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Insights

BEST LAID PLANS: A CAUTIONARY TALE FOR DEVELOPERS AND HOUSE BUILDERS ALIKE

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SUMMARY

BCLP is fortunate to work with promotors of some of the largest urban development schemes in the country. Rarely have we not been asked to advise on so called 'drop-in' applications at some point in the development lifetime: Greenwich Peninsular, The Olympic Park, Ebbsfleet Valley, Brent Cross and Barking Riverside are just a few to mention. The recent appeal decision in *Hillside Parks Limited v Snowdonia National Park Authority [2020]*[1] has led some to question whether the established rules around 'drop-in' permissions have been curtailed; some authors query whether they have been lost altogether. Rest assured – the option is alive and well. This blog examines the foundation for any concerns and highlights the importance of a carefully constructed initial planning permission which should have an eye on the real possibility of future scheme amendments.

The ongoing challenge for developers is planning for an ever shifting economic and political landscape, one that can change in the blink of an eye (as illustrated by the economic devastation wrought by the Coronavirus pandemic).

Developers know that tweaks and amendments to schemes are often inevitable to ensure what is ultimately built delivers the best possible outcome for the site. We see this all the time, especially with large scale residential and mixed use urban schemes that come forward over several years.

Thankfully, the planning regime accommodates for this commercial reality with various statutory mechanisms that enable permissions to be amended or modified if the changes are 'minor material' or 'non-material' amendments. However, more fundamental or substantial scheme changes often require the submission of a new planning application. Where the changes required apply only to part or a phase of a large or multi-phased scheme, a new application or 'drop-in' application can be submitted that relates only to that part or phase. This reduces uncertainty of the decision and therefore saves considerable time and cost. The courts have formulated rules to strengthen and support the planning control imposed by legislation which has led to a well-established line of law

(the *Pilkington*[2] test) which sets out when multiple planning permissions can be implemented on the same development site.

The recent Court of Appeal decision in *Hillside Parks Limited v Snowdonia National Park Authority [2020]* is causing a stir with concern that it introduces uncertainty to the well-established *Pilkington* principles and the lawfulness of 'drop-in' permissions. Rest assured, normal business can and should resume.

The *Hillside Parks* case considered the validity of a planning permission granted in 1967 for 401 dwellings in Aberdyfi, Wales, and the extent to which subsequent development on the site was incompatible with the original permission. Development commenced under this permission in 1967, but several later planning permissions (that were implemented) authorised development on parts of the development site which were incompatible with the master plan incorporated into the original permission. In 2017 the planning authority (Snowdonia National Park Authority) advised that the remaining unbuilt development permitted by the 1967 permission could no longer be implemented because the later permissions rendered this physically impossible. The High Court and the Court of Appeal both agreed that, on the facts of the case, future development under 1967 permission would no longer be lawful.

In his analysis of the case, Singh LJ said that whilst a planning permission can be construed as granting permission for development to take place as a series of '*independent acts*', in his view *'that is unlikely to be the correct construction of a typical modern planning permission for the development of a large estate such as a housing estate. Typically there would be not only many different residential units to be constructed in accordance with that scheme, there may well be other requirements concerning highways, landscaping, possibly even employment or educational uses, which are all stipulated as being an integral part of the overall scheme which is being permitted. I doubt very much in those circumstances whether a developer could lawfully "pick and choose" different parts of the development to be implemented*."

The orthodox view has always been that a planning permission is just that – a permission to build not an obligation to build. Singh LJ reminds us that whether a developer can pick and choose what is developed will be a matter to be judged on the construction of the permission. However, his suggestion that this *'is unlikely to be the correct construction of a typical modern planning permission for the development of a large estate such as a housing estate'* does not fit with our experience. Many large schemes are deliberately and successfully constructed to be delivered in this way. Singh LJ's comments can be reconciled with what often happens in practice: it is indeed 'unlikely' that that modern planning permissions allow developers to have total control to 'pick and choose' certain elements of a scheme, such as the infrastructure or landscaping requirements, because the suite of Grampian conditions tie the developer into developing these parts of the scheme. In this respect developers may be restricted to deliver certain parts of the development whilst having more flexibility around developing other elements of a scheme that are not tied by a Grampian condition. The construction of the original permission as well as subsequent

permissions and their physical compatibility continues, in line with the existing principles, to determine which elements of a scheme can and cannot be delivered using ‘drop in’ permissions and this case does not change this. One way to achieve both certainty of infrastructure delivery as well as flexibility for future change is via carefully worded conditions and in-built parameters.

The *Hillside Parks* appeal turned on the facts, which was that the original scheme was "totally incompatible" with the subsequent permissions. We have seen press reports that suggest that this marks the end to the use of ‘drop in’ applications; we do not agree with that view. This case does not introduce anything wholly new or replace the *Pilkington* legal principles. It does, however, provide an example of how things can go wrong. Doubtless Singh LJ’s comments may well be seized upon by future scheme objectors seeking to use them to support and advance their propositions.

This case highlights the importance of a carefully constructed initial planning permission which should have an eye on the real possibility of future scheme amendments, as commercial reality will dictate. If this exercise is carried out properly at the start of the planning application process, with tactical phasing and Grampian conditions, and care is taken to ensure compatibility of subsequent permissions and amendments, then future problems can be avoided. There is always a way through this minefield with careful planning and consideration at the outset.

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[1] [2020] EWCA Civ 1440

[2] *Pilkington v Secretary of State for the Environment* (1973) WLR 1527

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MEET THE TEAM

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