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Hillside Parks Ltd and the Impact on "Drop-in" Permissions:

A Lender's Perspective

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In November 2022, the Supreme Court handed down a judgment that upheld an earlier decision by the Court of Appeal in *Hillside Parks Ltd v. Snowdonia National Park Authority*[1] (*Hillside*), confirming that a planning permission needs to be implemented in full for it to be lawful. The significant concerns this raised in relation to large, multi-phased developments, which are frequently subject to "drop-in" planning applications varying individual aspects of the wider scheme, have been exacerbated by a subsequent appeal decision that extended the principle to outline planning permission.

The Supreme Court's decision reaffirms the position that "drop-in" permissions must be treated with significant caution. This is undoubtedly a concern for developers, but lenders also need to be mindful of the impact of this decision on the value of their security.

The Background

In 1967, full planning permission was granted for the development of 401 dwellings in the Snowdonia National Park in accordance with a detailed Master Plan. The Master Plan showed the layout of each house, along with the road design. The development progressed slowly, with only 41 houses being built. None of these houses were constructed in accordance with the Master Plan. Instead, they were built pursuant to subsequent planning permissions on parts of the site.

The subsequent permissions (some of which are termed "variations" of the original consent, and others, not) have allowed houses to be built on the main internal road network permitted in the Master Plan, along with the development of an estate road on areas identified for housing under the Master Plan. However, it still remains physically possible to build houses and roads on much of the site that conforms to the Master Plan.

It was held that, unless there is a clear indication that contradicts this, planning permissions for multi-unit development should be treated holistically, rather than authorising a series of independent acts. In other words, the permission is not severable into separate permissions. The fact that part of the site could still be developed does not overcome the fact that the permission as a whole cannot be complied with (it being physically impossible to develop the whole). The risk of any future development under the original planning permission being unlawful as a result of acting on "drop-in" permissions, therefore, is high.

1 [2020] EWCA Civ 1440

Threat to Security Value?

Lenders will be concerned that this decision could pose a threat to security values. Such threats could arise on sales of part where both the seller and the buyer wish to develop in accordance with an original planning permission but require variations within context of their own proposals. Issues of severability from the original permission are likely to arise, with unlawful development – and its resulting impact on value – being a significant risk.

New Lending

On new lending, safeguards can be built in to ensure that the borrower is both aware of the risk and committed to comply appropriately with planning obligations. Planning advisers should owe a duty of care both to the borrower and the lender.

Subsequent Phases

The real danger comes when banks lend on subsequent phases of development to either a purchaser or borrower who was not party to the original planning permission and who may not have considered the validity of a new planning permission against which the bank has made the loan.

Lenders should ensure:

1. There are provisions in the acquisition documents that protect the validity of the planning permission against which the bank has lent funds. Buyers/borrowers must check that it is still possible to develop in accordance with the original planning permission in context of the manner in which the seller has configured the development.
2. That contemporaneous valuation advice has been secured: the issue here is very much of scrutiny of the state of development and whether or not it is being developed in accordance with an original or "drop-in" permission. If the latter, will this stand the *Hillside* test? While not all "drop-in" applications will invalidate an original permission where such permission is severable, the risk is high.
3. That valuers have considered the value of the site without planning permission. Lenders may want greater involvement with planning consultants to establish relative values.
4. Any report prepared by a planning consultant should include a duty of care from the planning consultant to the bank in light of the risks that *Hillside* poses.

Existing Borrowers

In relation to existing facilities where funds have already been drawn down, lenders might want to consider contacting borrowers and/or planning consultants to ensure that the position is monitored closely.

Red Flag for Lenders

Hillside is a clear reminder of the need for caution when considering the impact of historic consents on an original permission as well as future proposals for "drop-in" applications. What is less obvious is that the decision should be as much a red flag to lenders as it is for developers.

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