficiently diverse housebuilding sector promoting a sufficiently diverse range of sites.
- Following the recommendation of Letwin (2018), large sites should be delivered by consortia of housebuilders offering differentiated products aimed at different market segments – including a sufficient supply of affordable housing at tenures preferred by local authorities to meet local need. (The recent consultation on revisions to the NPPF included provisions relating to diversifying tenures to maximise absorption rates.)
- Access to finance should continue to be offered to smaller housebuilders on favourable terms.
- If the costs of holding land increased (e.g. through tax on land with planning permission), then this would incentivise larger housebuilders to build out more quickly, thus limiting the extent to which they can use their market power to command higher sales prices. (The Levelling Up and Regeneration Bill and the recent NPPF consultation include proposals to discipline housebuilders into building out their planning permissions more quickly so as to tackle the perceived problem of land banking. The government has also indicated that it intends to launch a consultation on imposing a financial penalty on housebuilders for building out too slowly.)
- However, while increased competition is likely to increase build-out rates, it is unlikely to radically improve the elasticity of housing supply. We discuss the reasons why in Q5.

5. How can the functioning of the market be improved?

We would contend that making the housebuilding industry more diverse is a necessary, but not sufficient, condition for improving the functioning of the housebuilding industry, in terms of the elasticity and quality of housing supply.

The reason is that, even in a diverse housebuilding industry, it will remain the case that land is expensive and that housebuilding is an extremely risky business given the long lead-times and cyclicality of housing markets (and land values). Before the GFC, housebuilders assumed rapid and indefinitely rising house prices, and this made housebuilding seem a relatively risk-free business. Since the GFC, however, the big-three have understandably been much more cautious, as reflected in their prioritisation of margins over volumes and their reluctance to take on debt. We can reasonably assume that the smaller housebuilders are at least as cautious, if not more so given their lower (likely) margins (see Q4).

One way of addressing this problem is for the state to de-risk housing demand, which was precisely what the Help to Buy Equity Loan sought to do. The issue with this scheme though was twofold. First, by channelling first time buyer (FTB) demand towards the newbuild stock it appears to have unsustainably inflated the new-build premium (Carozzi et al., 2020), largely to the detriment of the consumers who purchased them. Second, in *competitive* land markets, these demand-side subsidies are likely to (partly) feed through into higher land prices, thus bringing the development risk back up again. Finally, for such a demand-side policy to succeed in boosting supply, it relies on suppliers choosing to increase volumes, rather than boosting margins (which was the strategy adopted by the big-three after the GFC). Overall then, demand-side subsidies are a relatively ineffective means of boosting supply.

A more effective solution, it would seem, is for the state to take on most of the risk associated with both the supply-side and demand-side, but also to maintain most of the returns. For example, the state could gain and retain ownership of land with planning permission, tender the build out of that land to a housebuilder/construction company, and finally, sell the homes to the end-buyer (e.g. home-owner or housing association). This would mean the state socialising most of the development risk (e.g. price declines in a market downturn) but it would also socialise the returns (housebuilders would essentially be construction companies, operating on much lower margins, as they do in other countries). This would avoid what happened in the previous downturn where housebuilders wielded their structural power (see Q13) to socialise their loses while privatising their gains. Indeed, as explored in work by Morphet and Clifford (2021), local authorities are increasingly engaging in direct delivery of housing and are using a range of models.

6. **Have any of the following aspects changed over time? If so, how and why? a. The role of land promoters and land agents in transactions. b. The propensity for land promoters and land agents to be used as part of securing planning permission and land transactions. c. The structure of the market for land promoters and land agents**

A report by McAllister, Shepherd and Wyatt (2021) explored the land promotion sector and its contribution to the supply of strategic housing land in the UK. The study is based on interviews with land promoters and an analysis of a snapshot of planning application data.

Based on interviews with land promoters, the research found that, although land promotion has long been a feature of the land market in the UK, it grew significantly in the years following the GFC. Interviewees suggested that this was for the following reasons:

a) Following the GFC, some larger housebuilders reduced their land buying activity and some sold some of their land assets. There was also a wave of redundancies in the built environment sector. This created a pool of land market professionals who were well placed to utilise their skills and promote land that was available in the market.
b) In the aftermath of the GFC, the government was keen to promote housing development as a means to fuel economic growth and recovery. This was part of the reason that it introduced a new National Planning Policy Framework in 2012 (NPPF), which included policy mechanisms that were intended to make it easier for speculative planning applications to be granted planning permission in circumstances where the local authority could not demonstrate a sufficient supply of deliverable land. While there had previously been national policy intended to discipline local authorities into maintaining a sufficient land supply, most interviewees agreed that the new NPPF (2012) created a more favourable policy environment for speculative land promoters.
c) A further catalyst for the maturation of the specialist land promotion sector was the increased use of land promotion agreements. These work differently to the option agreements that tend to be preferred by housebuilders. Under option agreements, the land is usually sold to the housebuilder that is party to the agreement with the price determined by an independent appraiser (by calculating the 'market value'). However, under promotion agreements, once the site has planning permission, it is usually marketed and sold to a housebuilder via a more competitive process. The resultant selling price may be higher than the independently calculated market value figure under an option agreement because the selling price is generated by a competitive process whereby buyers are incentivised to adopt

more optimistic assumptions regarding costs and values than the independent appraiser. Therefore, the interests of the land promoter and the landowner are in closer alignment in a typical promotion agreement than is the case with an option agreement because it is both their interest to generate the highest sale price possible. Some of the interviewees noted that promotion agreements represent different incentives to land agents compared with option agreements and this may prompt agents to recommend a promotion route to landowners. For example, promotion agreements represent the potential for a further commission via a market sale – this is not payable when the land is sold under an option agreement. Further, because of the misalignment of interests between landowner and housebuilder under the option agreement model, this creates potential for conflicts and reputational damage on the agent's part if the landowner later feels that they have been under-paid for their site.

In terms of the structure of the market for land promoters and land agents, the report analysed a one-year snapshot of Glenigan planning application data for the UK (June 2018 – June 2019). This data was for residential schemes of 100 units or more and comprised 4,613 sites accounting for 2,009,037 units in the UK (including London). The researchers sought to categorise the applicants and differentiate between *specialist* land promoters and other types of applicant. Specialist land promoters were defined as businesses that promote land as the sole or main part of their business activity (and may also be owned and/or funded by a larger business). Many market participants in the snapshot data seem use to land promotion models but land promotion is not their main business activity. In particular, some real estate development and investment companies have significant land promotion divisions. Indeed, in 2022 Barratt purchased Gladman which is the largest specialist land promoter in the UK. Previous research conducted by Savills (2016) and Lichfields (2018) classified development and investment companies (as well as master developers) as land promoters and therefore adopted a much broader definition than that used by McAllister, Shepherd and Wyatt (2021). The below table shows the number of strategic sites with outline consent for 100 units or more, classified by applicant type (in the period June 2018 – June 2019).

Table 1: Strategic sites with outline consent for 100 units or more

Applicant Type	Number of units	% of total number of units	Number of projects	% of total number of projects
Broker	705	0.16%	2	0.45%
Construction Company	7,208	1.59%	5	1.12%
Consultant	5,912	1.30%	6	1.35%
Developer	67,808	14.96%	86	19.28%
Holding Company	1,602	0.35%	4	0.90%
Housebuilder	159,843	35.26%	157	35.20%
Individual	4,401	0.97%	11	2.47%
Investor	66,702	14.72%	42	9.42%
Landowner	57,394	12.66%	55	12.33%
Occupier	140	0.03%	1	0.22%
Specialist Promoter	8,275	1.83%	29	6.50%
Public Sector	58,538	12.91%	36	8.07%
Registered Provider	13,870	3.06%	9	2.02%
Uncategorised	879	0.19%	3	0.67%

Total	**453,277**	100%	**446**	100%

(Source: from McAllister, Shepherd & Wyatt, 2021: 45)

This table demonstrates the variety of types of business that are active in the strategic land market. The analysis of the snapshot data (adopting a tighter definition of 'specialist land promoter' than in previous studies) produced the following key findings:

- Housebuilders (c35% of units), real estate development and investment firms (c30%) and landowners (c13%) dominated the market for strategic housing land in the 2018-2019 snapshot.
- Of the outline consents granted to housebuilders, Barratt, Persimmon and Taylor Wimpey accounted for over a third (37%) of units, and the top eight (Barratt, Bloor, Bovis, Cala, Countryside, Crest Nicholson, Persimmon and Taylor Wimpey) accounted for nearly 60% of the total number of units with outline consent in the 2018-2019 snapshot.
- Many market participants use to land promotion models even though land promotion is not their main business activity.

In the study period, *specialist* land promoters accounted for just under 2% of units with outline consent.

Although this is not time series data and so cannot by itself demonstrate *change* in the structure of the land market over time, the analysis does demonstrate the range of entities active in the housing land market, as well as the variety of businesses that engage in land promotion of some kind. Interestingly, in the snapshot year, housebuilders accounted for only 35% of the units granted outline planning permission on sites of 100 units or more. This variety does indicate the potential for a competitive land market in the snapshot year – although the relative lack of land value growth in the post GFC period suggests otherwise (see Q4).

Although there is no empirical evidence to support the claim, land promoters interviewed for the research by McAllister, Shepherd and Wyatt (2021) argued that their activity can improve the supply of developable land because they are incentivised to get planning permission quickly and supply sites with planning permission directly to housebuilders. However, the sites that tend to be preferred by land promoters tend to be those that are suitable for delivery by larger, rather than SME, housebuilders. Therefore, even if the claim that such sites pass through the development process more rapidly via a land promoter than they would if they were languishing in a housebuilder's strategic land bank, it remains the case that their activity potentially helps to consolidate the market concentration of the housebuilding industry rather than helping to diversify it.

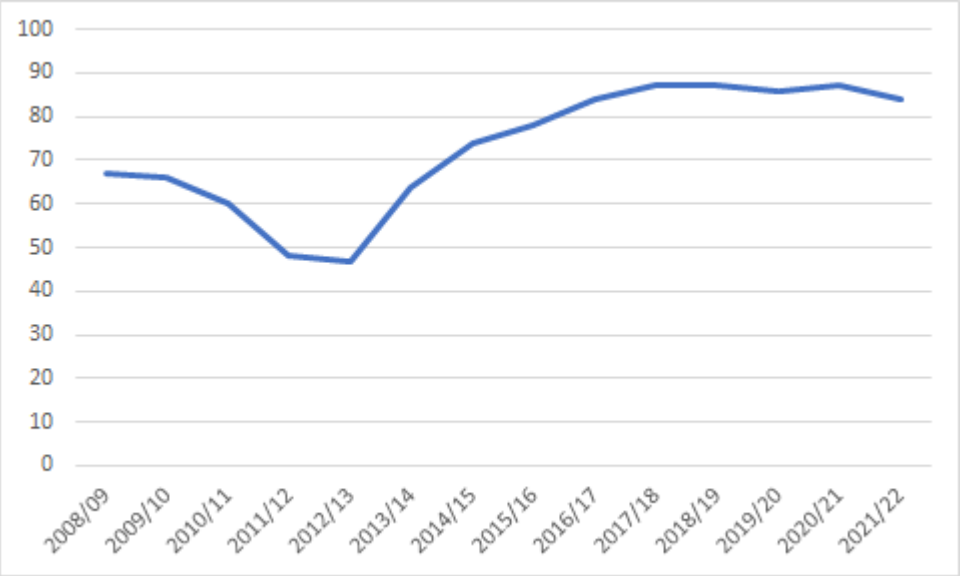
7. Have any of the following aspects changed significantly over time? If so, how and why?

a. Time and cost for developments to go through different stages of the planning process.

The Department for Levelling Up, Housing and Communities (DLUHC) publishes planning application statistics. Below is a summary of the trend in determination times for major and minor residential planning applications in District planning authorities. The statutory time limit for determining a minor planning application is 8 weeks. The determination limit for major planning applications is 13 weeks and 16 weeks if an Environmental Impact Assessment is required. A major residential planning application is one that includes 10 dwellings or more, or that comprises a site of more than 0.5 hectares when the number of dwellings is not yet known. It is possible for local authorities to

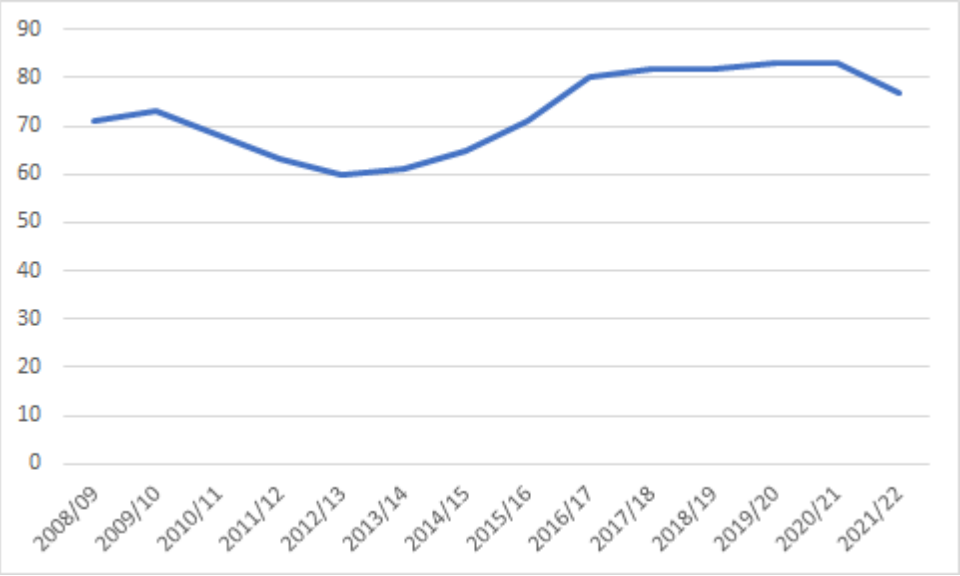
agree extensions with applicants, but the government's policy is that a decision should be made within 26 weeks at the most. It is also possible for developers to sign a performance agreement that includes a longer timescale.

Figure 3: Percentage of decisions on major residential planning applications determined within 13 weeks or agreed time in District planning authorities (2008 – 2022)



(Source: Live Table P120A, DLUHC)

Figure 4: Percentage of decisions on minor residential planning applications determined within 8 weeks or agreed time in District planning authorities (2008 – 2022)



(Source: Live Table P120A, DLUHC)

These data suggest that there has been significant improvement in the speed of planning decisions for major residential planning applications in District authorities as against statutory time limits or agreed extensions of time since 2012. There has been some improvement for minor planning applications in the same period. Both types of application have broadly similar rates of determination within agreed periods at present (around 80%).

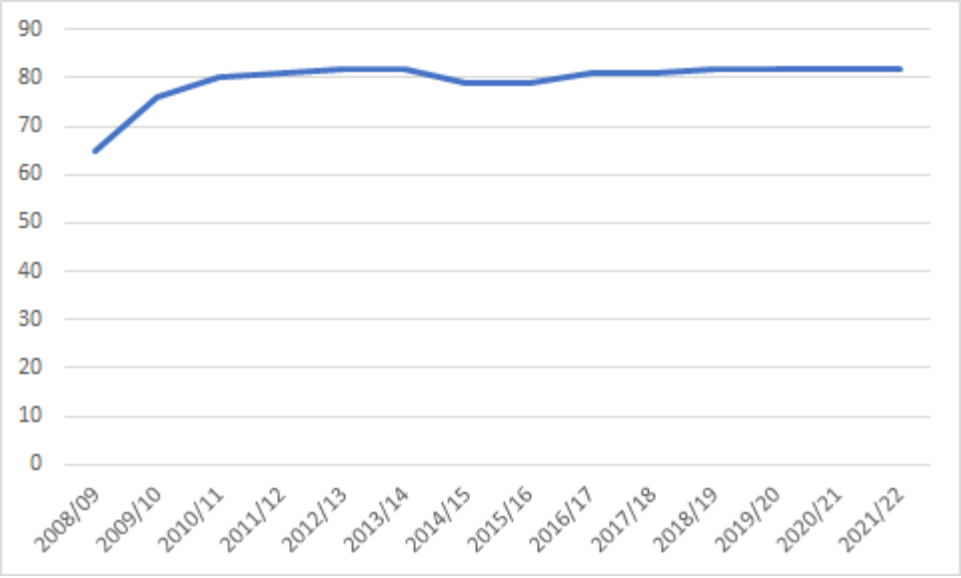
However, this should be treated with caution as it is not possible to tell how long the various agreed extensions of time were beyond the statutory determination periods. Therefore, although the percentage of applications determined within agreed time limits has improved since 2012, these data are not a wholly reliable indication of the trend in actual determination periods. Further, these data do not capture any post-consent delays such as those arising from the requirement for developers to submit further information to the local authority in order to discharge planning conditions (see Q14). Nevertheless, they do indicate that the vast majority of planning applications are initially determined within agreed or statutory time limits.

This is counter-intuitive given the extent to which the residential development industry singles out planning delays as a key issue that inhibits their business operations and housing supply. For example, in a survey of SME housebuilders conducted by the Home Builders Federation published last year (HBF, 2021: 8), 94% of respondents saw delays in securing permission or discharging planning conditions as a ''major barrier to housing delivery' - up from 83% in 2020. Ninety percent of respondents felt that the lack of resource in local planning authorities was a major factor, up from 73% in 2020.

b. Likelihood of success in securing planning permission.

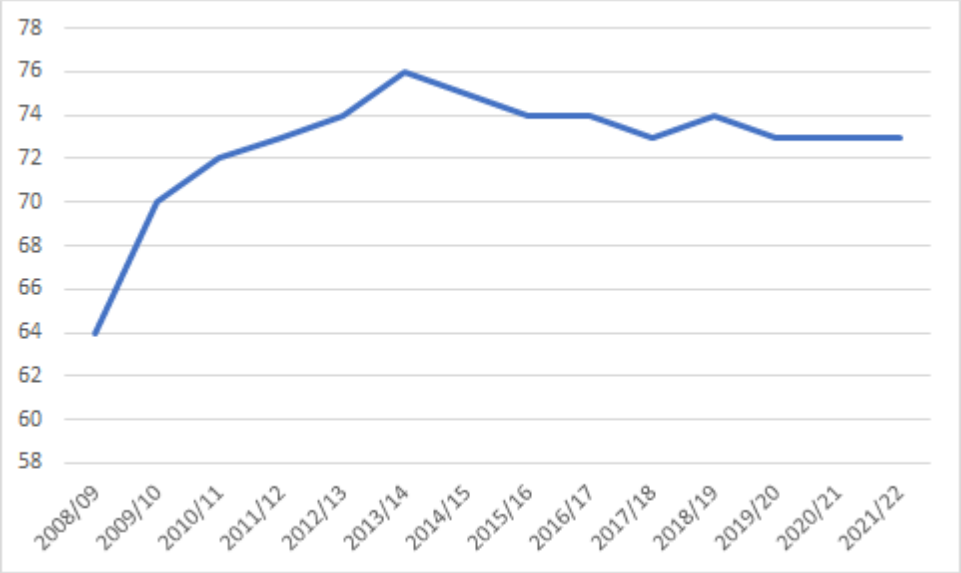
The figures below show the trend in the percentage of major and minor residential applications submitted to District planning authorities that are granted, based on data released by DLUHC.

Figure 5: Percentage of major residential planning applications submitted to District planning authorities granted planning permission (2008 – 2022)



(Source: Live Table P120A, DLUHC)

Figure 6: Percentage of minor residential planning applications submitted to District planning authorities granted planning permission (2008 – 2022)



(Source: Live Table P120A, DLUHC)

These data suggest rapid improvement in the period 2008-2011 for major applications but little change since then, with the proportion of applications granted permission consistently at around 80%. Minor application success rates improved very significantly in the period 2008-2013, but have declined since then and are currently at around 73%. The poorer success rates for minor applications could be due to the smaller sites that are subject to minor applications being more constrained than some larger sites as well as the fact that the smaller housebuilders promoting the smaller sites may have fewer resources to devote to securing planning permissions than their larger competitors (HBF, 2021: 9).

c. Propensity for developers to negotiate s106 requirements to reduce affordable housing requirements.

Local authorities' planning policy documents specify the proportion of affordable housing it expects to be contributed by residential developers. Developers enter into s106 agreements (planning obligations) with local authorities which are legally binding and specify the contributions the developer must make in order to mitigate the impact of the development and make it acceptable in planning terms. This can include affordable housing provision in kind or via a payment towards off-site provision. Such policy requirements are subjected to viability assessment during the plan-making process.

However, developers can seek to negotiate s106 agreements in their favour to provide lower levels of affordable housing than that required by planning policy. A developer may do this when first negotiating a s106 agreement as part of the planning application process. It is also possible to *renegotiate* existing s106 agreements and this affords a further opportunity to reduce the affordable housing element (see Q17). In both instances, the success of the strategy will depend on the developer convincing the local authority that providing the level of affordable housing set out in policy (or in an existing s106 agreement in the case of renegotiation), would render the development *unviable*.

The explicit use of viability assessments in British planning grew in the 2000s. McAllister (2017) charts a sequence of key policy documents and events between 1998 and 2015 that tell a story of the deepening embedding of viability and calculative market logic in plan making and development management. A key national planning document was Circular 05/2005, which specified that planning

obligations must be financially viable on a scheme-by-scheme basis (Crosby et al, 2013: 6). The original version of the NPPF (2012) required that the "the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened." (DCLG, 2012: 41). Development viability is now a core feature of plan making and in the determination of some planning applications.

Development viability for planning is assessed using the residual method of land valuation. The conventional 'textbook' approach is that the land value is calculated by working out the difference between the anticipated total value of the completed development project and the cost of delivery (including any developer profit). What remains is the 'residual land value'. If this is sufficiently in excess of the value of the land in its current use so as to incentivise a 'reasonable' landowner to release the land for development (i.e. the 'benchmark land value'), then the development is considered viable. Developer contributions can impose development costs and the inclusion of affordable housing in the scheme (via a s106 agreement) can reduce the total value of the development, thereby reducing the residual land value and, potentially, impacting viability. Because viability calculations are modelling anticipated future costs and revenues, they are subject to significant uncertainty and variation in assumptions. Further, there is often a lack of clarity regarding what precisely constitutes a reasonable return to the landowner.

It is doubtless the case that the propensity for developers to seek to enter into viability negotiations to provide developer contributions below policy requirements has increased alongside the deepening embeddedness of viability considerations in plan-making and development management processes over the last twenty years or so. There is evidence of this having been a particular issue in London in the post GFC period (Sayce et al, 2017) as well as in local authorities across at least 8 other cities in England (Grayston, 2017), with negative impacts on the provision of affordable housing. Key reasons for this include:

- the fact that brownfield sites can be costly and complex to deliver;
- there are skills and information asymmetries between developers and local planning authorities;
- there are incentives for developers to bias viability calculations for planning;
- the economic dependence of some viability consultants on developers and landowners;
- lack of public transparency regarding project-specific viability assessments;
- lack of clarity regarding national guidance on conducting viability assessments;
- inconsistencies in how development viability models were being applied;
- scope for exploitation of the weaknesses and uncertainties built into development viability models; and,
- the power of landowners to refuse to sell land at prices that reflected fully policy compliant levels of developer contributions.

(e.g. Crosby, 2019; Crosby & Wyatt, 2019; Sayce et al, 2017; Grayston, 2017; McAllister, 2017; 2019)

Indeed, such issues prompted the Mayor of London to introduce a 'fast track' planning application process in 2017 for applicants developing privately owned land who agreed to provide 35% affordable housing, even in cases where local policy may have a higher overall strategic affordable housing target (GLA, 2017). Furthermore, the national planning guidance in England was updated in 2018 to introduce a greater degree of standardisation in how development viability for planning is calculated in an attempt to reduce scope for developers and landowners to game the system and to secure more affordable housing. This latter change was intended to address some of the main issues with the use of viability assessments identified above, and to seek to ensure that land is transacted

at prices that more closely reflect policy requirements regarding developer contributions. These regional and national policy responses are indicative of the recognition by policymakers that there has been a problem with viability assessments being used to secure affordable housing at levels below policy requirements.

However, the degree to which there is scope to negotiate lower than policy required proportions of affordable housing contributions will depend on the nature and location of the site, the complexity and costs of development, the density of development and the level at which policy requirements are set. McAllister (2019) has modelled the potential range of affordable housing contributions on a range of types of site, taking into account different kinds of approaches to calculating the benchmark land value against which viability is assessed. The relevant results are summarised in the below table.

Table 2: Modelled viable levels of affordable housing contributions by type of site

	Affluent Urban	Affluent Greenfield	Average Urban	Average Greenfield
BLV Option 1	15%	24%	0%	15%
BLV Option 2	20%	31%	0%	22%
BLV Option 3	21%	50%	0%	18%

(Source: adapted from McAllister, 2019)

While the results in the table above are based on modelling hypothetical sites in hypothetical locations with hypothetical inputs as well as a range of approaches to benchmark land value, they do illustrate the fact that there are differing levels of affordable housing that can viably be provided on different kinds of development site. For example, greenfield development sites in affluent areas are able to provide higher proportions of affordable housing than greenfield development sites in less affluent areas or in urban areas. This (unsurprisingly) indicates that there is less scope to negotiate down affordable housing contributions for sites in areas with relatively high house prices and relatively lower development costs. This rather obvious point nevertheless is a reminder that it is difficult to generalise about 'developers' and their behaviour given the variety of types of developers, development, land and landowners.

d. Propensity for developers to be successful in negotiating s106 requirements to reduce affordable housing requirements.

The sources cited above, particularly Sayce et al (2017) and Grayston (2017), suggest that some developers in the post-GFC period have been successful in using the viability process to negotiate developer contributions and affordable housing contributions that are less than policy requirements. We are not aware of any research that has specifically examined the impact of the 2018 national viability guidance change in England, or of the introduction of the 'fast track' approach in London in 2017, and whether these adjustments have reduced the number of successful viability negotiations aimed at reducing levels of affordable housing to below policy required levels on individual schemes.

8. How do the aspects referred to in questions 7 and 8 vary (if at all) by:

a. Size of development the application is for?

As discussed in Q4, the proportion of planning permissions granted on large sites has increased since the NPPF, likely providing a comparative advantage to the larger housebuilders.

b. Size or identity of applicant (eg small developer, large developer, land promoter)?

See above

9. **What are the main barriers (if any), to the provision of affordable housing for (a) LPAs and (b) developers?**

Affordable housing is developed by:

- private registered providers (e.g. housing associations);
- nonregistered providers;
- local authorities.-

All of these, of course, can be described as developers in this context. However, for the purposes of this question, we refer mainly to private speculative developers who allocate a proportion of the homes they provide as affordable housing (or make payments for off-site provision) via S106 agreements. The government makes grant funding available for some affordable housing developments, but generally not those provided via S106 agreements (although grant funding for S106 schemes in London has been available in some circumstances to fund additional units if the scheme is able to provide at least 35% without grant funding). In 2021-2022 44% of affordable homes were funded through S106 agreements (nil grant), compared with 47% the previous year. In 2019-2020 the proportion funded via S106 was 51% (DLUHC, 2022).

For the purposes of this call for evidence, the key barriers to the provision of affordable housing arise from the interaction of the demands of most (private) landowners to achieve a desired return from the sale of their land, the lower values usually commanded by affordable housing and the lack of grant funding available to most S106 schemes. These considerations primarily impact on the developer in terms of viability (see Q8). This, in turn, impacts on the local planning authority which has to consider viability evidence when setting affordable housing policy, as well as when determining planning applications should the developer argue that delivering the policy requirement for affordable housing (e.g. quantum and/or tenure mix) renders the proposed development unviable. However, in the latter case, some planning authorities impose review mechanisms via the S106 agreement to revisit scheme viability at a later date to determine whether there is, in fact, scope to secure an increased contribution from the developer should viability have improved. There are many more detailed elements that impact on the actual delivery and development of affordable housing from the developer's and local authority's perspective – but evidence regarding these is best provided by developers and local authorities themselves.

10. **As regards land:**

a. What issues (if any) do developers face in identifying and securing land for development and how do they navigate these? Do these issues differ depending on the size of the developer?

The development land market is notoriously opaque. Further, there is no single development land market but, rather, multiple localised development land markets for different kinds of development sites. In addition, there are different kinds of developers (and landowners) active in different kinds of land markets. For these reasons, it is difficult to generalise. However, a key issue to bear in mind when reflecting on the operation of the 'development land market' is that it will be navigated rather differently depending on the nature of the developer, their business model and the kind of land they need. This means, for example, that developers active in different land markets for different kinds of sites may experience different levels of competition.

A key area of difference is between the SME and the volume housebuilder. Perhaps rather simplistically, SME builders will tend to develop smaller sites whereas volume housebuilders will tend to develop larger sites. They may therefore engage with different types of landowners in order to secure sites and this may therefore pose different types of issues. One key difference is to do with the interaction of the planning system and the availability of development land. Anecdotal evidence suggests that local authorities tend to prefer to allocate larger sites for development because this concentrates political risk onto a smaller number of sites and also because by allocating (and granting permission) for a smaller number of larger sites represents a theoretically more efficient way of delivering housing targets than spreading housing numbers across a larger number of smaller sites. This approach favours larger housebuilders over smaller ones that would not have the capacity to develop larger sites unless part of a consortium. Furthermore, specialist land promoters tend to focus on sites of around 100 units and so tend to supply 'oven ready' sites with outline planning consent to larger, rather than smaller, housebuilders (see Q7).

In terms of sourcing land, evidence suggests that housebuilders of various sizes prefer to source land through networks and contacts rather than through the open market (Adams et al, 2012). This is because relying on the open market to source land is less efficient and effective than utilising networks. Such networks could include other developers (competitors), landowners, land agents and local state actors as well as land promoters. Experienced developers may tend to prefer to deal with landowners or land promoters who are experienced in supply land for the development process, rather than inexperienced actors who may have unrealistic expectations (Adams, 2012: 714). This was corroborated in more recent research by McAllister (2020) on the role of brokers in the real estate market. However, this research also found that housebuilders also purchased land through an 'on market' process of competitive bidding brokered by specialist agents.

b. What issues (if any) do landowners face in finding purchasers of land for development and how do they navigate these?

See above.

11. **How do land promoters and land agents compete to secure contracts with**

(a) land owners and

See response to Q7.

(b) developers (or vice versa)?

See response to Q7.

12. **What are the key factors or objectives LPAs need to balance in taking decisions on housebuilding, and what drives these requirements? To what extent (if any) do these factors conflict, either with each other or with housebuilders' objectives?**

See response to Q16.

13. **Are there differences in the bargaining power between LPAs and developers when negotiating with each other? If so, what are the key differences and why do they arise**?

Yes, there are differences in the bargaining power between LPAs and developers when negotiating with each other.

To understand these, we think it is useful to introduce the concept of structural power (Culpepper, 2015), which can be broadly defined as the power that a firm, or group of firms, possesses in relation the state as holders of capital in a particular economy and society. The most obvious example of structural power, was when the state was forced bail out the banks because they were too "too big to fail": by threatening to undermine a service that society was dependent upon (the banking sector), the largest banks deployed structural power to secure concession.

Housebuilders *in general* are likely to possess structural power in relation to LPAs through their control of development land which effectively grants them a spatial monopoly over housing supply in that particular location: if they don't build out that specific piece of land then nobody else can. This means that if a local authority wants to maintain local (social) housing supply[14], S106 tax revenues[15], or ensure that a site is built out rather than mothballed (with all the associated negative externalities), then they are reliant on a select group of housebuilders to achieve that[16].

By threatening to withhold supply/mothball sites, these housebuilders can therefore exert structural power in relation to LPA's - power that is underpinned by the fact that land, as an asset, does not depreciate over time[17]. This structural power of the 'big-three' has probably been enhanced by the cuts to local authority funding, which made them more reliant on S106 tax revenues, and the NPPF 2012, which made it easier for the 'big-three' to win planning permission on appeal[18.]

The structural power of the *largest housebuilders* is likely to be further enhanced by two factors. First, for the reasons discussed in Q4, they have greater ability to build out slowly which, means their threat to withhold supply/mothball sites carries more weight than smaller housebuilders. Second, simply by virtue of controlling a greater proportion of land/supply, they also hold greater stocks of structural power: if a development of 10 units is mothballed then few people are likely to be

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[14]Persimmon, August 2008 "MIKE FARLEY "We're negotiating with Local Authorities about Section 106 payments in the planning consents and I think we're getting a favorable response on that front, particularly over the phasing of some of these payments on the larger sites. The Local Authority are aware, if they are going to get the affordable housing that they want in their region they are going to have to be flexible on that. And if there are large capital sums to be paid up front, they may not get those houses. So we are getting a favorable response to that and continue that negotiation
Taylor Wimpey, March 2011 "PETE REDFERN "We've got planning [gains] already where we've had local authorities that are starved of cash, less controlled by a national policy, more able to accept lower affordable housing or a different kind of level of design on a site. There are some positives in it"

[15] We don't have data on S106 savings by the 'big-three' during the GFC, but they were significant. For example, in August 2009, Taylor Wimpey (PETE REDFERN) told shareholders that they had negotiated down S106 contributions on three "not massive" sites in Manchester by £1M each.

[16] Taylor Wimpey, August 2011 "PETE REDFERN "I think a combination of a real local and national need for funds to drive any project that needs to happen, so actually the sort of contributions we're making through Section 106s, have become much more important for local authorities who are very starved of cash, which is making for a better planning environment, and genuinely a better dialogue between ourselves and local authorities and planners. "

[17] Persimmon, August 2009 "MIKE FARLEY "A major focus of the business has been on re-planning our schemes, our existing schemes that haven't started yet. And we've been looking at where possible revising session 106 cost, either to reduce them in some instances or re-phasing them to make the sites more viable to start site to reduce the cash up front commitments that are required. We've been reasonably successful on that. The planning authorities by and large I think are understanding of the current market positions, and if they want their planning [going] packages they are going to have to be realistic about them. "

[18] Barratt, September 2012 "MARK CLARE: Yes, the debate as to what the local authority thinks is not viable and what we think is not viable will clearly be different. But certainly, an impaired site is not viable because it's making no money so why would we carry on? We can clearly stop building on that site and say well, look, it's under water. I think that's where the debate with local authorities is, but we have had a very sensible debate in a lot of cases. I think it's more when the local authority says, that's what you signed up, you're stuck with it, that's when you go well, to be honest, we're not accepting that any more. We now believe we have the right to appeal that, and I think that's very helpful."

affected, but if it is a development of 2000 units then its effects will be much more wide-ranging. In short, some developments/developers are likely to be perceived as being “too big to fail” by LPA’s, which like the banks, provides them structural power which they can deploy to secure concessions.

To explore the possible material effects of this structural power imbalance, we would recommend the CMA collects data on S106 negotiations (and renegotiations) and explore whether the largest housebuilders are able to secure better terms.

14. Where s106 agreements are negotiated after the award of outline planning permission, what are the implications for

b) developers, compared with negotiations before outline planning permission is awarded? Please explain with reference to costs, benefits, and any other outcomes.

Planning Conditions and Planning Obligations

As a point of clarification, the Statement of Scope document appears to conflate planning conditions and planning obligations in paras 1.27, 2.11 and 2.23. Planning conditions and planning obligations are different mechanisms and are subject to different legal tests.

Planning conditions are imposed on a planning permission to “enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects" (DLUHC & MHCLG, 2019). They must be necessary; relevant to planning; relevant to the development to be permitted; enforceable; precise; and reasonable in all other respects. Planning conditions are imposed on and appended to planning permissions (including outline permissions). They cannot be used to directly require a payment by the applicant. However, planning conditions can have financial implications for a development.

Planning obligations are negotiated legal agreements used to mitigate the impact of unacceptable development to make it acceptable in planning terms. This can be via an agreement under section 106 of the Town and Country Planning Act 1990 by an entity with an interest in the land and the local planning authority (a S106 agreement); or via a unilateral undertaking by an entity with an interest in the land. Planning obligations must be: necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development. Unlike planning conditions, planning obligations can be used to require financial contributions from the applicant, as well as affordable housing contributions. The form and extent of planning obligations can therefore have implications for the financial viability of development (see Q8).

Planning conditions and planning obligations are both usually applied to outline planning permissions and would therefore bind the developer that ultimately delivers the development. It is possible in exceptional circumstances to grant an outline planning permission with a planning *condition* requiring that a planning *obligation* (e.g. S106 agreement) is later entered into before commencement of development, but this is only likely to be acceptable “when there is clear evidence that the delivery of development would otherwise be at serious risk” (DLUHC & MHCLG, 2019). The national planning guidance states:

“Ensuring that any planning obligation or other agreement is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency." (DLUHC & MHCLG, 2019)

However, it is possible to remove or vary a planning *condition*, or modify a planning *obligation*, subsequent to the grant of outline planning permission. In the case of planning conditions, this is done via an application under Section 73 of the Town and Country Planning Act 1990. The developer may wish to do this if a condition imposes constraints that they wish to have removed or changed.

In the case of varying/renegotiating planning *obligations*, there are the following options:

a) Voluntary renegotiation, where the developer and the local authority agree to do so. This can be done at any time. There is no right to appeal if an agreement cannot be reached.
b) Where there is no such agreement, if the planning obligation is more than five years old, the developer may apply to the local authority to change the planning obligation where it *no longer serves a useful purpose*, or would *continue to serve a useful purpose in a modified way*. If the local authority refuses permission, the developer can appeal the decision which is then determined by the Planning Inspectorate on behalf of the Secretary of State.

The government introduced new clauses to the relevant parts of the Town and Country Planning Act 1990 via the Growth and Infrastructure Act 2013 enabling developers to apply to local authorities to vary the affordable housing requirement contained in planning obligations amid fears that these were rendering developments unviable in the post-GFC environment. This legislation required local authorities to consider viability evidence and to change the affordable housing contribution in the planning obligation. The legislation also granted powers of appeal to developers in cases where the local authority refused the application to vary the affordable housing contribution. However, these clauses expired in April 2016 and have not been renewed.

Therefore, developers must now either rely on local authorities voluntarily entering into renegotiations to vary existing planning obligations, or they must submit an application to remove or vary the obligation. However, they can only do this if the planning obligation is more than five years old and they must be able to argue that it no longer serves a useful purpose, or would continue to serve a useful purpose in a modified way. These are more stringent requirements than those in the now-expired provisions relating to affordable housing renegotiations.

Outline Planning Permission and Reserved Matters

When outline planning permission is granted, there will be various matters reserved for subsequent 'reserved matters' applications to agree the detail. Matters that can be reserved are: appearance, access, landscaping, layout and scale. The details in the reserved matters application must be in line with the original outline planning permission and must comply with any planning conditions imposed. The original planning obligation / s106 agreement will also apply. However, as discussed above, these existing requirements can subsequently be varied (see below).

When outline planning permission is granted, this establishes the principle of development. This reduces planning risk and will usually result in an increase in the land value. If the land is being promoted to be sold on to a housebuilder, the housebuilder can submit reserved matters applications in accordance with the outline planning permission. Alternatively, the housebuilder could choose to make non-material amendments to the existing permission via an application under section 96A of the Town and Country Planning Act 1990, minor-material amendments via an application under section 73 of the Town and Country Planning Act 1990 (e.g. to vary a planning condition to refer to a different set of plans in accordance with which the development must be delivered), or submit an entirely new planning application for a different residential scheme. In the

latter case, a *new* planning obligation / s106 agreement would need to be negotiated and this could have different levels of affordable housing or other contributions.

Renegotiations of Planning Obligations: Volume and Grounds

There are various reasons why a developer may wish to vary an existing planning obligation and/or an existing planning permission. An obvious reason is because of viability issues i.e. the consented scheme is deemed not to generate the required return and/or the planning obligation imposes developer contributions (e.g. affordable housing) that can no longer be met while still enabling the developer to achieve required returns. Research by Landmark Chambers suggests that the most common S106 renegotiation appeals are related to changing restrictions on the occupancy of dwellings or which otherwise restrict the use of the land e.g. for holiday lets, agricultural workers, staff accommodation, affordable housing, age restriction on retirement flats etc. (Maurici et al, 2020).

Crook et al (2010 – cited in Burgess & Monk, 2016: 208) examined the planning obligations in 2007 – 2008 and found that one in twelve of planning obligations dealt with by the local authorities who returned data were subsequently modified. There was no evidence of an increase between 2003-2004 and 2007-2008. The renegotiations largely related to timing of payments, transferring an existing agreement from an old to an updated planning permission which had superceded the old one, changing from direct to in kind payments and adjustments to affordable housing tenure mix (rather than quantum).

Later research by McAllister et al (2014) that examined planning obligations in 2011-2012 found that 36% of the 126 local authorities that responded to the survey had been subject to requests to renegotiate one or more planning obligations and that these had been agreed in almost all cases. This time, the main reason for developers wishing to renegotiate was that development viability had been impacted by the GFC. The renegotiations tended to relate to the affordable housing element of planning obligations, but also included requests to change time limits to implement planning permissions, introduction of a claw-back mechanism (i.e. to reduce contributions subject to a later increase should viability improve within a specified period) and introduction of staged payments. Given that the study period pre-dates the introduction of the right to apply to local authorities to renegotiate affordable housing provision in 2013, these findings are illustrative of the extent to which local authorities were willing to enter into such negotiations in this period.

Updated research by Lord et al (2018) covering planning obligations in 2016-2017 found that 65% of local authorities who responded to the survey renegotiated a planning obligation – a further increase from 2011-2012. Adjustments to the affordable housing element was one of the most common reasons for renegotiation. However, requests were also made to vary the housing type of residential developments in order to better suit market demand. The latest version of this research by Lord et al (2020), examining developer obligations in 2018-2019 found that 46% of local authorities who responded to the survey renegotiated a planning obligation in this period – a decrease from the 2016-2017 period. Most authorities only received a small number of requests (four or fewer) but several authorities received ten or more such requests to modify an obligation.

Overall, this research suggests that "renegotiation became a more common feature of planning practice in the immediate aftermath of the 2008 downturn usually relating to the question of revised development viability" (Lord et al, 2018: 58). Although there has been a decrease in the volume of planning obligation renegotiations in the period 2018-2019 compared with 2016-2017, it remains significantly higher than in the years prior to the GFC. There could be various reasons for this,

including the increasing use of viability assessments in the planning process (see Q8), adjustments to the national planning policy environment, changes in market conditions, changes in the structure of the land development market (resulting in a disconnect between applicant and developer) as well as the impact on viability from the introduction of the Community Infrastructure Levy in 2010, which imposes a non-negotiable tariff on new development in local authorities that have chosen to introduce it (see Connell, 2015 for a discussion of how CIL may impact affordable housing delivery).

Implications for LPAs and Developers

As discussed above, it is usually the case that planning obligations are entered into prior to the grant of planning permission (outline or otherwise) in the interests of certainty and transparency. There is then the potential for renegotiation of the planning obligation and/or a change to the planning permission at a later stage. Renegotiations could be instigated by the original developer interest that entered into the obligation that was granted the permission, or its successor.

Whatever the precise circumstances under which a planning obligation relating to a residential scheme is entered into or renegotiated, similar issues will be relevant.

The developer has the potential to wield significant power over the local authority because of the threat that the development will not go ahead if it is not commercially viable. The local authority may wish the development to be delivered in order to help meet its planning objectives. In particular, this may include the delivery of housing to help meet housing targets. The local authority has the potential to wield significant power over the developer because it has monopoly control of development rights. The development will not be able to go ahead (and the developer will not be able to realise a return and will lose any investment they have so far made in promoting the planning application) if an agreement cannot be reached. Of course, the exception to this is in the case of a planning appeal, where monopoly control of development rights is wielded by the Planning Inspectorate on behalf of the Secretary of State.

If the key issue at play is viability, then the negotiations will be guided by the viability model and debates regarding the robustness of its inputs and assumptions (see Q8). Ultimately, the outcome of the negotiation between the local authority and the developer will partly depend on the extent to which the development proposal/planning obligation is in accordance with planning policy (local and/or national) as well as the weight given to any 'material considerations' that may justify departure from planning policy, combined with the perceived political risk to local politicians. Depending on the developer, it may have access to significant resources in the form of planning consultants, legal professionals and other specialists that it can deploy in the negotiations in order to secure a preferred outcome.

Ultimately, the grant of planning permission with a signed S106 agreement confers certainty regarding the principle and/or detail of development and the amount of developer contributions. This certainty is in the interest of both developer and local authority, as well as any developer that subsequently takes on the site for delivery. However, if market conditions change or a subsequent developer has different preferences, then it may seek to vary a planning permission and/or a S106 agreement. This will bring additional development costs, largely in the form of consultant's fees and any application fees. However, the developer may judge these to be acceptable in return for securing a preferred planning outcome for the site. Further, if the principle of development has already been established by an outline planning permission, this point will usually not need to be revisited, which means that the focus of the negotiation will be on points of detail rather than principle, such as quantum, typology, design and tenure mix etc.

From the local authority's perspective, such a renegotiation may be acceptable if it takes proper account of policy and any material considerations. However, research by Hickman et al (2021: 4) suggests that "the way in which post-consent planning processes unfold can allow for significant decline in the overall quality of a delivered scheme". The research found that outline planning permission followed by reserved matters is 'particularly problematic' in delivering design quality with full planning permission preferred because of the greater degree of control it offers local authorities. Further, the research found that the cumulative impact of multiple material and non-material amendments to planning applications are difficult for local authorities to monitor and may be used by developers to 'chip away' at the design quality of the scheme.

Finally, as discussed in our response to Q9, some planning authorities may impose review mechanisms via the S106 agreement to revisit scheme viability at a later date to determine whether there is, in fact, scope to secure an increased contribution from the developer should viability have improved.

15. **Do any of the participants in the market (including but not limited to housebuilders, land agents, and land promoters) have market power? If so, what drives this and how (if at all) do they exploit it?**

See Q4.

House prices

It was already recognised by the Office of Fair Trading (OFT) in 2008 that housebuilders have significant price setting power in local markets: by building out slowly, housebuilders can keep the price of housing in a local area, and particularly the new-build premium (i.e. the gap in value between new homes and second-hand homes), higher than they would be in a "competitive" housebuilding market (see also Adams et al., 2009). This is more a question of degree – the existing analysis suggests that larger housebuilders are likely to exert greater market power than smaller housebuilders.

Land prices

In terms of the land market, we have already presented evidence that suggests larger housebuilders have a degree of market power on larger plots of land – see Q4.

16. **Have any of the following aspects changed significantly over time? If so, how and why?**

a. The concentration of housebuilding at local level, in particular whether concentration is high in specific local areas.

Research by BuiltPlace using Energy Performance Certificates – which are a useful lead indicator for net housing supply – suggests that housing supply has fallen in areas with high population densities since 2016 and increased in those with lower population densities since 2014. The research suggests that a combination of tax changes reducing the attractiveness of city centre flats for investment and Help to Buy equity loan increasing the supply of larger houses in edge-of-town/city locations are responsible.

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