Please sir, can we have more planning legislation?

The courts continue to highlight the areas where planning reform is genuinely needed

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In the foreword to *Planning For The Future*, the prime minister oversells the white paper's objectives: "Radical reform unlike anything we have seen since the Second World War. Not more fiddling around the edges, not simply painting over the damp patches, but levelling the foundations and building, from the ground up, a whole new planning system for England. One that is simpler, clearer and quicker to navigate, delivering results in weeks and months rather than years and decades."

The proposals, in fact, leave much of the current legislation intact – with additional layers of complexity it might be said. But aside from the politics of the current reform agenda, is our legislative framework, even those aspects which are not the subject of proposals in the paper, adequate?

The case law conundrum

Many principles are not addressed in planning legislation and the courts have had to join the dots to arrive at a system that is workable in practice. For instance:

- whether implementation of a planning permission is still legally effective even if it is only done in order to keep the permission alive (originally no, now yes); and
- whether implementation in breach of a pre-commencement condition is still legally effective (usually no).

Many of the procedural building blocks that we all use – for instance joint applications, hybrid applications, drop-in applications, conditions on reserved matters approvals – have no specific legislative basis.

A Court of Appeal ruling this month, *Hillside Parks Ltd* v *Snowdonia National Park Authority* [2020] EWCA Civ 1440; [2020] PLSCS 199 illustrates how unpredictable things can be when we simply rely on case law. It concerns the extent to which development pursuant to one planning permission can be carried out without jeopardising the ability of a developer to carry out work pursuant to another planning permission which was granted over the same area of land. The principle established in *Pilkington*

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v *Secretary of State for the Environment* [1973] 230 EG 1737 has been essential to the modern planning system – there can be two planning permissions in relation to the same piece of land and the question to be asked is whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the first permission, which has been implemented.

This principle is the basis for the common practice of there being an outline planning permission for a large, multi-phased, development and then, in order to accommodate inevitable changes over time which cannot be delivered by way of section 73, a "drop-in" permission for a different form of development proposed for a particular phase, usually accompanied by a section 73 permission to amend conditions on the main permission so as not to be inconsistent with enabling that particular phase to be built out pursuant to the drop-in permission rather than the main permission. Any other procedural route, for instance requiring an application for a fresh planning permission for the whole outline planning permission area, would be unnecessarily unwieldy.

However, the judgment of Singh LJ in *Hillside* appears implicitly to question that practice, drawing on other case law (*Sage* v *Secretary of State for the Environment* [2003] UKHL 22; [2003] PLSCS 81) to suggest that, if the effect of carrying out development pursuant to one permission means that development pursuant to the other permission cannot be "completed", that subsequent development as a whole will be unlawful.

But *Sage* was a case about a planning permission for a single dwelling that was only partly completed. I can see that a part-completed house is a different form of development from that which was approved, but surely this is very different for a planning permission for many dwellings, or for several phases of development (where after all there is no express requirement for the development to be completed in the absence of a completion notice)? Singh LJ seems to think not, choosing not to apply another old case, *F Lucas & Sons Ltd* v *Dorking and Horley Rural District Council* (1966) 17 P&CR 111. He concludes that: "... it is conceivable that, on its proper construction, a particular planning permission does indeed grant permission for the development to take place in a series of independent acts, each of which is separately permitted by it. I would merely add that, in my respectful view, that is unlikely to be the correct construction 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 whether a developer could lawfully 'pick and choose' different parts of the development to be implemented."

Dealing with the devil in the detail

I wouldn't complain about having a little more planning legislation if it cleared up this sort of unnecessary uncertainty (see also the unnecessary restrictions on the use of section 73 caused by the Court of Appeal's judgment last year in *Finney* v *Welsh Ministers* [2019] EWCA Civ 1868; [2019] EGLR 56). It is a shame that the government's focus is through long-range binoculars rather than a microscope because these details really matter.