AMENDING PLANNING PERMISSIONS AND THE IMPLICATIONS OF "HILLSIDE"

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In Hillside Park Ltd v. Snowdonia National Park Authority ('Hillside'), the Supreme Court has revisited the principles for determining the validity of multiple planning permissions.

This important case considers the lawfulness of development pursuant to overlapping planning permissions and has potential wider implications for the planning strategy for development sites subject to multiple planning permissions and, in particular, the common practice of using "drop-in" permissions.

This Note sets out some of the key principles of the Hillside judgment before considering the different routes available for amending planning applications and wider implications.

The Pilkington principle upheld

"… the principle illustrated by the Pilkington case ([1973] 1 WLR 1527, Divisional Court) is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission)." (paragraph 45)

Under the Pilkington principle, departures must be material

"The Pilkington principle should not be pressed too far. Rightly in our view, the Authority has not argued … that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the document recording the grant of planning permission – all the more so where the permission is for a large multi-unit development. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole … What is or is not material is plainly a matter of fact and degree." (paragraph 69)

Interpretation of planning permissions for multi-unit developments

In the absence of clear express provision to the contrary, a planning permission for a multi-unit development is unlikely properly to be interpreted as severable into a set of discrete permissions to construct each individual element of the scheme.

The "severable" nature of many large multi-phased planning permissions may often already be clear on their face and where this is not so this will be a useful discipline for the future.

The whole development is not unlawful if a proposed development cannot be completed fully in accordance with the planning permission

The Supreme Court doubted that "in carrying out a building operation, any deviation from the planning permission automatically renders everything built unlawful, even in relation to a single building" and considered that it was certainly not the case that failure to complete a building operation for which planning permission has been granted renders the whole operation including any development carried out unlawful, disagreeing with Lord Hobhouse's remarks in Sage v Secretary of State for the Environment, Transport and the Regions ([2003] UKHL 22).

No principle of abandonment of planning permissions

The Supreme Court states that there is no principle in planning law whereby a planning permission can be abandoned.

How to vary a planning permission

Aside from utilising s73, s96A or in due course the additional procedure proposed in the Levelling-up and Regeneration Bill (s73B), what else can a developer do where it wishes to depart from a planning permission?

The Court suggests that "there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and includes the necessary modifications. The position then would be that the developer has two permissions in relation to the whole site, with different terms, and is entitled to proceed under the second." (paragraph 74).

The implications of the judgment for the means of varying planning permissions (and, in particular, the continuing feasibility of "drop-ins") is that which has been subject to the greatest level of interest, and the following section of this Note considers routes for achieving change, in light of the judgment.

ROUTES FOR ACHIEVING CHANGE

The table below considers the different options that exist for amending a development scheme once planning permission has been granted, with reference to Hillside.

Mechanism	Considerations
s96A Non Material Amendment (NMA)	An NMA amends a planning permission and does not create a new planning permission. What is material/non-material must be considered on a case-by-case basis and is at the discretion of the Local Planning Authority. The cumulative effect of a series of NMAs must be considered. Together they may become material, hence a further NMA would not be accepted. An NMA can be used to amend the description of development in a non-material way.
s73 Minor Material Amendment (MMA)	This is an application to vary/amend/remove a condition. It cannot be used to amend a description of development. Where a condition lists all the scheme drawings, it can be amended to substitute drawings, hence amending the physical properties of a scheme. The cumulative effect of a series of MMAs must be considered. Together they may become "more than a minor amendment" when compared to the base planning permission and the development as a whole. In this case a new planning permission may be required. An MMA results in a new planning permission for the whole scheme, which is then implemented in place of the first permission.

Mechanism	Considerations
New application for the whole scheme	Where a change is required that is more than "minor material" and hence s73 cannot be used, there is the option to submit a new application for the whole scheme that includes the amendment. The Hillside judgment refers to this: *"Despite the limited power to amend an existing planning permission, there is no reason why an approved development scheme cannot by modified by an appropriately framed additional planning permission which covers the whole site and included the necessary modifications. The position would then be that the developer has two permissions in relation to the whole site, with different terms, and is entitled to proceed under the second." (Para 74)* This approach is potentially cumbersome in relation to large development sites and a fresh application may open up new issues that are not directly related to the change that is proposed. For example: • The planning policy framework and development plan policies may have changed since the original grant of permission. • Other material considerations may exist (for example, a new and sensitive use may have been introduced on an adjoining site). • Other cumulative schemes may need to be added to technical assessments (and EIA where relevant) and may affect the conclusions. However, it will be the most robust approach to situations where the Pilkington principle would otherwise bite i.e. where, although development will be unchanged pursuant to part of the permission: 1. The part where changes are proposed cannot be shown to be clearly severable from the remainder (or amended via s96a or s73 to be clearly severable); and 2. It would be physically impossible to complete the development pursuant to the original planning permission in accordance with its terms (its original terms or as amended by s96a or s73) once development is carried out pursuant to a separate permission granted in relation to part of the development area covered by the original permission.
Drop-in application for part of the scheme	This refers to the practice of "slotting out" one part of an approved planning permission, and "slotting in" an alternative scheme for that discrete parcel of land. The approach is used to avoid the Pilkington issue, whereby the layering of one planning permission over the top of another may have the effect of making the original planning permission incapable of further implementation (see above commentary). This approach has frequently been used particularly on major schemes which might be being built out over long periods of time, such as the Olympic Legacy scheme for the Queen Elizabeth Park in Stratford. In short, a s73 application (and sometimes also a s96A to amend the description of development, following the case of Finney v Welsh Ministers) is used to amend the underlying permission to create "a space" into which the new application can be "dropped" without compromising the integrity/ability to physically implement the remainder of the original permission. The Hillside judgment does not directly consider this point, as it was not relevant to the case. However, from our analysis of the case in circumstances where Pilkington issues do not arise, drop-in applications, where very carefully framed, will still be appropriate. It is clear that careful legal and planning strategy advice is needed if this route is to be pursued.

The following are a number of considerations to take into account in connection with drop-in strategies. Further to the Hillside judgment, it is likely that applicants will want to make efforts to 'future proof' planning applications in order to seek to accommodate future drop-in proposals (whether or not any are specifically anticipated). This being said, it is important to note that this need not be essential as, in many cases, it will still be possible to devise a drop-in strategy following the grant of planning permission, with amendments to the original permission serving to create the severability which might otherwise have been 'baked in' to the original permission.

ENSURING YOUR PLANNING PERMISSION IS SEVERABLE

Para 68 states of the judgment states:

"In summary, failure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to the permission unlawful. But (in the absence of clear express provision making it severable) a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible."

The concept of severability is therefore important in future proofing the ability to safely make an amendment via a subsequent drop-in application.

There is no precise definition of "severability", and a bespoke approach will be needed on an application-by-application basis. However, indicators of severability could include:

- Reference in the description of development to a phased development
- A clear phasing plan indicating the component severable parts.
- Reflecting the same phased approach in your technical documents and EIA if relevant. The inter phase impacts should be assessed.
- Structuring conditions and obligations accordingly so that they can be discharged on a discrete phase by phase basis.
- Embedding a drop-in protocol into the original planning permission which sets out the approach that will be taken to future amendments made by drop-in applications. This makes it quite clear that the scheme is regarded as severable. This approach was taken in the Olympic Legacy permission (see Box A).

If the original planning permission does not include relevant indicators, it may be possible to achieve severability of a component part of a planning application via S96a and/or S73 applications. This is effectively facilitating the "slotting out" part of a drop-in strategy. Consideration should be given to including in the original permission a condition making it clear that later phases of the development permitted under the original permission may take place if other phases are developed under the relevant drop-in permission.

Box A: Olympic Legacy Permission - Superseding Development Protocol

A condition attached to the Olympic Legacy permission (the "Permission") secured the submission of a 'Superseding Development Protocol' (the "Protocol") to "set out the guideline process and procedures for the assessment of amendments to the development including any applications for superseding development." The reason for imposing this condition was expressed as being "to ensure that the development is carried out in a manner consistent with future envisaged development" and to adequately control cumulative impacts.

The Protocol sets out the details of the mechanisms to be applied when amendments are made to the Legacy development through s96A and s73 applications, as well as through slot-in applications for alternative development within the redline boundary that would replace the currently consented development in respect of a particular part of the site. Of most interest is the procedure for the submission of slot-in applications. Key elements of this are as follows:

- the Permission and the accompanying s106 agreement anticipated slot-in applications by virtue of conditions requiring submission of the Protocol and applications for superseding development to be in accordance with this and a clause in the s106 agreement requiring a 'Statement of Superseded Development' to accompany each slot-in application;
- Statement of Superseded Development – this needs to demonstrate which elements of the Permission will be superseded, and effectively replaced, by the slot-in application;
- S106 covenant - the developer covenants in the s106 agreement that, on the implementation of a slot-in permission, it shall not implement the Permission and/or any other slot-in permissions to the extent that the Permission and/or other slot-in permission permits development identified in the Statement of Superseded Development;

- Environmental information – all slot-in applications must be accompanied by an Environmental Statement if the slot-in application constitutes EIA development or an Environmental Information Report if it does not. The latter needs to include a brief comparison of the likely significant effects of the amended development against the comparable effects of the relevant Legacy development (taking into account any other relevant slot-in permissions, section 96A approvals and s73 permissions);
- Impact of slot-in application on wider Legacy development – the Protocol notes that consideration needs to be given to any consequential amendments that may need to be made to the Permission (including any consequential amendments to the Design Codes, the conditions and/or the s106 agreement); and
- Legacy Permission conditions – the Protocol notes that, insofar as the conditions attached to the Legacy Permission are relevant to slot-in applications, they will need to be replicated in the permission granted.

IMPLICATIONS

Although a clear indication of severability in a planning permission will be helpful in establishing the scope for future drop-in applications, there are a number of other factors to consider:

- For many major schemes, especially in regeneration areas, achieving a comprehensive development is often a key objective which may be captured in policy too. Local planning authorities will want to see the whole scheme developed and may be concerned by the "severable" approach to an application. Therefore, this will need to be carefully explained as an approach to bake-in flexibility for the future, and not a dilution of commitment.
- Impact on CPO - the structure of the planning application will need to be carefully considered where CPO may need to be used in the future with the need for comprehensive development being a driver.
- Public consultation - care will need to be taken on how a scheme is presented to stakeholders and the community to ensure that a structural mechanism to provide flexibility for future amendments is not confused with a lack of commitment to delivery of a full scheme and any public benefits therein.
- The phasing and delivery of infrastructure will need careful thought.

WHY DOES THIS MATTER?

The specific facts of the Hillside case are unusual, and developers might rightly question how the findings are relevant to modern well-planned schemes. The key risk arising from Hillside is that development undertaken pursuant to one planning permission jeopardises the ability to continue to carry out work lawfully pursuant to another planning permission granted in respect of the same area of land. This can play out as follows:

a) The local planning authority, concerned about the implications of Hillside, refuses to entertain a drop-in strategy, and requires a new site-wide planning permission to be obtained. This is notwithstanding the fact that Hillside concerns the risks of implementing overlapping planning permissions and does not prohibit the grant of overlapping planning permissions.

b) Subsequent development carried out under an initial permission after the commencement of development under a drop-in permission is rendered unlawful and the local planning authority takes enforcement action. It may be unlikely that a local planning authority would take enforcement action where it has supported the drop-in process.

c) There is a legal challenge by a third party. This would have to be a challenge against the local planning authority's refusal to take enforcement action when subsequent development is carried out under an initial permission. A local planning authority is, of course, entitled to reach the view that enforcement would not be expedient.

d) Solicitors acting for funders who are providing finance for development take a conservative approach to Hillside and query the lawfulness of further development under the initial permission, perhaps irrespective of the extent of the risk that such development will be enforced against or challenged.

e) Solicitors acting for tenants or purchasers take a similarly cautious approach in light of Hillside.

f) On a large site subject to one planning permission where various parcels have been sold off into different ownerships and the development is incomplete, implementation of a drop-in permission by one owner on one part of the site could have implications for the ability to continue unfinished development elsewhere on the site by different owners.

FOR THE FUTURE - S73B

Even prior to Hillside, there has long been clamour in the development industry for a more straightforward regime for effecting changes to planning permissions. Hillside has thrown the issue into sharp relief once again and the question arises as to whether there is appetite for legislative change to address both the lawfulness of drop-in applications and the regime more broadly.

It is notable that the Levelling-up and Regeneration Bill introduces a new process for making 'non-substantial changes' to existing planning permissions. It is understood that this process is intended to sit alongside the existing s73 and s96A, with both of these remaining on the statute book.

The expressed intention is "to allow greater flexibility for making non-substantial changes to planning permissions (including to the descriptor of development and imposed conditions)".

The grant of non-substantial change will result in the grant of a new permission, rather than an amendment to the existing permission. The local planning authority is tasked with assessing whether the effect of the planning permission would be 'substantially different' from the existing permission (and any other permissions granted under s73 to which its attention is drawn in the application). Indeed, it must limit its consideration to these matters and is not invited to re-visit the principle of the development.

The phrase 'not substantially different' draws from the Planning Practice Guidance which, in answering the question 'is there a definition of 'minor material amendment?' states, no, 'but it is likely to include any amendment where its scale and/or nature results in development which is not substantially different from the one which has been approved'. As such, it seems that the intention is for the level of changes permitted to be akin to those permitted under s73 but with the express ability to make changes to the description of development as well as planning conditions.

While this stands to address the convoluted procedures arising following the case of Finney v Welsh Ministers, it fails to provide more certainty regarding the lawfulness of drop-in strategies and raises various questions including the long-term function of the existing s73. There may be a case for re-visiting this proposed limited reform to the panoply of options for amending planning permissions so as to create an entirely comprehensive legislative code which addresses issues associated with the amendment regime more broadly.