

Welcome to Landmark Chambers and Herbert Smith Freehills' "Overlapping Planning Permissions: the difficult questions" webinar

The recording may be accessed [here](#).

Your speakers today are...



Neil Cameron QC (Chair)
Landmark Chambers



Zack Simons
Landmark Chambers

Topic:
Introduction to the Cases



Matthew White
Herbert Smith Freehills

Topic:
Overlapping planning
permissions:
Making the difficult
questions go away



Annika Holden
Herbert Smith Freehills

Topic:
Inconsistent planning
permissions:
Practical Implications

Introduction to the Cases



Zack Simons
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Inconsistent planning permissions

Practical Implications

10 March 2021

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Pilkington (recap)

- *“a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposals.”* **Widgery CJ, Pilkington**
- *“Equally it seems to me that a planning authority receiving a number of planning applications in respect of the same land is required to deal with them, and to deal with them even though they are mutually inconsistent one with the other.”* **Widgery CJ, Pilkington**
- There is no duty on the local authority to assess consistency. Risk lies with the landowner

How to assess inconsistency

The process set out in *Pilkington*

- **In respect of Permission A** - look to see the full scope of that which has been done or can be done pursuant to Permission A.
- **In respect of Permission B** – look at what can be done pursuant to Permission B.
- **Question:** Is it possible to carry out the development pursuant to Permission B having regard to what can be/has been done under Permission A?
- **If no:** Permission B incapable of implementation.

How to assess inconsistency

Assessing “impossibility” (or possibility?)

- Physical inconsistency – ***Melap Singh v Secretary of State for Communities and Local Government* [2010] EWHC 1621**
- Need to consider conditions on both permissions - ***Staffordshire County Council v NGR Land Developments Ltd and Roberts* [2002] EWCA Civ 856**
- Possible to complete the whole development in accordance with its terms? – ***Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 WLR 983**

Practical implications

2008 Planning Permission

Plot 1

Plot 3

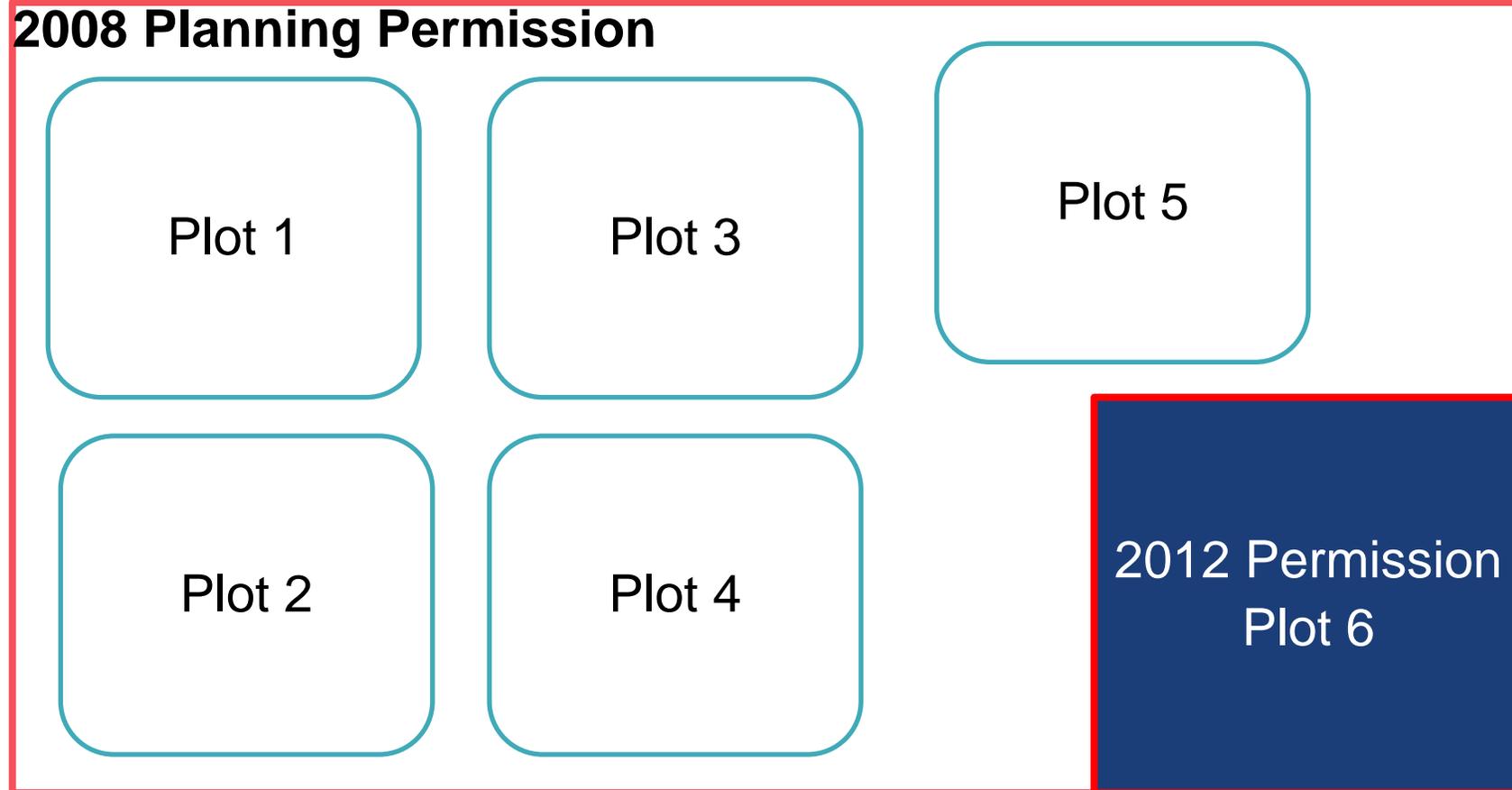
Plot 5

Plot 2

Plot 4

Plot 6

Practical implications



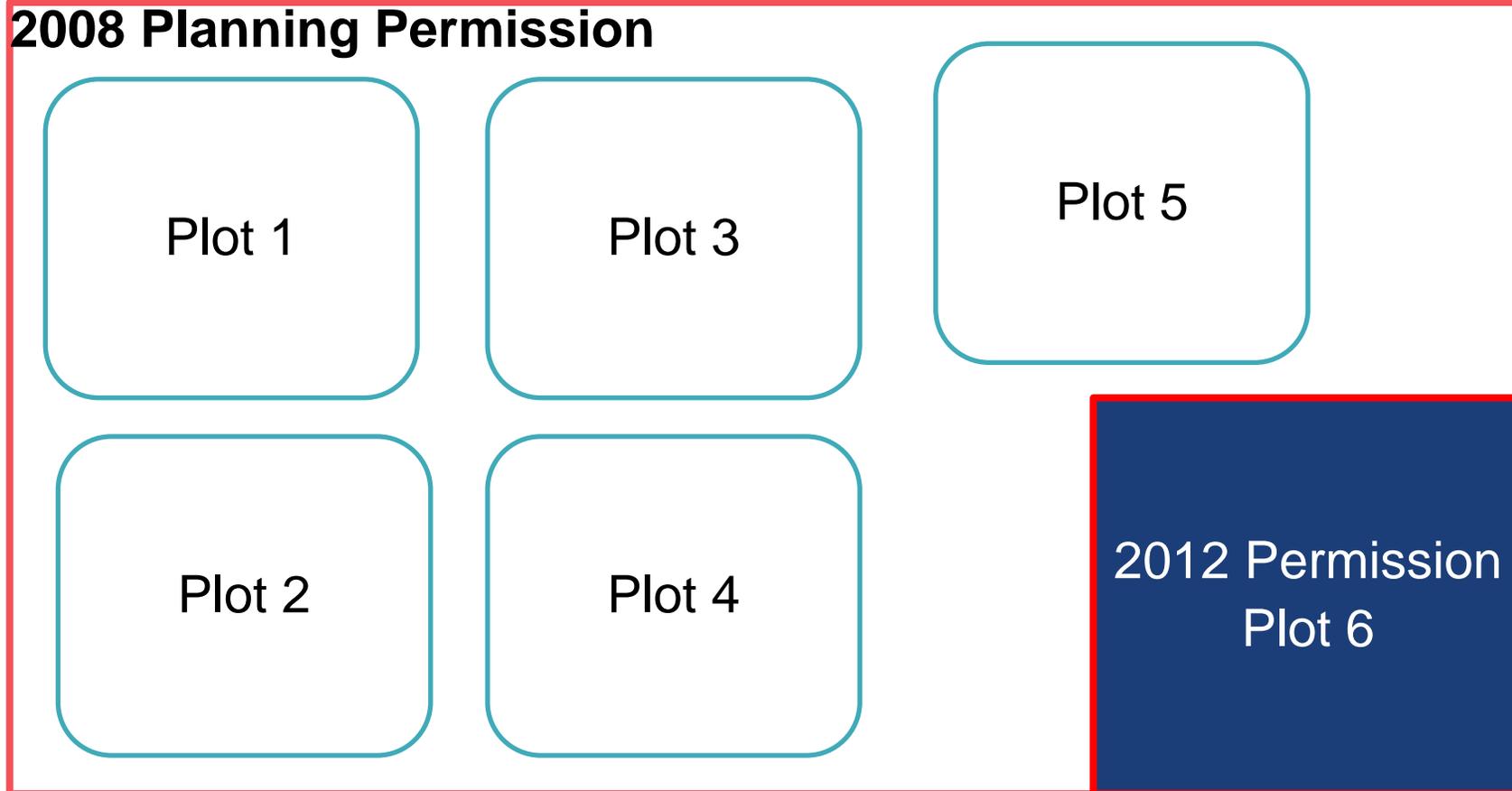
Slot-in/slot-out

Goal: Each element must be capable of being developed completely separately from the other, with no interdependencies, shared facilities or cross-cutting conditions.

Steps

- (1) Physically separate the development into two discrete parts**
- (2) Separate out the conditions into two discrete parts**
- (3) Submit new application**
- (4) Amend the existing section 106, and enter into a new section 106 for the new permission**
- (5) Both permissions to contain statements contemplating the other**

Slot in/slot out



Slot-in/slot-out

- The slot-in/slot out process is recognised in practice by planning authorities and implemented widely.
- But it is not formally recognised in legislation, guidance or case law.
- = always some residual risk



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Overlapping planning permissions

Making the difficult questions go away

10 March 2021

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The perils of *Pilkington* – why bother?

We should recognise and value the right for a landowner to explore different options for the development of her land

“I have no doubt that a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposals.”

– per Lord Widgery, *Pilkington* at 1531E

The perils of *Pilkington* – do we need reform?

The courts plugged a gap in the statutory code ...

“The Pilkington problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved.”

– per Lord Scarman, *Pioneer Aggregates* at 145B

The perils of *Pilkington* – do we need reform?

... but the plug is leaking

“There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation.”

– per Lord Scarman, *Pioneer Aggregates* at 145B-C

Canada Water Masterplan



Reform: a new power to vary planning permissions

Reducing the scale of the problem

- A new statutory power to make material amendments to planning permissions
- Would avoid the need to use section 73 or to make a fresh planning application in many cases

> fewer overlapping permissions

> fewer inconsistent permissions

= fewer *Pilkington* problems

Reform: application to supersede development

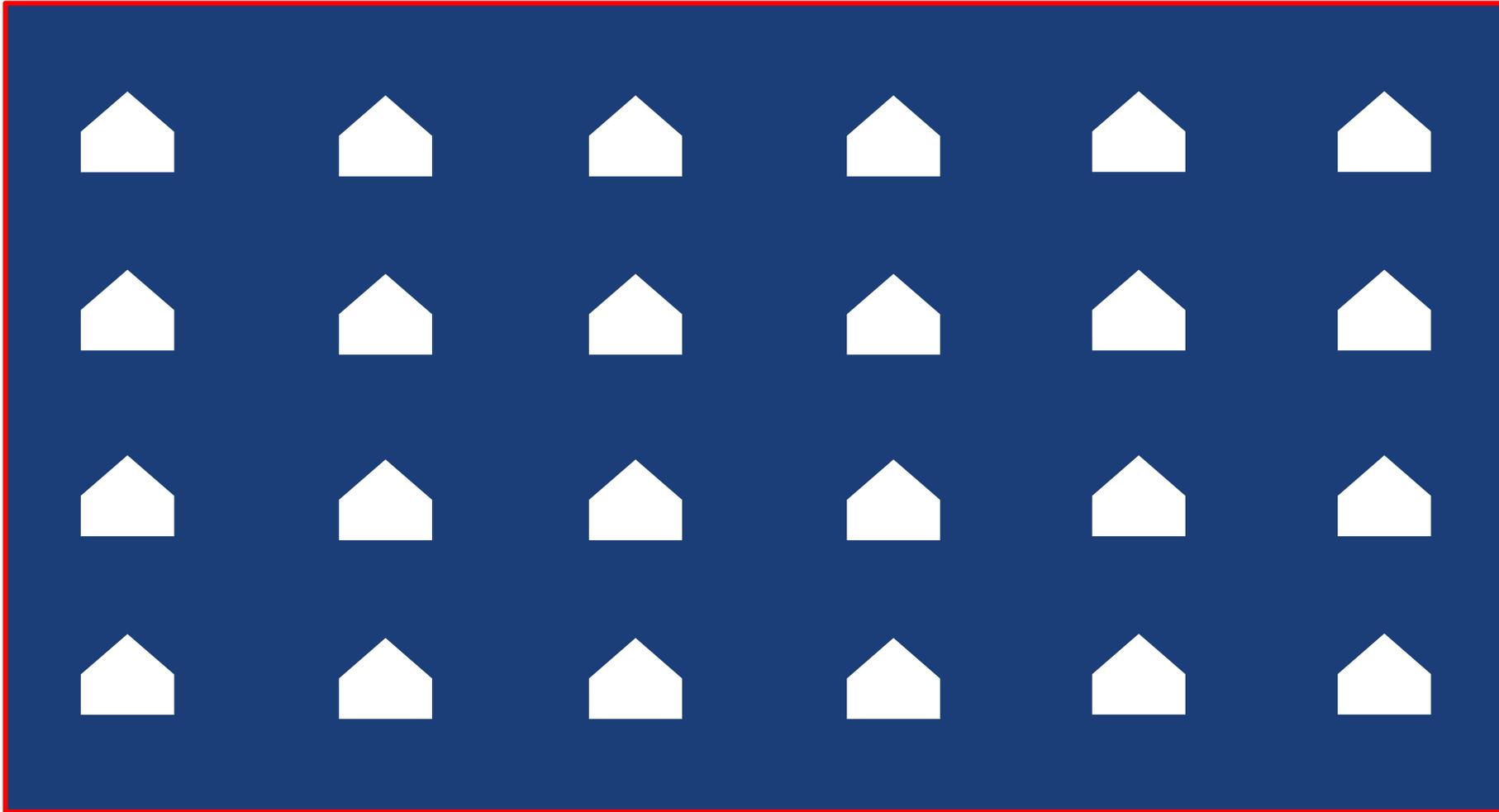
Removing inconsistency by express application

“Of course, special cases will arise where one application deliberately and expressly refers to or incorporates another, but we are not concerned with that type of application in the present case.”

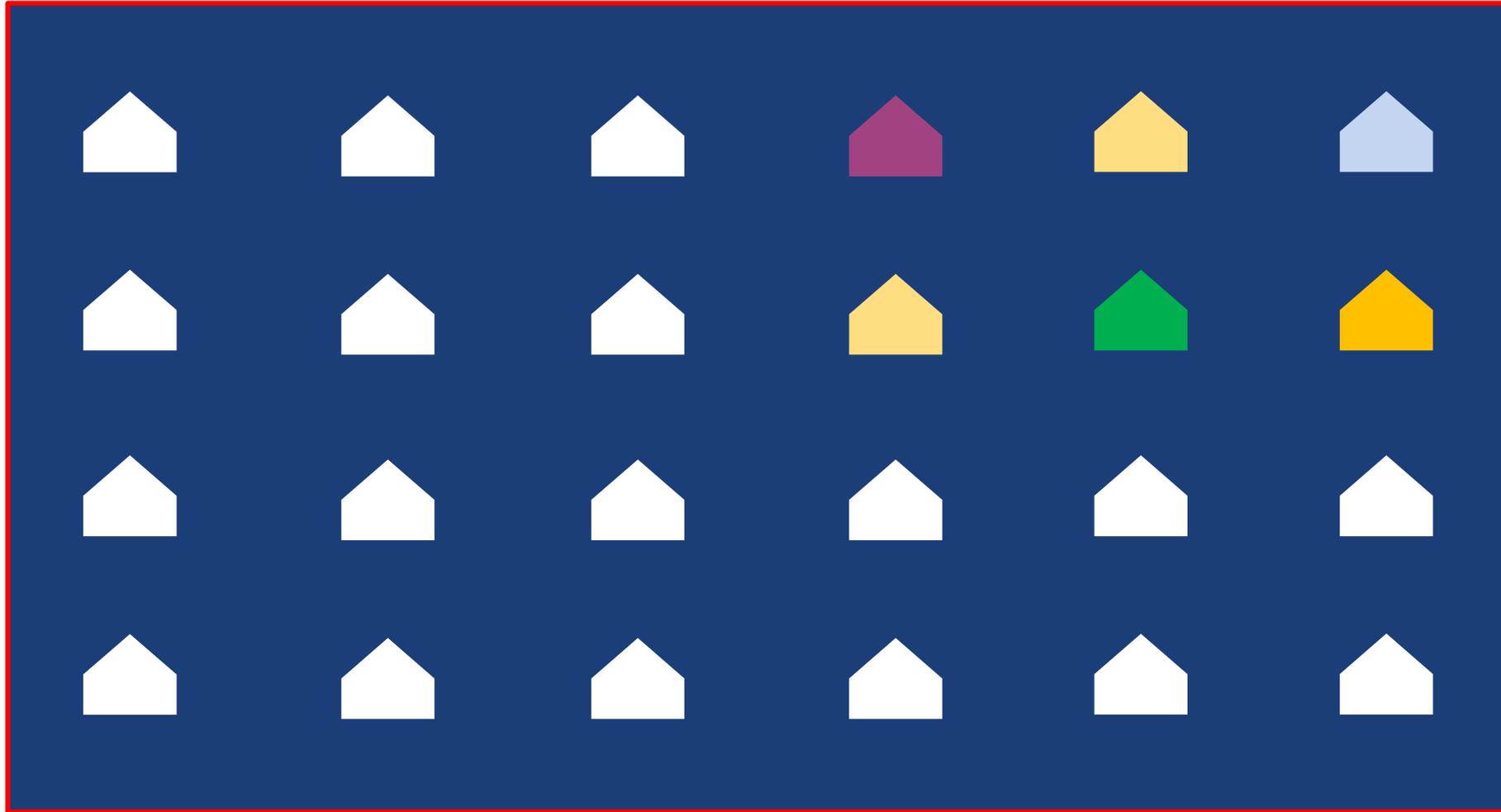
– per Lord Widgery, Pilkington at 1531G

- A new statutory power to apply to supersede the unimplemented part of an existing planning permission
- Only available when applying for a new planning permission for the same part of the site

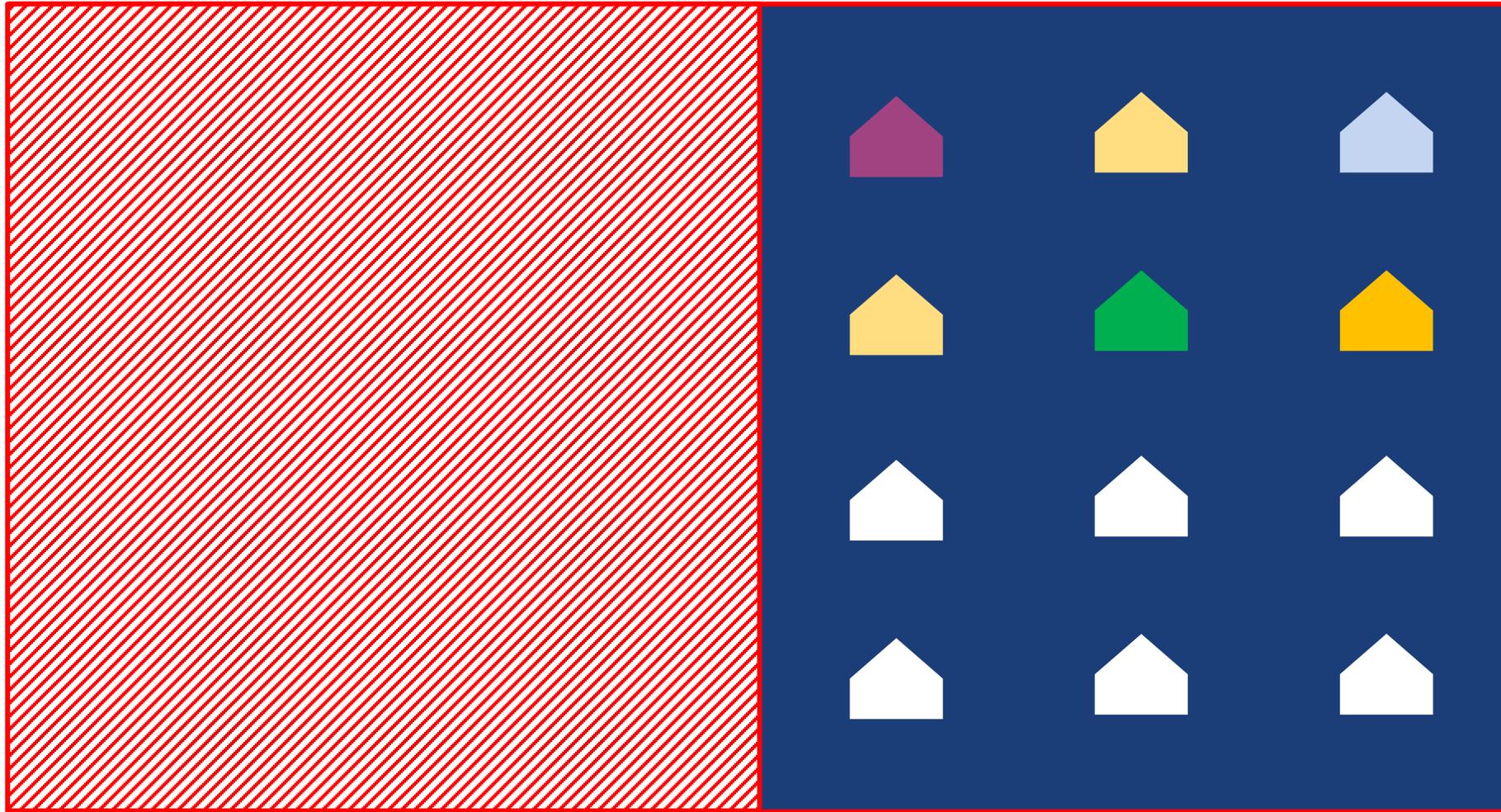
Existing planning permission “A”



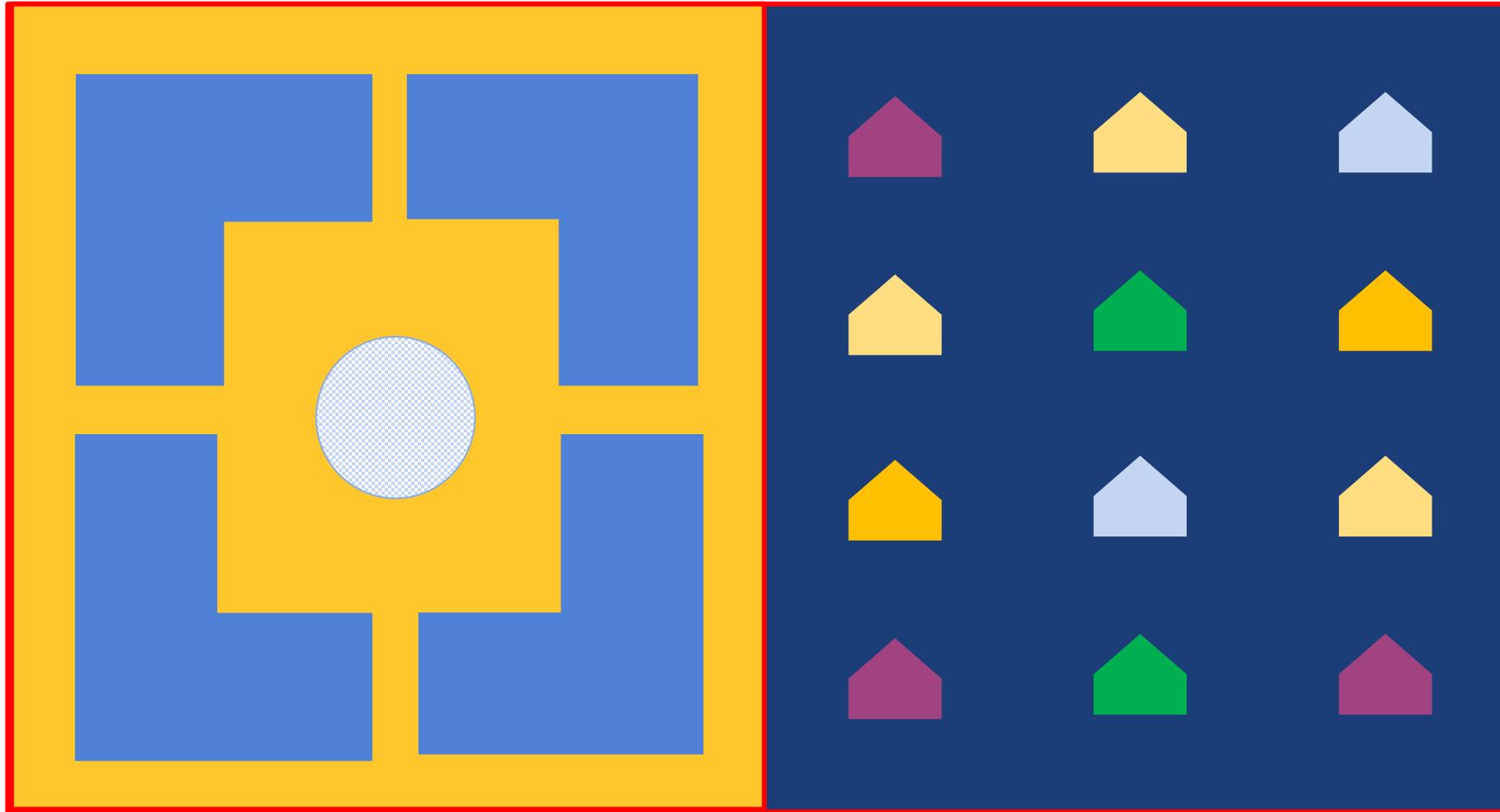
Development partly built



Application to supersede development on part



Insert new permission "B" and complete "A"



Constraints

The power would need some limitations

- Effectively codifies the “slot-out” procedure
- Land ownership or owner’s consent required
- Only unimplemented development can be superseded
- Need to demonstrate how new development ties into existing / authorised development
- Preferable to use of a section 106 agreement

Thank you for listening

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