Hillside – a mountainous decision?

"Drop-in" permissions, that vary a smaller part of a larger development scheme, are a useful planning tool when developing large, complex sites. However, the law has not always been clear on how such permissions can be used to ensure a lawful development and as the notes to the Levelling-up and Regeneration Bill openly acknowledge "*the existing framework for varying planning permissions is often seen as confusing, burdensome, and overly restrictive by applicants and local planning authorities*".

On 2 November 2022, the Supreme Court handed down its much awaited judgment in the case of Hillside Parks Ltd v Snowdonia National Park Authority [2022] UKSC 30 and it now seems that that the long established practice of using "drop-in" applications is in fact much more restricted than previously thought.

This has significant implications for both developers and local planning authorities.

Hillside

The case revolved around a planning permission granted in 1967 for 401 dwellings at a large site known as Balkan Hill in Wales. The site has had a long and controversial planning history. The original planning permission was accompanied by a masterplan specifying the position of the dwellings as well as the layout for the estate roads. Over the years, Hillside applied for, and was granted, a series of additional planning permissions to develop out the site. However, at the time proceedings were brought, only 41 of the 401 dwellings originally permitted had actually been constructed and none of those had been constructed in accordance with the masterplan or the original 1967 permission.

In 2017, Snowdonia National Park Authority put its foot down and informed Hillside that it could no longer

continue to build out in accordance with the 1967 permission as it was not physically possible to carry on with the development in a manner consistent with the masterplan. Hillside brought proceedings in the High Court seeking a declaration that the 1967 permission remained valid and could be carried out to completion.

The question that eventually came before the Supreme Court was whether the original permission could still be implemented given that subsequent development pursuant to "drop-in" planning applications had taken place at odds to the masterplan. The answer was no. The Supreme Court found that the development that took place under the post-1967 permissions had made it physically impossible and so unlawful to carry out any further development under the original planning permission.

The practical implications – sounding the death knell to drop- in applications?

In its judgement the Supreme Court said: *"...(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."*

This has two practical implications.

The first is that, where construction of a wider site is underway, implementation of an incompatible drop-in permission must be avoided to prevent partially completed development from potentially becoming incapable of lawful completion (unless a further permission is obtained).

The second is that it may still be possible to construe a planning permission as authorising a series of independent acts, but this will need to be very clear on the face of the original permission. In other words, in order to ensure that the original consent sought provides the flexibility for future drop-ins, that consent needs to include careful and creative drafting expressing the development in phases which are severable, separate component parts.

So where do we go from here?

Drop-in applications

Drop-ins are still possible.

A drop in application may still be possible where the first permission is clearly expressed as authorising severable parts of a phased development. The Supreme Court also made it clear that drop-in applications will still be possible if the incompatibility between the two permissions (i.e. between the original permission and the subsequent permission) was not material. This means that if the variation can properly be regarded as a non-material or minor material amendment to the planning permission then specific statutory procedures remain available.

There are however two hitches:

- the test as to whether any departures from the original permission is material is whether it is "*material in the context of the scheme as a whole*" (and not just in respect of the part which the developer proposes to amend); and
- "*what is or is not material is plainly a matter of fact and degree*".

Get it wrong by using a drop-in permission to make an amendment in one part of the site that would be **material to the scheme as a whole**, then you risk losing the benefit of the original permission and having to apply for a

fresh planning permission for any remaining development which has not yet been carried out on other parts of the site (once you proceed to implement the drop-in permission).

Existing development unaffected by implementation of an inconsistent permission

Importantly the Supreme Court confirmed that while implementation of a subsequent drop-in permission would render further development under the original permission unlawful, the lawfulness of development already carried out under an existing consent is unaffected by the implementation of an inconsistent permission. This means that if there is no intention to carry out any further development under the existing consent, there is no need to be concerned about the drop-in permission cancelling the earlier permission.

Additional planning permission

Apply for an appropriately framed additional planning permission that modifies the development, but which covers the whole site.

The variation permission would be treated as an alternative to the existing consent in the sense that the developer could then choose between them (rather than work alongside it, in the way a drop in condition would). This has obvious financial and practical consequences for developers but does offer a way forward where a drop-in permission risks compromising the site.

Final thoughts

Whilst Hillside has gone some way to clarifying the position on drop-in applications, uncertainties still remain not least because Hillside was an application for a full, non-phased planning permission and we do not therefore have guidance as to how the principles set out in this case will apply to outline or phased consents.

The bottom line is that developers will need to exercise caution when seeking to submit 'drop-in' applications (or to otherwise vary a consent) in relation to a site which has the benefit of a wider planning permission.

There is also a bear trap for owners of large multi-phase sites (where parcels are often sold off to separate developers) who will need to make sure that there are sufficient contractual controls in place to avoid the risk of any one purchaser applying for a new consent which is materially different from the site wide permission applied for by the master developer which, if implemented, may under Hillside principles, compromise the development of the site as a whole for all stakeholders.

Whilst Hillside has not sounded the death knell to drop-in applications, it has certainly provided much food for thought when assessing the planning risk profile. This in turn shapes the strategic approach to be adopted for each particular site or scheme.

How we can help

If you would like to know more about Hillside and the issues you may need to think about when considering varying a planning consent please do not hesitate to contact our real estate planning team.

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