



PLANNING REF: 2187/24/CLE

DESCRIPTION: Certificate for lawfulness for existing use is to establish that permission 28/1382/00/F, as amended by applications 28/1315/01/F, 28/1990/02/F, and 28/0797/04/F, has been lawfully commenced remains extant

ADDRESS: Wills Marine Ltd, The Promenade, Kingsbridge, TQ7 1JF

3rd August 2024

LETTER OF OBJECTION FROM THE SOUTH HAMS SOCIETY

The South Hams Society interest

For the last 60 years, the South Hams Society has been stimulating public interest and care for the beauty, history and character of the South Hams. We encourage high standards of planning and architecture that respect the character of the area. We aim to secure the protection and improvement of the landscape, features of historic interest and public amenity and to promote the conservation of the South Hams as a living, working environment. We take the South Devon Area of Outstanding Natural Beauty very seriously and work hard to increase people's knowledge and appreciation of our precious environment. We support the right development - in the right places - and oppose inappropriate development.

The South Hams Society wishes to comment on this application for a Certificate for Lawfulness request on behalf of one of our members.

The application description identifies the four historical applications for the development of this site as 28/1382/00/F, as amended by applications 28/1315/01/F, 28/1990/02/F, and 28/0797/04/F and seeks clarification as to **whether permission 28/1382/00/F was lawfully commenced.**

Did the demolition of the historic buildings lawfully implement planning permission 28/1382/00/F?

Not recorded within the Certificate of Lawfulness planning application was an additional application, namely:

Planning permission 28/1381/00/CA, Will's Marine and Redundant S.W.W.A. Depot, The Promenade, Kingsbridge 'Conservation Area Consent for demolition of existing buildings' - this was the permission that authorised the consent for demolition of buildings. Approval was given on the 14th February 2001.

It therefore follows that demolition was not part of the planning approval 28/1382/00/F (or any of the subsequent planning permissions for amendment) and that the 28/1382/00/F planning permission was not implemented on that basis.

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Condition 13 was listed in both the 28/1382/00/F and 28/1315/01/F permissions, indicating that the buildings were not demolished prior to the approval of the first amendment 28/1315/01/F.

Condition 13 required an Archaeology report to be completed prior to development commencing.

The archaeology report - Weddell, P. J., ed. (2001). Archaeological Assessment of Proposed Development of Former SWW Depot at the Quay, Kingsbridge, Devon. Exeter Archaeology was published late in 2001.

It is also evident that each of the four planning permissions contained the same condition 1.

Condition 1. The development to which this permission relates must be begun not later than the expiration of five years beginning with the date on which this permission is granted.

Reason: To comply with section 91 of the Town and Country Planning Act, 1990.

This confirms that not one of the preceding applications had implemented the approval, as this condition would have been unnecessary in later amendments if the development had commenced.

What planning permission was used to build out the development?

Each of these permissions are independent permissions and therefore it is necessary to identify which permission was used in completing the development.

The permission 28/1382/00/F was for the 'Redevelopment to provide 9 apartments and replacement retail units, Wills Marine & redundant SWWA Depot, The Promenade, Kingsbridge'. This development contained two retail buildings.

The amendment permission 28/1315/01/F was for 'Amendment to planning permission 28/1382/00/F for redevelopment to provide 9 apartments and replacement retail units (reduction of apartments from 9 to 7), Wills Marine & redundant SWWA Depot, The Promenade, Kingsbridge'. This development also contained two retail buildings.

The permission 28/1990/02/F, not listed as an amendment but was for 'Provision of additional apartment in lieu of ground floor retail area, The Malt Mill Development, Phase 3, Embankment Road, Kingsbridge'. One retail unit remained and only 2 planning conditions were included.

The permission 28/0797/04/F was given for 'Amendment to approved plans 28/1382/00/F for redevelopment to provide 9 apartments and replacement retail unit (provision of 2 no. 1 bed apartments in lieu retail unit and internal amendments)'. Again, this approval only contained 2 planning conditions.

The sales details of the flats on 'Rightmove' <https://www.rightmove.co.uk/house-prices/tq7-1hp.html> identify the following apartments:

Apartment 1, The Malt, The Promenade, Kingsbridge, Devon TQ7 1HP - 2 bed, Flat.

Apartment 2, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 1 bed, Flat.

Apartment 3, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 1 bed, Flat.

Apartment 4, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 2 bed, Flat.

Apartment 5, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 1 bed, Flat.

Apartment 6, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 2 bed, Flat.

Apartment 7, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 2 bed, Flat.

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- Apartment 8, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 2 bed, Flat.
- Apartment 9, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 1 bed, Flat.
- Apartment 10, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP - 2 bed, Flat.
- Apartment 11, The Malt, Promenade, Kingsbridge, Devon TQ7 1HP – Flat.

The phase 3 development contains 11 apartments.

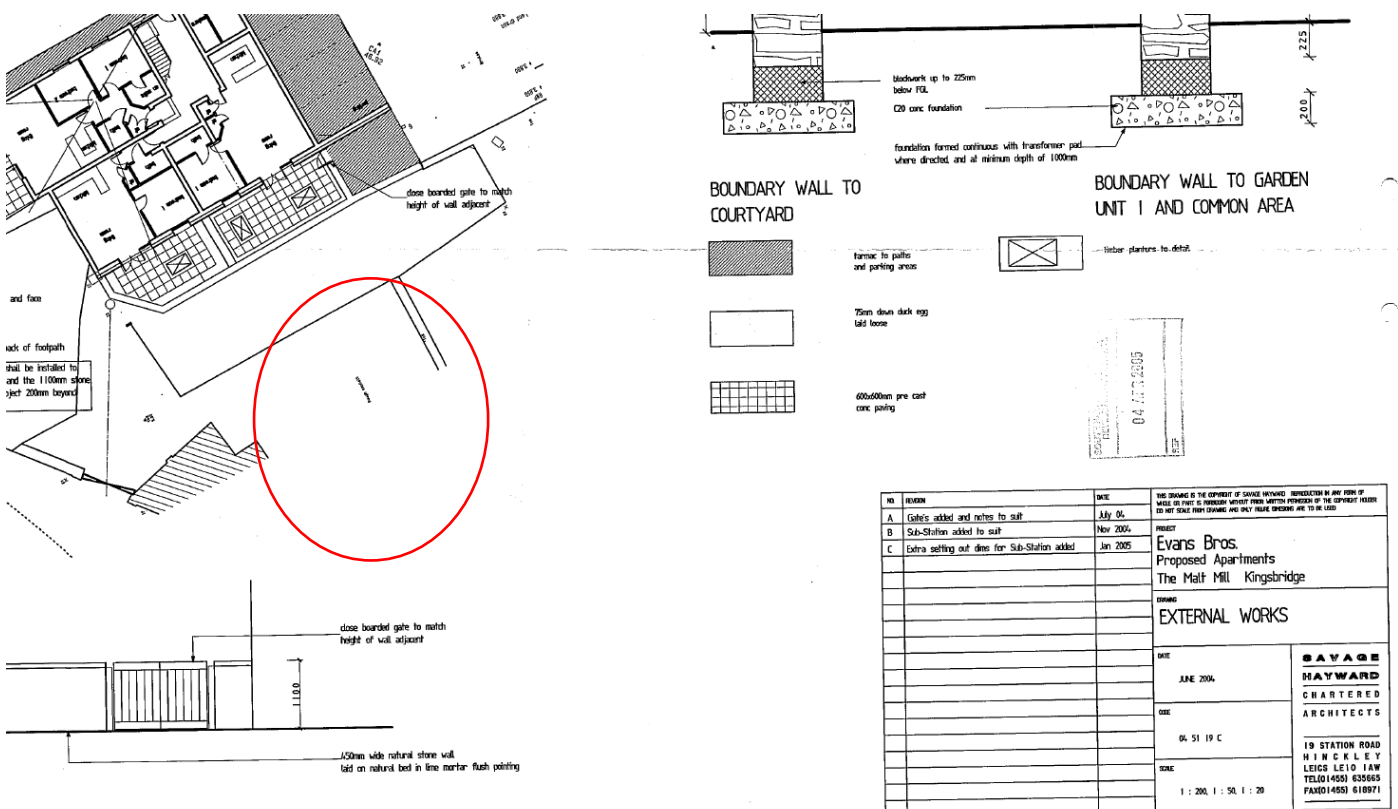
There are two apartments more than the 28/1382/00/F planning permission allowed (9 apartments).
 There are 4 apartments more than the 28/1315/01/F planning permission allowed (7 apartments).
 There is 1 more apartment than the 28/1990/02/F planning permission allowed (9 + 1 additional apartment).

11 apartments accord with the 28/0797/04/F planning permission that provided for 9 apartments plus 2 apartments in lieu of a retail unit.

On this evidence alone it was the 28/0797/04/F planning permission that was implemented.

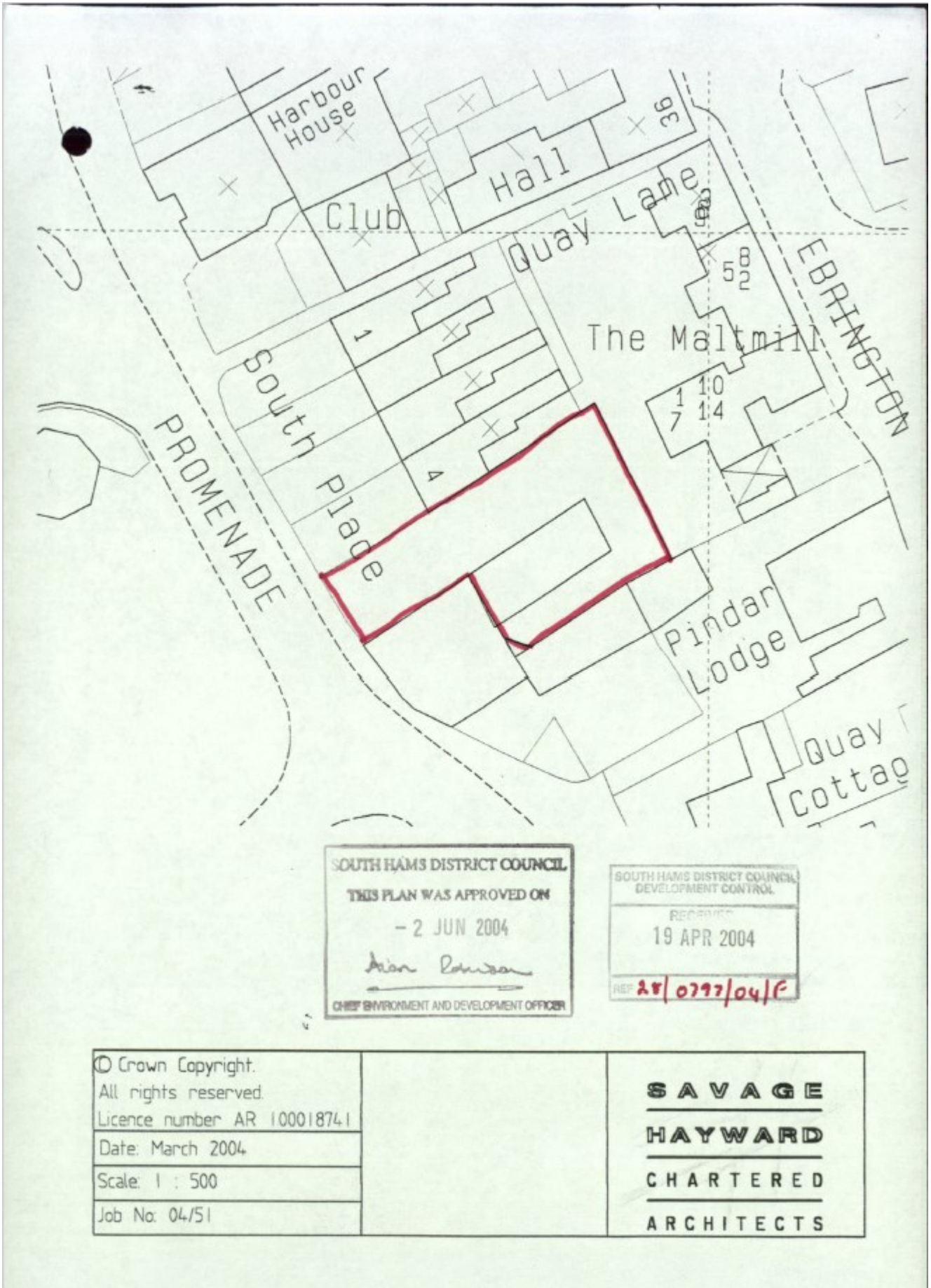
It should also be noted that the site boundary now excluded the area for the retail unit to the south.

And again it should be noted that the retail unit is not shown on the 'as implemented development plan' shown below (red ring location).



The 2004 planning application agent was Savage Hayward and the applicant was Evans Heritage Developments Ltd. Both these companies are different to the earlier 3 applications where the applicant was Mariner Resources Ltd and the agent Andrew Lethbridge MBIAT. All four of the permissions are for phase 3 of the overall development.

The site plan for permission 28/0797/04/F excludes the area for previously included southern retail unit.



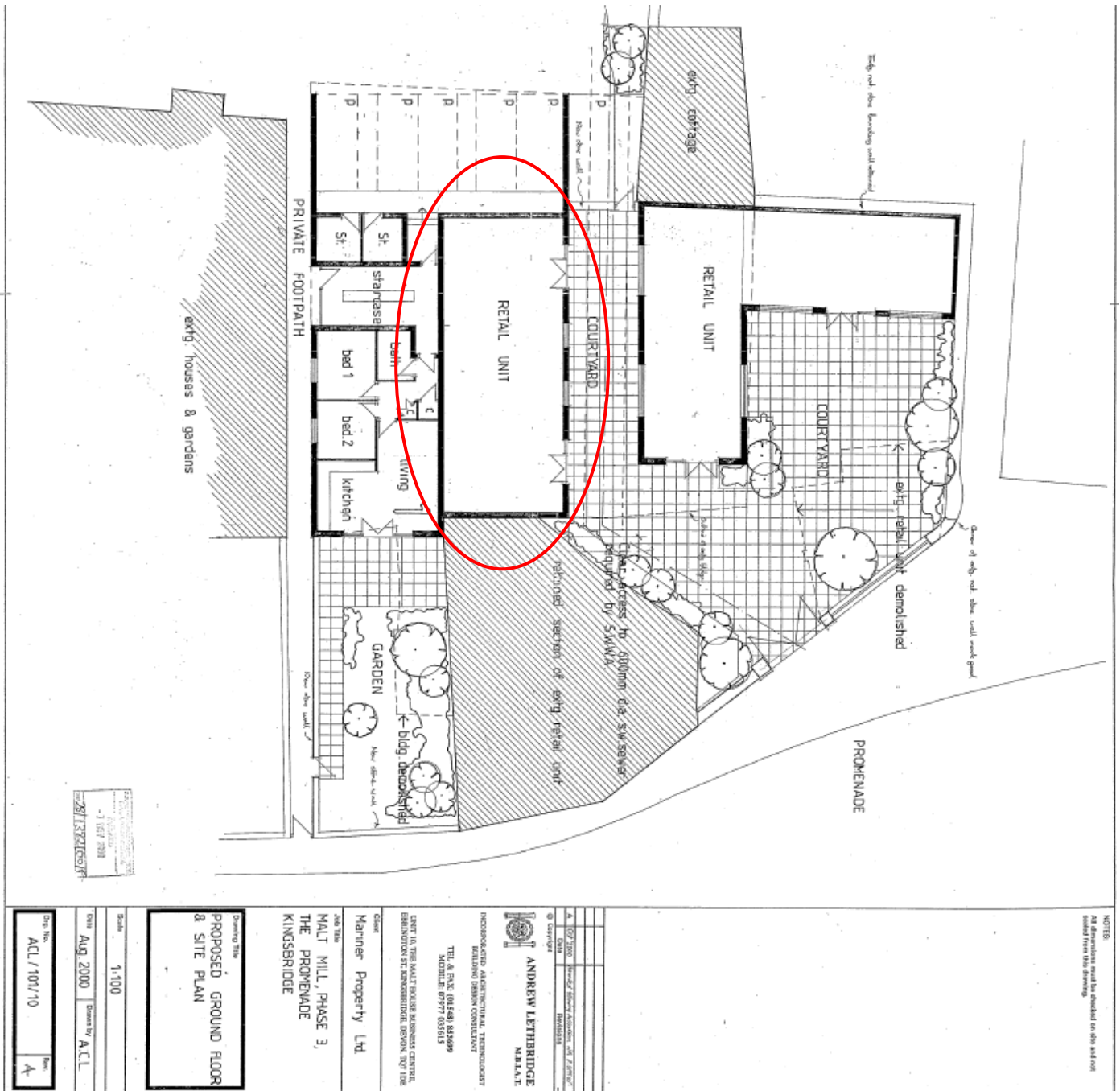
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Examining the aerial image below, it should become obvious that no retail unit exists on the ground floor of the southern block of apartments (location identified by a red ring).



Application 28/1382/00/F was for the 'Redevelopment to provide 9 apartments and replacement retail units. The ground floor retail unit was replaced by 2 apartments in 28/0797/04/F permission.



Again, this confirms that planning permission 28/1382/00/F was not implemented but the permission 28/0797/04/F for 'Amendment to approved plans 28/1382/00/F for redevelopment to provide 9 apartments and replacement retail unit (provision of 2 no. 1 bed apartments in lieu retail unit and internal amendments)' was implemented.

The replacement retail unit must refer to the unit being replaced by two flats as the site plan boundary does not include the area of the southern retail unit.

It would not be possible to build the southern retail unit as drawn in planning permission 28/1382/00/F Drawing ACL / 101/10 Rev 4 because the windows would overlook the outside amenity spaces of the two ground floor flats.

The windows were removed in the permission 28/1990/02/F when the first ground floor retail unit was lost.

The Society are of the opinion that the evidence is substantial that the Certificate of Lawfulness should be refused.

We refer the LPA to this commentary:

<https://wslaw.co.uk/blog/overlapping-permissions-caselaw-update-post-hillside/>

'Overlapping Permissions – Case law Update Post Hillside

Following the Supreme Court decision in Hillside Parks Ltd v Snowdonia National Park Authority (Hillside) in 2022 which considered the effect in planning terms of implementing two or more inconsistent planning permissions on the same site (a situation commonly arising with drop-in permissions), we now have (as expected) further judicial guidance on some of the principles established in Hillside. The latest caselaw comprises a High Court decision from Holgate J in R (Dennis) v London Borough of Southwark and a Court of Appeal decision R (Fiske) v Test Valley Borough Council.

The statutory planning code does not deal with the effect of implementing two or more inconsistent planning permissions on the same site. This lacuna in the law has instead been filled by way of evolving caselaw, which by its nature, continues to create uncertainty in the application of these principles to each project and the relevant permissions.

In December 2023, the Court of Appeal held in R (Fiske) v Test Valley Borough Council that when deciding a planning application which was incompatible with an earlier planning permission for the same site, a planning authority was not required (in law) to take account of that incompatibility as a material consideration in deciding the later application. More recently, the Planning Court decision from Holgate J in R (Dennis) v London Borough of Southwark has provided judicial guidance on the concept of "severability" identified by the Supreme Court in Hillside.

Following Dennis, the current position in law on overlapping inconsistent permissions (whether detailed or outline) can be summarised as follows:

- *Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527 is still good law and where this situation arises, the starting point is to consider whether building out both permissions results in physical impossibility as between the two developments;*
- *If physical impossibility arises which cannot be overcome between the overlapping permissions, the effect would be to make unlawful any further development of the underlying permission and to keep both permissions alive whilst continuing to build out, one must look to Hillside to identify if the exceptions in that case apply*
- *Those Hillside exceptions comprise (i) whether the underlying permission is a "severable" permission or (ii) whether the difference between them is a "mere inconsistency". If either exception applies this overcomes the effect of Pilkington and both permissions may be built out*
- *The decision in Dennis now provides further judicial guidance on the meaning of "severability" – a severable permission is one that amounts to a collection of separate, discrete or freestanding permissions – but in each case it will depend on the construction of the relevant planning permission. The effect of this may well be to make it harder to establish severability – and the implications of a severable permission also need careful*

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thought. The inclusion of a phasing condition will not in and of itself automatically mean the permission is severable.

It is worth noting that:-

- *Despite the fact that both Pilkington and Hillside were full permissions in Dennis, Holgate J considered that Pilkington could apply to outline permissions although he acknowledged that outline permissions with all matters reserved provide a great deal of flexibility in terms of the detail that may come forward and that this flexibility in practise could defer to a much later point when (if at all) Pilkington was engaged. Indeed, whether physical impossibility arises at all may also be less likely for outline permissions.*
- *The scope of the Hillside exception in terms of “mere inconsistency” was not explored but Holgate J noted again that in Hillside the Supreme Court said that the Pilkington principle should not be pressed too far, in particular to inconsistencies in relation to large scale multi-unit developments.*

It remains important that when looking at the effect of implementing two inconsistent planning permissions (whether detailed or outline) careful attention must be given as to whether physical impossibility arises applying Pilkington, and if so, how the exceptions in Hillside might apply to reduce the risk that further development pursuant to the underlying permission might be made unlawful if a subsequent permission or drop-in is implemented. That assessment must have regard to the fact that the law on this subject is uncertain and, through continuing caselaw, is very likely to evolve further’.

The general doctrine established by *Pilkington v Secretary of State for the Environment and Others* [1973] 1 WLR 1527 CA and subsequent cases (the “Pilkington doctrine”), namely that, whilst a landowner can make multiple planning applications for the same piece of land which may be inconsistent with each other, once one of those permissions has been implemented, and development has been carried out which makes it impossible to achieve development under another permission over the same piece of land, that other permission is no longer valid.

The Society are of the opinion that planning permission 28/1382/00/F is inconsistent with the permission implemented (28/0797/04/F) and therefore first permission 28/1382/00/F must be seen to be invalid.

For and on behalf of the South Hams Society,

Richard Howell
Chairman.