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Insights

DENNIS V SOUTHWARK: DOES THIS NEW CASE MATERIALLY AMEND HILLSIDE?

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SUMMARY

Can a multi-phase development, consented in outline, be changed from that which was originally contemplated? This recent case, *R (Dennis) v London Borough of Southwark*, was decided on 17 January and involved Pilkington/Hillside principles. Southwark sought to use a s96A non-material amendment to "confirm" that the planning permission was severable. This Insight considers the latest attempt to authorise the amendment of a multi-phase development scheme.

THE PLANNING BALANCE: FLEXIBILITY V CERTAINTY

Like many of us at BCLP, anyone who has been involved with the promotion of long-term, complex, strategic development knows that if one thing is certain it is that what you knew you wanted to build at the outset is not what you will want to build 10 years later. Tenant requirements, cost of labour and materials and land-use values change, influencing the form and scale of development that must come forward to deliver the public benefits, and the private return, necessary.

This is why, with such schemes, building flexibility into planning permissions is both desirable and necessary to balance sufficient flexibility to allow a scheme to evolve as it comes forward with a framework of development parameters to allow a scheme to be defined and assessed.

Oh, and I feel it necessary to apologise for the pun in the title as you will see below…

THE CASE IN POINT

R (*Dennis) v London Borough of Southwark* concerned an outline planning permission for the phased development of the remainder of the Aylesbury Estate in south London. Specifically, the case concerned the attempt by Notting Hill Genesis (**NHG**), development partner of Southwark Council, to obtain a s96A non-material amendment to the outline planning permission "*to formalise*

the severable nature of the OPP" by simply adding the word "severable" at an appropriate point in the description of development.

The purpose of this application was to address the risk that has received prominence following the *Hillside* judgment in 2022, but which has always required attention due to the *Pilkington* principle following a case of that name in 1973. NHG had applied for a *slot-in* or *drop-in* permission (as is your preference) for a phase of the scheme in order to consent development that was outwith the parameters set by the outline planning permission. A drop-in permission introduces a detailed planning permission to layer over part of the outline planning permission and is an established approach when, for example, one needs to consent a later phase of development but the time limit for submission of reserved matters applications has expired.

The challenge was brought in the name of a concerned local resident as to whether this was, in fact, non-material. Was it, as Southwark Council and NHG claimed, simply to attach a label to an outline planning permission that was already severable, or was it an attempt to convert a permission to becoming severable.

This matters because the Supreme Court in *Hillside* tells us that, unless a planning permission can be considered "severable", the effect of a drop-in permission for development that renders the development under the original permission physically impossible to complete, or the two are materially physically incompatible, is to render unimplementable the remainder of the original permission.

The Court found that that the proposed amendment was material because the original permission was not severable. Southwark Council's resolution to grant the drop-in permission was contingent upon the s96A amendment being made so a different approach/decision will be required as things now stand.

WHAT CAN WE TAKE FROM THIS?

1. **Be careful what is written in the application documents.** The judge borrowed heavily from the content of the planning statement and the design and access statement from the outline planning permission when considering whether the permission was severable. He was able to do so because of the (irritating) practice now prevalent among many local planning authorities to incorporate by reference most, if not all, application documents into the decision notice.

2. **What is "severability"?** One interpretation may have you think this term, in this context, refers to the ability to excise part of the permission from the whole. The Judge in *Dennis* reminds us that severability is about whether the permission can be separated into a collection of free-standing permissions for the respective elements of the scheme. The nature of severability is not something that can be easily retrofitted, it is about the structure of the permission and the development underlying the permission.

3. **S96A remains a useful tool.** The breadth of the amending power under s96A for non-material amendments is recognised by the Court, and in particular its ability to amend more than just conditions (a limitation on s73 applications). I have come across several local planning authorities who adopt a mistaken policy of only using s96A to amend planning conditions.

4. **This judgment adds to the line of cases post-Hillside.** You may have missed the Court of Appeal decision in *R (Fiske) v Test Valley BC* during Christmas party season. The Court dismissed the appeal of the local objector and re-stated the principle that one is entitled to have the benefit of several incompatible planning permissions to select from and the Council did not need to treat that incompatibility as an impediment to the grant of permission.

5. **There are solutions!** Whether it is building-in flexibility to the structure of the permission at the outset or finding solutions part-way through the scheme, there are opportunities to address these issues in a lawful way. The Courts do not, for the most part, operate in a way that is ignorant of market reality and are not seeking to constrain development for the sake of it. By the same token, an apparently quick-fix of s96A might well not be the answer!

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