Hillside Parks Limited v Snowdonia National Park Authority

Podcast Script

Sheridan: Welcome to episode 6 of the Planning Life Insights of Bryan, a podcast looking into the practical things you need to know about navigating your business through the planning system of England & Wales. We hope the joys of Lockdown 3.0 and home-schooling find you well.

Today we'll be looking at whether it's the end of the line for making applications for 'drop-in' permissions, one of the key options where developers need to rework planning consents within a wider scheme to reflect market changes and achieve the best possible outcome for all parts of their site. That's following the recent Court of Appeal decision in *Hillside Parks and the Snowdonia National Park Authority*.

I'm reminded of when, in the 1890s, the American humourist Mark Twain was on a speaking tour in London to help pay off some massive debt. Without the trusty online social media we enjoy today rumours started in the US that he was gravely ill; then that he'd died; and then an American newspaper printed his obituary. A reporter asked Twain for comment on all this back in London, he replied "The reports of my death how greatly exaggerated".

So, spoiler alert, we think nothing particular has changed on "Drop-ins". The online stir in the microcosm of Planning about whether *Hillside Parks* has drastically affected the lawfulness of 'drop-in' permissions is greatly exaggerated. Rest assured, normal business should resume. But what this does highlight is two things. Firstly, as ever, it's so important to bake scope for lawful future scheme amendments into your initial site-wide planning permission – so you can roll with the dictates of commercial reality later on and Secondly before applying for or implementing a Drop-in permission it's worth checking you're not dropping an unintentional tactical nuke into your site-wide consent.

But stepping back, this ever evolving case law on whether permissions benefitting the same land are compatible with each other really brings to the fore that there is something wider rotten in the State of Denmark. Or at least administratively totally messed up in the Town and Country Planning system when it comes to varying planning permissions. None of which is particularly helpful when a post-pandemic economy will be crying out for flexibility and growth. So we'll also be touching on avoiding pitfalls in Section 73 Applications.

My name is Sheridan Treger. I'm in the planning team of law firm Bryan Cave Leighton Paisner and joined by colleagues Clare Eccles, our team's dedicated know how lawyer and Joe Tyler, a first seat trainee. We also caught up earlier for some expert insights from Matthew Sharpe, Director at Quod and BCLP Partner Christian Drage who see this kind of thing all of the time, especially with large scale residential and mixed use urban schemes that come forward over several years.

Good afternoon everyone. Key question – have you read the standing orders and understood them?

All: Good afternoon.

Sheridan: Good. Before we dive into planning processes, let's get a bit of flavour from Matt Sharpe of the commercial drivers he's seen for why parts of wider large scale schemes get tweaked and remodelled after their initial consent. Here is Matt

Matthew: Thanks for inviting me to respond to this topic. Is [*inaudible*] I've been working in for almost 20 years. I principally work on large scale regeneration projects and almost all schemes will need to change at some point between planning and delivery. Given the [*inaudible*] ability of change to a project, it seems crazy, but there's still not a formalized way to deal with changes to planning permissions. Looking at wide schemes change, the answer is simple. Any type of development has a potential to change and this is legitimate in almost all instances. The case law you're highlighting is a potential to affect most developments of more than a single unit. Planning applications of all types have to make a wide range of assumptions that are used to help illustrate schemes in a way that can help articulate and applicate the benefits to the local Planning Authority and help demonstrate that the scheme is acceptable in planning terms. Genuinely speaking, the larger and more complex the scheme is, the more inevitable changes will be. When you take a step back and look at the principal examples, this point seemed

obvious. Assumptions on the amounts used or design of a building, several years before construction has started clearly need ways to ensure that schemes can evolve and respond to current commercial drivers along with local need. This could range from obliterating or subdividing retail units to respond to changing commercial demands, changes to accommodate housing tenures such as build to rent, the need to overcome liability challenges, including the need to relook at affordable housing, the availability of grant funding. Changes in construction method also create change such as potential to [*inaudible*] construction to be used. This can lead to changes to the exterior design of a building which could affect both layers the height of a building. More recently, transit meant that the slowdown in construction reduced demand for some types of [*inaudible*] uses such as Ground floor retail or [*inaudible*] uses can also create the need to change. So the driver seems to be that almost all [*inaudible*] Planning permissions will change in some way between planning permissions being granted and the scheme being built out and this is particularly the case of a large scale mixed use housing lead regeneration schemes.

Sheridan: Clare. Let's scroll back a bit. Could you summarise for us the options for changing part of a wider planning permission?

Clare: Sure. You wouldn't design the process as it stands if you were starting from scratch but, thankfully, the planning regime has been adapted over time to accommodate for the commercial realities of matching consents to the market with various statutory mechanisms available that enable permissions to be amended or modified to various degrees. However, there are some pitfalls with these mechanisms which we will touch on later. First up, you can make a non-material amendment under Section 96A of the Town and Country Planning Act.

Sheridan: But what's allowable as 'non-material' depends on your scheme and which authority you're in. Sometimes it's no more than moving around a few doors and windows; sometimes it's an extra couple of stories on a tall building.

Clare: That's right. There is no statutory definition of 'non-material'. It's dependent on the context of the overall scheme – an amendment that is non-material in one context may be material in another and it is for the local planning authority to be satisfied that the amendment is non-material, acting rationally. If this mechanism is available it's good news because it's quick and doesn't need any amendments to the SECTION 106.

Alternatively, if the amendments are more than 'non-material', and amount to minor material or major changes you can amend the conditions attached to your planning permission under a Section 73 Application. Usually this would be the conditions that reference plans, with the new plan references showing the scheme modifications required.

Sheridan: And that Claire would clarified by the Courts in the Finney v West Ministers case that everyone knew would come, i.e. that Section 73 means what it says on the tin - it only allows changes to conditions, not changing the description of development.

Clare: That's right Sheridan. A lot of planning authorities had been granting Section 73 planning permissions which changed to the description of development, often to ensure consistency between the description and other changes made via planning conditions, because there was no other statutory method to do this without having to go for a wholly new permission.

Sheridan: And developers often apply to change schemes quite substantially in Section 73 Applications, loading the concept to the max. Because permissions have a condition listing the plans which the permission is authorising, and so you then apply to switch the plan listed in the condition with the changes to the scheme and say look, I'm just changing a condition. But on the piece of paper of your permission you have two parts: at the top the description of what the permission is authorising and then underneath an increasingly long list of conditions imposed on the development. A lot of Councils include every cap possible in the description of development at the top of the permission: the floor space of the scheme, its height, its uses etc. etc. So some Councils would let you switch the plans in the condition

under Section 73, fine, but as you say also let you use Section 73 to change that description, so if your new plans showed a different floor space the description of development would now have a different number to what was shown on the drawings. But Finney reminded everyone that Section 73 on its face only lets you tweak conditions and not the description at the top of the permission. I must say an alien observing from Mars would think this is all madness, and why we should be looking for a better way. But I do think all the excitement around *Finney* is overblown. The workaround is just to say look, these restrictions on height, floor space, uses etc. don't have to be part of what describes what is authorised by my permission. What's the difference if those restrictions are just conditions imposed on the development, so let's use Section 96A, which is for non material tweaking about like this, to move the unhelpful limitations from the description of development into a condition. And then let's use Section 73, which is for changing conditions even if the change are quite big, to change the limitations in the conditions to match whatever the new plans say. We'll come to it later but there must fundamentally be a better way. But Clare there's a fair amount of other limitations on what a Section 73 Application can do isn't there, even if you sort the *Finney* limitation?

Clare: Indeed. There's a few, which in some circumstances will be obvious and in others need legal advice. For example any new condition imposed on Section 73 permission must be one which the LPA could lawfully have imposed on the original grant of planning permission, and an amended planning condition will not be valid if it alters the extent or the nature of the development originally permitted. For example if an original permission permit say a hotel development which is in a Class C1 with the maximum number of bedrooms set out in a planning condition, a Section 73 Application could not be submitted to change this condition to allow these bedrooms to be used for student accommodation instead, which is a sui generis use as this would change the nature of the development originally permitted. And also remember your new Section 73 permission is a new permission and not a tweak to the original one like a Section 96A amendment, so you can pick and choose between implementing the original permission or the Section 73. If you're looking at more substantial scheme changes you might have to submit a new planning Application. However, if you are making substantial changes to only part or a phase of a large or multiple scheme which warrants submission of a new planning application, you can do this so that the new application relates only to that part or phase and these are called 'drop-in' or "slot in" applications and what we're talking about today and these should always be approached with care.

Sheridan: Ok, and these 'drop-in' or "slot in" applications are again trying to interfere with wider principles as the wider consent as little as possible. They're called 'drop-in' applications because you are basically parachuting in a new consent on top of part of the existing wider consent. Now, these 'drop-in' applications over part of your site and Section 73 Applications of the entire wider consent are not mutually exclusive. There's nothing wrong with a misconceived and mixed up analogy from time to time. So, if your site-wide planning permission were a patient, and your 'drop-in' application Planning keyhole surgery, you might need to prep your patient for the procedure, so to speak with a Section 73 to make sure the body is ready to receive a new and unexpected organ, there by changing any conditions on the main permission to make sure that development carried out under the drop-in permission doesn't mess with everyone's ability to comply with the conditions on the main permission. So a concrete example, let's say the site-wide permission says you cannot build out, on a 60% of private residential dwellings until you have delivered some highway access works on a particular part of the site, but then you come with a new Drop-in and you drop it in and you implement a permission there for something else that means you can't deliver that access any more, well then you can't deliver more than 60% of private residential dwellings under the original site-wide permission anymore. You're going to have to move that access under the site wide permission first.

Now we touched on some of the reasons why you'd prefer one of these routes to change your scheme consent to another. But I asked **Matthew Sharpe** what's going through his mind when it comes to putting for one route to consent over another.

Matthew: The need for change often arises closest to the point when a development is expected to be delivered. This means that time scales, the securing change, is an important factor. The cost of going

through a fresh application can be high which adds both time and money to a project at a point where viability is the commercial driver for a change. Of many of the changes that affect these schemes, would not materially affect the nature of the scheme originally gone into planning permission. The decision is ultimately with the local Planning Authority, given the fate of your project is in their hands, is therefore essential that you've got a positive and working relationship with both officers in seeing members of the counsel. No [*inaudible*] amendments and often the preferred roots and secure changes that their scope is [*inaudible*] to those where the local Planning Authority agreed that the change is not material. This can be particularly problematic where the scheme has gone through a number of changes which will incrementally reduce your scope for change. They should also be the quick way to secure a change as they can be determined within 28 days. What we are seeing many local Planning Authorities take much longer than. Particularly when Planning permissions are often requiring these applications to be determined by them, which can then add ability or dimension to the project including the re-examination of additional topics not within the scope [*inaudible*]. Section 73 Applications can give a wider range of changes, but with large sites with multiple [*inaudible*], this cannot impose the range of additional challenges. You may also need to consider your seal liability when considering options for change The seal regulations and [*inaudible*] already paid to be credited against new Section 73 permissions or Drop-in, but both of the series of tests as to whether this will apply. The timing and structure of new permissions can affect this. A new permission can also lead to the recalculation of [*inaudible*] which in some cases where the counsel as increased its charges since the original permission. All significant indexation applies can lead to a big and unexpected jump in liability even where the floor space doesn't change significantly. A Drop-in can also provide a number of benefits potentially providing [*inaudible*] straight forward approach but they are clearly not without their challenges as the principal of development is reopened along with the need for new application documents such as their environmental [*inaudible*] assessment. So option for change can be a mind filled but with careful thought particularly in relation to the way the wider planning permission is interacted with. There can always be some helpful ways through these problematic issues.

Sheridan: OK, let's drill down into what the legal issues for Drop-ins look like. Now, if drop-in applications are like parachuting in a focused saviour to part of the wider consent, with risks, I'm reminded of that move from the 70s, a Bridge Too Far. In World War 2 British paratroopers get dropped behind enemy lines to capture some bridges in Holland. But no one has really thought about what's going to surround the paratroopers when they land and how they're going to interact with those surroundings when they land. They're told don't worry guys, resistance will be bored kids and old men in uniform- but it turns out to be fanatical elite infantry with tanks. And the British paratroopers haven't been sent in with serious anti-tank weapons, they don't have enough water. The paratroopers do not interact well with their new environment at Arnhem. After a lot of heroic scenes they have to surrender. At least figuratively speaking, that's basically what happens when drop-ins go wrong…if you don't go in prepared…

Joe: Can't we at least have a movie reference from after I was born, maybe post the 90s?

Sheridan: Next time Joe. Anyway. Back to Town and Country Planning, statute doesn't explicitly cater for Drop-in applications this so it's all governed by Judge made law which we need to practically apply when scheme changes are proposed. **Clare**…

Clare: Exactly, the courts have formulated rules to support how planning control imposed by legislation applies to implementing multiple and overlapping planning permissions on the same development site. You'll hear people, particularly lawyers, referring to this well-established line of case law as the "**Pilkington**" principle.

Basically, the cases clarify that a landowner is entitled to test the market by putting however many applications for planning permission which their fancy dictates, and seeing what the local planning authority thinks. This can lead to multiple planning permissions for many different forms of development

being granted on a particular site, in fact there is no limit to the numbers of permissions that can be granted.

However, the difficulty comes if a developer tries to implement a number of different permission on the same site. This might be possible, but not if these permissions are inconsistent with each other, so the Courts have set out a bit of a compare and contrast test to establish when multiple permissions can be implemented on the same land:

First of all you have to check what the full scope of the original planning commission that has been implemented is, and what has been done on the land, or what still can be done on the land pursuant to the first permission which has been implemented.

Then you look at the development permitted in your second permission, which you are looking to implement. And you ask yourself, is it possible to carry out the development proposed in the second permission, having regard to what's been done or authorised under the implemented first permission.

Sheridan: And that's great Claire, and one easy way to tell if it's not still possible to carry out an earlier permission because you've implemented a later one is because you've messed up being able to comply with the conditions imposed on the earlier one. Take our example earlier where you've parachuted a new development over the access for the older permission needed to unlock housing development under that older permission. That's an easy almost logic based incompatibility. But moving away from conditions, you've also got to work out whether the schemes are physically incompatible given what's been consented to what you are talking about. So you basically hold up the plans for the first permission against the window and superimpose the plans from the second permission and see what incompatibilities get flagged up. Do things like buildings or roads get cut in half. Joe, give a bit of colour to the test from the *Pilkington* case itself…

Joe: Sheridan, I'd just say first there are software programmes these days to superimpose plans like that. But sure, well in the 1973 Pilkington case the earlier permission contemplated that the site would consist of a small holding being built, which is a residential site with more land than a garden but kind of less than a farm. But the later permission that got built out put a house smack bang on the centre of the site, destroying the possibility of a small holding with lots of land for the quasi farm. So the permissions were ruled to be incompatible.

Sheridan: Thanks Joe. As you say, it is always worth the architects providing a careful digital comparison. But as we're on the more conceptual side of *Pilkington*, Clare can you talk us through the *Arfon* case?

Clare: Of course, in this 1997 case there were a couple of 1950s and 60s planning permissions for a housing estate under which some housing had been built. The developer wanted to build out some more decades later. But by the 1990s a dual carriageway had been built straight through the site, which hadn't been contemplated when the planning permissions were issued decades before.
The court said the physical situation had changed so much since the 50s and 60s permissions had been granted that it was impossible to implement them. The original permissions assumed an expansive layout with recreational areas and an estate road running through the site with two exits which could no longer be delivered.

It didn't matter that there weren't planning conditions requiring these things to be provided. Given what was contemplated, the Court said it wasn't physically possible any more to build anything that could sensibly be said to be an implementation of the 50s and 60s permissions.

Sheridan: Yes, I think the Judge said there you don't have to show you could build out the whole of the site in the way envisaged by the older permission. But the part you are building out has to be something

reasonably contemplated as part of that original permission. OK, so let's look at whether the recent *Hillside Parks* case changes any of this. Joe, what happened there.

Joe: The Hillside Parks case looked at a 1960s planning permission for around 400 dwellings in Snowdonia, Wales. Some dwellings had been built out under this permission back in 1967. But there had been several later Drop-in planning permissions implemented. These drop-in permissions weren't compatible with the master plan incorporated into the original 1960s permission. So in 2017 the planning authority which was the Snowdonia National Park Authority told the developer that they couldn't build out the remaining unbuilt dwellings permitted by the 1960s permission - because the later permissions rendered this physically impossible. The High Court and the Court of Appeal both agreed that, on the facts of the case, future development under the 1960s permission would no longer be lawful.

Sheridan: It sounds to me, Joe, like it is another example of someone trying to bank the benefit of an ancient planning permission from back in the day when they were easier to get. This sounds like another fact specific application of the *Pilkington* principle that Clare was talking about, so Claire why the excitement about wider implications for Drop-ins?

Clare: Well exactly, why the excitement, the case is a conventional application of the Pilkington principles . However, in his analysis of the case, the Judge endorsed the approach by the High Court in 2010 in the case of Singh v the Secretary of State, which held that if a development which planning permission has been granted cannot be completed because of the impact of other operations carried out under a later permission, that subsequent development as a whole will be unlawful, and he made some other comments that are troubling and cast a shadow over the accepted practice of Drop-ins. He acknowledged that a planning permission can be interpreted as granting permission to developers to take place as a series of 'independent acts' but, in his view, he said, 'that is unlikely to be the correct [interpretation] of a typical modern planning permission for the development of a large estate such as a housing estate. Typically there would be not only many different residential units to be constructed in accordance with that scheme, there may well be other requirements concerning highways, landscaping, possibly even employment or educational uses, which are all stipulated as being an integral part of the overall scheme which is being permitted. I doubt very much in those circumstances [he said] whether a developer could lawfully "pick and choose" different parts of the development to be implemented."

Sheridan: Clare, it seems to me a lot of these Court decisions like Hillside Parks seem to be wrestling with these ancient permissions where it's not clear the development can be built out in phases and there may not be conditions properly binding infrastructure to the right bits of the development in the typical way you'd get today, and that's what's caused the stir. So the Court applied the existing law, to make sure that developers are not cherry-picking from permissions where you only get the mitigation measures built into the scheme if the whole scheme is built out. The existing law says that generally speaking, you've got to build out a development fully in accordance with the permission. Fair enough. Case law *is* clear you can't build half a house without a roof, leave it without a roof, occupying it and then saying what I've built is lawful in accordance with the drawings. What's got people excited here is that the Judge is transposing this case law about having to build out a whole house for it to be lawful, usually as part of enforcement shenanigans, onto bigger modern housing schemes. And then not in the part of the case that legally counts (the "ratio") to get all plummy and lawyerly about it, but in the orbit of it, where the Judge expresses their general view on life, the Judge says he imagines in a modern permission you wouldn't be able to pick and choose what you build out but would have to build everything. Coming from the good place that developers shouldn't be ditching mitigation bits for the profitable bits. But that suddenly brings into play the question of whether by carrying out development under a Drop-in permission you cannot by definition finish the original development and thus maybe everything that comes afterwards, even in the bits which you could finish, suddenly becomes unlawful, and maybe even the bits finished before the Drop-in become unlawful too, because after the Drop-in you can never finish all the bits shown in the Lego instructions of your approved drawings. But first of all Hillside Parks has been appealed to the Supreme Court so if that goes ahead, hopefully all of that will be clarified. But frankly I think this is all academic because it all depends as the Judge says on what the description of the

development is in the permission and its planning permissions and the Section 106. A modern multi-phase scheme should be clear you don't need to build out the whole thing as a composite whole or else. So if you take something basic you'd expect to be able to build out say five of the ten independent detached houses your permission authorises, unless the permission or related planning agreement says well you cant, but to avoid all of that debate it's now an even better idea than before to put in the description of development that this permission authorises "up to ten houses" not just "ten houses", so you can build, one, two, three, four or up to nine or ten. And if you're talking about a permission authorising a multi-phase scheme, you'd expect to see conditions making it clear the scheme is to be delivered in phases and again not as a composite whole.

Clare: Exactly, the Judge is following the orthodox view that whether a developer can pick and choose what is developed will be a matter to be judged on what the permission, is condition and approved drawings say. He was just offering his own personal view that it's unlikely you could properly interpret a typical modern planning permission for the development of a large housing estate as it's unacceptable to allow a developer to pick the profitable bits like the houses from the associated amenities and infrastructure like highways and landscaping.

Sheridan: Well, he's probably right about cherry-picking. But that's because the planning conditions in a modern permission should be linking amenities and infrastructure to the parts of the phased scheme that need it. Anyway, this is all very interesting, but what are developers supposed to do to make sure they don't fall foul of these slightly esoteric conceptual arguments, (1) like Arfon about not undermining what the site-wide permission contemplated if they want scope for later Drop-ins. Or (2) like Pilkington nuking the site wide permission in planning terms by implementing a Drop-in that physically means you can't implement parts of the wider permission. Here's Christian:

Christian: Thank you Sheridan. By the way, I let the throwback to one of my most favourite all time movies, A Bridge too Far. That talking of the past, and I'm reminded that in my younger days, I had the pleasure of working with a number of [inaudible] god at the UK Planning bar. There's a number of interested parties were involved with a 1957 Planning Permission for major development on a 2,400 acres owned called Seven Side [inaudible]. Now I'm not talking about working on that actual Permission; I'm not quite of that vintage, thank you. I was advising a part land owner [inaudible] and their ability to continue to use the 1957 consent which had been relied upon for major housing and major commercial and industrial uses for decades. On one particular variation for access to unlock more development and object [inaudible] their grievances to the court of appeal, they argued [inaudible] amongst others and we were successful in defeating that claim. But we all know prevention is better than cure. And linking the many years of practical experience of working on major permissions from seven side through to the Olympics and beyond; I'm pretty sure the best way to achieve both certainty the infrastructure delivery as well as flexibility for future change is by carefully worded conditions and built in planning [inaudible] legal parameters within the original site wide permission. Bu t how do we achieve that? Well, here I suggest some practical examples, number one. Make sure the Planning Permission comprises appropriately self-contained phases of development across the site and when doing so make sure that site wide [inaudible] or pre occupation conditions are conditions which [inaudible] phases are avoided. Furthermore, make sure phases are bound only by conditions which comprise mitigation relating only to that phase or phases, that way you mitigate the risk of future permission issues for future face specific [inaudible] applications. Above all else, clarity is key and everyone needs to be careful and keep an eye on the detail. It doesn't take long or it costs too much but to get it right but boy does it take a long time and it cost a lot to sort that retrospectively. And here are a couple more tips. First the environmental mitigation should be allocated only to the relevant phase or phases. And always make sure there is flexibility as to where [inaudible] maxima for different use classes may [inaudible] each phase. Make sure any document secured in the outline planning stage, which constrained what might be brought forward under reserved matter applications such as design codes have been carefully reviewed legally and technically to minimize unnecessary restrictions and that there are very specific where appropriate and are open to revision and re discharge. It's also particularly that any Section 106 agreement reflects the same approach to flexibility and subscribed in respect of the planning conditions. [Inaudible] they uses strategies depended or for future approval rather than primary applications of his inheritance flexibility and they can be updated

without the need to trigger formal deed of variation. Also, isolating the enforceability of specific [inaudible] obligation to different phases or parts of phases provides certainty and confidence to investors either out front or refinancing's and their occupiers and future purchasers. The team here at BCLP are frequently asked review pane questions which on their face seemed fine, but then when you dive into the detail, you discover all sorts of inherent defects. And even if developers content take those risks [inaudible] to ask why should they when they are paying good money for advisors to get this right. The subsequent commercial tenant, buyer, or financer with their legal egos paying all over [inaudible] might not. [inaudible] identifying the principals of how the overwriting architecture of future transaction documents would allocate responsibilities and liabilities under those revised outlined permission and related Planning Agreement upfront would reduce work, costs, and risks for all those involved during the Post planning stages. And finally, the use of strategies depended or for future approval [inaudible] obligations of his inherent flexibility, they can be updated without the need to trigger form of deed of variation. These are just some of the tools available to us in the right way and I must emphasize this, at the right time when formulating the planning application. To know there's another way, if I were developing a site, one of my first top ten considerations would be, What is my exit strategy? And from there I define how I want the planning permission to flex. And then my second top ten consideration would be to remember that in all likelihood, what I think I would build, what I think a buyer might build is probably going to be different by the time it actually come to implement my consent. And more so by the time I come to exhaust it [inaudible]. As one development traitor once said to me, don't just advise me of what I can build, advise me what I cannot build and then get me a consent that delivers up to that extreme. Hence we can still [inaudible] in future completion by achieving greater flexibility in our planning permissions.

We have leading experience on this risk point following our work over the years on a 2,400 acre zone called near Bristol, which has been undergoing development for housing and major commercial and industrial uses for the last 20+ years. We advised on a variation for access to unlock more development land and an objector took their grievance to the Court of Appeal, arguing *Arfon* and *Pilkington* (amongst others), where we succeeded in defeating that claim.

Prevention better than cure. One way to achieve both certainty of infrastructure delivery as well as flexibility for future change is via carefully worded conditions and in-built parameters in your original site wide permission. Make sure the planning permission comprises appropriately self-contained "phases" of development across the site; that site-wide pre-commencement or pre-occupation conditions or conditions which cut across phases be avoided, and phases should be bound only by conditions which comprise mitigation which relates to them (so as to mitigate the risk of future *Pilkington* issues for future phase-specific drop-in applications) – clarity is therefore key; the environmental mitigation should be allocated only to the relevant phase; there is flexibility as to where floorspace maxima for different use classes may be located within each phase; any documents secured at the outline planning stage which constrain what may be brought forward in RMAs (e.g. design codes) have been carefully reviewed legally and technically to minimise unnecessary restrictions, are phase-specific wherever appropriate and are open to revision and re-discharge. It is particularly key that any Section 106 agreement reflects the same approach to flexibility as described in respect of planning conditions above. Isolating the enforceability of specific tranches of obligation to different phases or parts of phases provides certainty and confidence to investors (upfront or on re-financings), occupiers and future purchasers. Similarly, identifying the principles of how the overarching architecture of future transaction documents would allocate responsibilities and liabilities under the revised outline permission and related planning agreement upfront will reduce work, cost and risk for all involved during the post-planning stages. We have substantial experience of acting both for owner/developers and forward funders of parts of wider developments at major London sites. The use of strategies (appended or for future approval) rather than primary obligations wherever possible offers inherent flexibility; they can be updated without the need to trigger a formal deed of variation.

Sheridan: OK, So that's lining up your site wide consent upfront for possible later Drop-ins. But what about if a developer has looked at the market and is thinking about dropping in an application for fresh permission over part of their site. Here's [**Christian**] again:

Christian: So scrolling forward, when you are thinking of a Drop-in you need to work with developers to determine the best route to consent. There need to be a legal consideration of some of this esoteric caseload you've been referring to and practical compatibility, of the Drop-in but the existing permission if indeed you do go for a Drop-in. Think about using technology with interactive tables of key conditions in the existing permission and comment on those [*inaudible*] on the Drop-in. Key to success would be getting the local authority on board with the route consent. Sell the route consent by a series of presentations and word examples and produce a tracker to identify the changes any additional impact and associating mitigation and fundamentally the benefits that changes bring to the scheme and the environment more generally. Also don't forget your new Section 106 would need to make clear what the relationship is with the previous Section 106 agreement in order to avoid duplication of liabilities. This main [*inaudible*] potential sterilization of parts of the existing permission, implications of course which would need to be considered carefully. And then the seal regulations come into play, they never really sat easily with how developers revise permission to a scheme over time. The choice of the Section 73 or [*inaudible*] needs to be checked carefully against implications with seal liability and how transaction documents going forward proposed a portioning that liability.

Scrolling forwards, when you're thinking of a Drop-in, lawyers and consultants need to work with developer to determine the best route to consent. There'll need to be a legal consideration of some of this esoteric case law + practical compatibility of the Drop-in with the existing permission if you go for a Drop-in. Think about using technology with interactive tables of key conditions in the existing permission and comments on the restraints this puts on the Drop-in. Key to success will be getting the local authority on board with the route to consent. We would work with the consultant team to 'sell' the route to consent via a series of presentations and worked examples, producing a tracker to identify the changes, any additional impact and associated mitigation and, fundamentally, the benefits the changes bring to the scheme and the Borough more generally.

Your new Section 106 will need to make it clear what the relationship is with the previous Section 106 to avoid duplication of liabilities. This may include potential sterilisation of parts of the existing permission, the implications of which will need to be considered carefully.

The CIL Regulations have never sat easily with how developers revise permissions for scheme over time and we commonly advise on the issues. The choice of the Section 73 or fresh permission routes needs to be checked carefully against the implications for CIL liabilities and how transaction documents going forwards propose apportioning that liability

Sheridan: And here's **Matthew Sharpe** with some more practical top tips when pursuing a Drop-in:

Matthew Sharpe: The first point to take into account is getting the right team. Making sure that you've got a team that can give you advice on all of the available options and is clearly going to be very important. Your team are going to need to ensure that all the options are carefully considered and do not discount options too soon. It may be beneficial to progress both a Drop-in strategy alongside keeping open the idea of amending a planning permission. The next point is then sort of making sure that you have good working relationships with the local planning authority. Offices can be the best advocate for you in making sure that they are on side who supportive of the strategy who's going to be key. Having a clear and robust narrative for me will support them in advocating on your behalf so giving them a well thought through strategy is going to be very helpful. It's also important to remember seal in your approach. This can lead to additional costs or complications to the project and early consideration will help ensure you've got a deliverable strategy. There were also some very good examples where local planning authorities have produced superseding development protocols at which [*inaudible*] Planning permissions can be amended and higher Drop-ins can be dealt with. These types of documents can be very useful particularly if a new planning permissions as it can help you have a discussion with a local planning authority about what the agreed approach to changing a planning permission would be from the access and that currency [*inaudible*] help delivery.

Sheridan: Lots of food for thought there. Before we move on, last take home thought from [**Christian**] on the *Hillside Parks* case and the way forwards:

Christian: Thanks Sheridan, so back to your 'Bridge too far' analogy. Hillside Parks was not the last bridge. Certainly more bridges are available. For start, The Hillside Park [*inaudible*] which was like the original scheme was totally incompatible with the subsequent permissions. Personally I do not agree with you sometimes reporting the press that his marks the end of the use of Drop-in applications hence the last bridge. This case does not in my view, institute anything hardly new or replace the Pilkington legal principals. But I would say this, Hillside Parks does provide an example of how things can go wrong doubtless the judges' comments may well be seized upon by future scheme objectors seeking to use them to support [*inaudible*] their propositions. But rest assured, your business can and should resume.

The *Hillside Parks* appeal turned on the facts, which was that the original scheme was "totally incompatible" with the subsequent permissions. We do not agree with the view in press reports that this marks the end to the use of 'Drop-in' applications. This case does not introduce anything wholly new or replace the Pilkington legal principles. It does, however, provide an example of how things can go wrong. Doubtless the Judge's comments may well be seized upon by future scheme objectors seeking to use them to support and advance their propositions. But rest assured, normal business can and should resume.

Sheridan: I think one of the key underlying features that we seem to be coming through with today is that something really needs to be done on sorting out Section 73 at a legislative level. There is a statutory mechanism for small tweaks to a permission of any kind under Section 96A, very nice, statutory mechanism for changing conditions under Section 73 and everyone is not clear that's it's limitations, but otherwise you are pushed to make an application for press time permission with all the practical and political risk and cost that is involved. Statues almost academically doesn't recognize the commercial and practical reality that developers were taking all the risk and costs will be wary of another fresh application of a major scheme and so then getting pushed back on unforeseeable procedures. Shouldn't there be a proper mechanism for making a material change to any part of a provision, just like, for example, there is on development consent orders for national and significant infrastructure. You know, then we wouldn't have to project rules from judges making the best of particular facts on the permission from the 50s and 60s unto the lawfulness of risk and consent when new schemes post Covid era. So here is **Christian**.

Christian: Ok thanks. So now we are talking about cure version 2.0. The potential for improvement of the planning system to help both promoters of development and those with whom set a duty to consider an associated planning application I, i.e., ok's and so on. Yes, in summary, I think there is potential for improvement but first I think it's worth remembering some fundamental principals and reality checks, though I would hate to get lost in the greater noise. The Planning System does not interfere with a basic right of the developer to test the market and to put forth several applications or variations to allow for flexibility. The LPA's role is to determine each planning application in its own right. [*Inaudible*] from LPA to reduce the scope of what was properly permitted in the first place. With a matter of law and practice to decide if by implementing wrong consent, a fundamental legal issue arises in relation to another and if unsure or if wanting further comfort, a developer can always apply for a certificate of lawfulness. The process which is decided on principals of law not planning policy or case merits and certainly not politics. Likewise an LPA can initiate a completion notice process [*inaudible*] is very rare and itself not without a difficulty I do accept. So that all said, I do appreciate the un helpfulness of this legal fog preventing clarity on what can and can't be done lawfully when a developer needs to start development under version A but finish under permission B and so on. The Courts have in several cases pointed to the solutions already available under Statue and to either Section 73 or Section 96A, but are they still fit for purpose or one might argue not since there have been only limited amendments to [*inaudible*]. Yet the courts have been filling in the gaps since the 1950s and the Pilkington case and with Hillside showing us the debate is still live and kicking today. So this is an important and broad subject and is really [*inaudible*] its own right for now and seeing the curtain starting to twitch above my head making it clear I need to wrap up before the set curtain comes down. But after these [*inaudible*], first we know the government with the right paper looking to write a clearer, brighter, and quicker route map the developers and investors in UK PLC and

how the planning system needs to pull up itself in order to facilitate growth and the levelling up. Amendments to legislation can help and should be looked at but with a legislative [*inaudible*] any improvements will need to be slick and efficient, otherwise suggestions would unlikely carry favour with government. I do see advantage in land Section 73 approvals whether different variations of conditions to allow for minor material amendments or otherwise to be granted in such a way that if applied for, then it does not result in a new Planning permission necessarily. This will reduce the red tape burden and the risk of tangled chains and different planning permissions overtime. The system could also provide for a new form of planning application or permission when the developers applying for a superseded development permission and chooses to give up rights to continue to build out under Permission A in return for being granted a fresher Permission B. But I would emphasize there should be a matter of choice with the applicant. I think improved guidance and how the EIA [*inaudible*] should apply to these different permissions will certainly help. EIA statements of conformity should be given greater problems and planning applications clearly sometimes even Section 73 will require a new EIA but it should not be the case that every time a developer wishes to vary a large commission in any way that is more than none material than at risk opening Pandora's box with EIA risk spilling out. And above all, I think we are talking about tweaks to existing legislation and improved guidance as opposed to wholesale review which I don't think Is helpful at the current time. I don't think the system is batch but doubtfully it would benefit from an injection of common practical sense.

Not a lot of time for primary legislation these days; but White Paper and keenness for major change; but will full blown zoning really happen now with various departures in Government (no names); this small interim change would make a difference. Lot of clamour for this kind of things from specialist practitioners; not just us. Doesn't need to be fancy. You could find appropriate level of public consultation to the application for the change; local and national policy would still apply but consideration should be limited to the change, similar to limitations on Section 73; would help with the politics; still need EIA for whole scheme but work with consultants to see if still robust to have an addendum and not full rerun; still keep s96A and Section 73; shouldn't matter what stage of implementation you are at or before then; have a robust reading of Section 106 – you only need parties by or against whom the obligations are enforceable, so not usual crippling issue. You still have complexity in case law on overlapping consents but it's easier to change the consents so they fit together and there's less need for Drop-ins causing the problems in the first place. Commercially what are benefits?

Sheridan: The long view from Christian. Here's hoping. Now, at BCLP Planning we're involved in the full life cycle of schemes from site acquisition, to the planning stage and of course the long ongoing life of schemes as marketable commodities that get forward funded, financed and refinanced and of course sold on and sometimes split into multiple ownerships. If you're interested in what transactional arrangements you need between landowners for making sure a single valuable site-wide permission does not get ruined by various landowners dropping in their own slot in applications for fresh planning permission on only their part of a wider site, or Section 73s across the wider site, have a listen to Episode 3 of the podcast. That's on how planning plays out in real estate and corporate transactions and how to line planning up nicely for a smooth and commercially attractive sale or refinancing later down the line. Just search Planning Life Insights of Bryan on iTunes or your Apple Podcasts App to listen to past episodes. Anyway, you've been listening to Clare Eccles, Joe Tyler and me Sheridan Treger, with insights from Matthew Sharpe of Quod and BCLP Partner Christian Drage. You'll be hearing from us again and the Planning Life Insights of Bryan will return with more on what you need to know about where the Planning system ends up at in these interesting times. Keep well, keep safe and if you're home-schooling, just keep breathing…slowly.

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