SUPREME COURT AFFIRMS THE COURT OF APPEAL HILLSIDE DECISION ON INCOMPATIBLE PLANNING PERMISSIONS

Last week, the Supreme Court upheld the Court of Appeal's decision in the case of Hillside Parks Ltd v Snowdonia National Park Authority [2022] EWCA Civ 1440 and reaffirmed the application of the Pilkington principle in cases of successive incompatible planning permissions on the same site and promises to have significant impact on practice for seeking planning permission for complex developments.

BACKGROUND

In 1967, planning permission was granted to develop 401 dwellings in accordance with a 'master plan' (the "**Old Permission**"). Following this, several other planning permissions were also granted (the "**New Permissions**"). Homes built under the New Permissions were built in such a way that meant carrying out development in accordance with the Old Permission had become physically impossible. Not only did the position and size of the houses differ significantly from what was anticipated under the master plan, but an estate road had been constructed over where houses should have been under the Old Permission.

At the Court of Appeal, the Developer (Hillside) sought to argue that the Old Permission could still be relied upon; but this was rejected by the Court of Appeal on the basis of the principle in Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527.

In Pilkington, the owner of a plot of land was granted planning permission to build a bungalow on half of the land. He later found an old planning permission stating that a bungalow could be built on the other half of the land, provided that the remaining half was used as a smallholding. The owner sought to rely on both planning permissions simultaneously and build two bungalows on the land. The Court in Pilkington had held that the original planning permission could not be carried out once the new bungalow was built as this would mean the other half of the land would not be used as a smallholding. As a result, the first planning permission was rendered physically impossible and could not be relied upon.

In the current case, the Court of Appeal had held that the Developer could not rely on the Old Permission since developments made under the New Permissions had rendered works under the Old Permission incapable to implementation. It was also argued in front of the Court of Appeal that the

Key issues

- The Pilkington rule still applies meaning a planning permission cannot be further implemented if works under another permission have made it physically impossible to do so.
- If the permission could still be implemented with immaterial changes, Pilkington will not apply.
- Historical development carried out but not completed under a permission affected by Pilkington is not unlawful.
- It is a question of interpretation as to whether a permission is severable and parts of a development can be undertaken separately. However, permissions will generally be taken not to be severable unless it is clearly expressed in the permission.
- Material amendments to a scheme should be dealt with by application over the whole of the land covered by the original permission, which could require environmental impact assessment to be updated.
- Care over drop-in applications will be required to ensure they will not make a wider permission unimplementable.

implementation of the New Permissions had made it impossible to rely on the Old Permission and, as a result, the entire development 'as a whole' was unlawful. The Court of Appeal decided it did not need to determine this argument and left the question open, causing concern to the development industry.

On appeal to the Supreme Court, the Developer sought to distinguish itself from Pilkington by arguing that the Old Permission was severable, and so any dwelling that could still physically be built in accordance with the Old Permission should be allowed. It also argued that the New Permissions were simply 'variations' of the Old Permission.

THE SUPREME COURT DECISION

The Supreme Court agreed with the Court of Appeal and reaffirmed the Pilkington principle: development on a site under one permission (here the Old Permission) cannot lawfully be undertaken where works are carried out under a different permission (a New Permission) covering all or part of that site, and where those works make it physically impossible to carry out the development (or further development) under the Old Permission. The Court emphasised that carrying out development under the Old Permission would be considered physically impossible if any part of it could not be developed (even where some aspects of it could be developed without being in conflict with permission B).

While the Supreme Court endorsed Pilkington, it also made the following useful clarifications:

- If the Old Permission could still be implemented with immaterial changes to the Old Permission, this would not bring the Pilkington principle into play (meaning the development under the Old Permission could be still be carried out).
- It is a question of interpretation on whether a permission authorises a number of independent development acts (each separately permitted) or whether it grants permission for a single scheme which cannot be disaggregated. However, in the absence of an express provision, planning permissions for multi-unit developments should not be seen as severable and therefore the decision in Lucas ([1964] 5 WLUK 27) was not correct (Lucas concerned a case where the High Court had interpreted a planning permission to build 14 houses as severable into 14 individual permissions).
- Where a multi-unit permission is not severable and a material variation is required, then a new permission should be sought for the whole site showing the proposed variation (rather than by way of drop-in application).
- The failure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to that permission unlawful or subject to enforcement (providing comfort on the point left open by the Court of Appeal).
- There is no principle of abandonment in planning law: planning permissions can only be extinguished by legislation or the terms of the planning permission itself.

COMMENT

Prior to the Court of Appeal decision in Hillside, drop-in applications were regularly relied upon by developers to modify discrete parts of a wider

masterplan site where the changes were not within the scope of section 73 or 96A of the TCPA.

However, while the Court of Appeal and Supreme Court have not entirely closed the door on drop-in applications, the judgments do warn that care will need to be taken by developers to ensure that subsequent drop-in applications do not render existing master permissions unimplementable. The judgement could have serious implications for developers, particularly where parts of a multi-phased development is sold off to third parties who may then look to redevelop their parts in ways which may impact or undermine the master plan as a whole.

While each situation will need to be considered on its facts, it will now be more difficult to use drop-in applications where changes need to be made to a masterplan permission or phase of development. Variations should be advanced via the existing statutory processes (s96A or s73) or where material, as the Supreme Court suggests, via a new permission which covers the whole site and includes the necessary modifications to be sought. This would avoid a subsequent permission rendering an earlier masterplan permission unimplementable.

In preparing masterplan permissions and drop-in applications, developers should be careful to:

- ensure drop-in applications (where used) do not conflict with the existing masterplan permission and detail should be given to the local planning authority to confirm this (for example, the Supreme Court suggests a plan is provided showing how the new permission complies with the wider site design);
- consider how masterplan permissions are framed so that they are as flexible as possible at the outset in order to reduce the need for future drop-in applications or variations;
- seek that it is made clear on the face of the masterplan permission that it is severable and can be implemented separately by phase (e.g. though an express condition); and
- ensure any amendments fall within the scope of sections 73 or 96A of the TCPA so as to allow any drop-in application to be consistent with the masterplan permission (as amended).

As readers will be aware, the Levelling Up and Regeneration Bill ("**LURB**"), which is currently before Parliament, seeks to amend "the existing framework for varying planning permissions which is often seen as confusing, burdensome, and overly restrictive." The LURB currently proposes a new section 73B which will enable variations to an existing permission (including to the descriptor of development and imposed conditions) where such changes are not substantively different from the existing permission. While the scope of s73B may not cover the issues raised in the Hillside judgments, it will be interesting to see if the Government looks to address the issue of multiple overlapping permissions through the LURB and provide developers with a clear statutory framework for the amendment of masterplan permissions and the use of drop-in applications.

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