Neutral Citation Number **[2022] EWHC 2166 (Admin)**

IN THE ADMINSTRATIVE COURT IN CARDIFF

Case No. CO/3394/2021

Courtroom No. 12

Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Thursday, 21st April 2022

Before:
HIS HONOUR JUDGE JARMAN QC

B E T W E E N:

DEE & DEE

and

SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES
& NEW FOREST NATIONAL PARK AUTHORITY

MS J WIGLEY QC appeared on behalf of the Claimant
MR M DALE-HARRIS appeared on behalf of the First Defendant
MR G GRANT appeared on behalf of the Second Defendant

JUDGMENT
(Approved)

HHJ JARMAN QC:

1. This is a statutory challenge to a decision letter dated 26 August 2021 by an inspector appointed by the first defendant, the Secretary of State for Levelling Up Housing and Communities, when he considered an appeal under section 78 of the Town and Country Planning Act 1990 against a refusal by the second defendant, the New Forest National Park Authority, to grant planning permission under section 3 of the 1990 Act for the development of land, without complying with conditions subject to which a previous planning permission was granted.
2. The application sought planning permission, as the inspector records in his decision letter, for "a first-floor extension, conversion of attached stables to facilitate additional accommodation, alterations to fenestration, raised patio, demolition of existing porch, associated landscaping", without complying with conditions attached to the planning permission dated 24 September 2020.
3. That planning application was in relation to the dwelling of the claimants which is situated in, and wholly within, the New Forest National Park.
4. The conditions which were the focus of the appeal before the inspector were conditions one and three to the 2020 planning permission. Condition one says this:

> "The development hereby permitted shall be begun before the expiration of three years from the date of this permission; or the carrying-out of any further extension or enlargement of the dwelling otherwise permitted under paragraph one of schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015, or any order subsequently revoking or re-enacting that order, whichever is the sooner".

   I shall refer to that order as the "GPDO".
5. The reason given for that condition was, "to comply with section 91 of the Town and Country Planning Act 1990 as amended by section 1 of the Planning and Compulsory Purchase Act 2004, and to ensure that the dwelling remains of the appropriate size in accordance with polices DP35 and DP36 of the adopted New Forest National Forest Local Plan 2016 to 2036 (August 2019)".
6. Condition three reads as follows, "Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any re-enactment of that order), no extensions or alterations otherwise approved by classes A, B or C, of part 1 of schedule 2 to the order …, or otherwise approved by class E of part 1 of schedule 2 to the order shall be erected or carried out without express planning permission first having been granted".
7. The reason given for that condition was as follows: "To ensure the dwelling remains of a size which is appropriate to its location within the countryside, and to comply with policies DP35 and DP36 of the adopted New Forest National Park Local Plan 2016 to 2036 (August 2019)".
8. The inspector dismissed the appeal. It is not in dispute between the claimants and the Secretary of State that, in coming to his decision, the inspector made a mistake as to the implementation of the GPDO within properties falling inside the National Park.
9. Ms Wigley QC, in her skeleton argument, has helpfully set out, in a table form, the differences in respect of class A, part 1 of schedule 2 to the GPDO, which sets out:
   1) permitted development rights applying; and
   2) amongst other things, enlargement of dwellinghouses.

10. Distinctions are made between what is allowed generally, and what is allowed inside land falling within Article 2(3) of the GPDO; that is National Parks. The main differences for the purposes of this claim relate to side and rear extensions to detached dwellinghouses inside the National Park.
11. Inside the National Park, there is no right at all to add a side extension under the GPDO (see 8.2(b)). Outside the National Park, however, there is a right to construct a single-storey side extension adding up to half the width of the original dwellinghouse.
12. Inside the National Park, there is no right to add a two-storey rear addition (see (a) to (c)). Outside the National Park, there is a right, under the GPDO to add a two-storey rear addition, extending up to three metres beyond the rear wall of the original dwellinghouse.
13. Inside the National Park, there is a right to add a single-storey rear addition, extending up to four metres beyond the rear wall of the original dwellinghouse. Outside the National Park, there is a right to add a single-storey rear addition, extending up to eight metres beyond the rear wall of the original dwellinghouse.
14. The real issue before me is whether the mistake which the inspector made, which was not to recognise the difference in GDPO rights inside and outside the National Park, was a material mistake which demands that the decision should be quashed, and remitted to the Secretary of State, as the claimant submits, or whether, as Mr Dale-Harris, on behalf of the Secretary of State submits, it was not material to the decision.
15. There was no dispute before me as to the test to be applied, which is clearly set out in a number of authorities including *Simplex GE (Holdings) Limited & Another v Secretary of State for the Environment & Another* [2017] PTSR 1041. Purchas LJ gave the lead judgment in the Court of Appeal in that case.
16. At page 17 of the report, Purchas LJ points out that the decision letter in that case was a succinct document, and skilfully and carefully drafted. Ms Wigley QC submits that such is the case in relation to the decision letter which I am considering.
17. Purchas LJ went on to say this: "I find it impossible to consider that the Minister referred to matters which he considered were irrelevant to the decision-making process". Then, a little bit later:

> "The error, in my judgment, is undeniably a significant factor in the decision-making process carried out by the Minister. Accordingly, even if it is not a dominant reason for the decision, it cannot be excluded as insubstantial or insignificant".

18. Later on, Purchas LJ indicated that, in order to show that the decision would still have been the same, had the mistake not been made, it must be shown that the decision would not necessarily have been the same decision.
19. I accept Ms Wigley QC's submission that this decision letter which I am considering was succinct and carefully worded. The inspector, at paragraph three, sets out the main issue before him, which was whether conditions numbered one and three are necessary and reasonable, having regard to the local policy in respect of extensions to dwellings.
20. He then sets out, in paragraphs four to 10, his reasons. In paragraph four, he refers to the policy DP36 of the New Forest National Park local plan, which sets out the circumstances where extensions to existing dwellings will be permitted. In this case, extensions to dwellings should not result in a floor space increase to the existing dwelling by more than 30%. "Existing dwellings", in this context, means the dwelling, as it existed on 1 July 1982.
21. The inspector went on to refer to the justification to that policy, and it is accepted that in his decision letter he accurately summarises that justification. It is that proposals which incrementally extend dwellings in a nationally designated landscape can affect the local distinctive character of a built environment. In addition, extensions can result in an imbalance

in the range and mix of housing stock that is available, and a disproportionate number of larger dwellings.

22. Accordingly, where necessary, the Planning Authority will use appropriate planning conditions to ensure that proposed extensions are not used to undermine the aims of the policy.
23. At paragraph five of the decision letter, the inspector said this:

> "The approved scheme included works and additions to the dwelling that will result in a 29% increase in floorspace, which was in accordance with policy DP36. Yet, any further enlargement of the property would likely result in the 30% limit set by the policy being exceeded. Accordingly, the Authority thought it necessary to impose conditions (numbers one and three), which restrict any further extensions to the dwelling that could be carried out under permitted development (PD) rights. From my assessment of those PD rights removed, works might include large side and rear additions that alter the appearance of the dwelling, and significantly increase its overall scale and mass, as well as the 30% limit referred to in the policy".

24. As the inspector appears to have accepted, any further enlargement of the property would likely result in the 30% limit. It was not bound to do so because the approved scheme resulted in a 29% increase in floorspace. However, that may be, for present purposes, a mere technicality.
25. In paragraph six, the inspector then goes on to refer to the National Planning Policy Framework. That states that planning conditions should not be used to restrict national permitted development rights unless there is clear justification to do so.
26. The inspector went on to refer to the Planning Practice Guidance which says the conditions restricting the future use of permitted development rights, or changes of use, may not pass the test of reasonableness or necessity. The scope of such conditions needs to be precisely defined by reference to the GDPO so that it is clear exactly which rights are being limited or withdrawn.
27. It is accepted in this case that the conditions one and three of the 2020 permission do state clearly which rights have been limited or withdrawn.
28. At paragraph seven, the inspector then went on to consider the appellant's case which was that the impositions of conditions one and three were not reasonable and necessary in the context of the National Planning Policy Framework or the Planning Practice Guidance.
29. He went on to say, however, that, "The circumstances of the case relate to a nationally important landscape, where there has been a consistent application of policy that restricts the cumulative expansion plans, so as to maintain the consistency in build, form, and development".
30. He added this:

> "Allowing the appeal would weaken the application of policy DP36 to the detriment of the extrinsic character of the National Park. Moreover, the Authority would not be able to regulate the scale of future alterations that may unacceptably alter the range and mix of housing stock that is available".

31. Mr Dale-Harris, on behalf of the Secretary of State, submits that that is the critical passage in the decision letter which founds the reasoning of the inspector. Moreover, at paragraph eight, he said this:

> "This approach of limiting the scope of extensions to existing dwellings was endorsed by the inspectors who examined the current local plan.

> Accordingly, I find that there is a clear justification for removing permitted development rights".

32. At paragraph nine, he said this:

> "I acknowledge that the extension the appellant wishes to build is of modest proportion, and may result in rationalising space internally. Even so, there would be nothing preventing further expansion of the dwelling with other additions permitted by the relevant PD rights, should I allow this appeal. This could result in further incremental and/or unsympathetic extending of the dwelling to the detriment of the area's character and the local housing stock".

33. As Mr Dale-Harris realistically accepts, that must refer back to paragraph five of the decision letter, and the inspector's reference there to further extensions that may be carried out under permitted development rights.
34. Finally, at paragraph 10, the inspector says this: "Therefore, conditions one and three are necessary and reasonable, having regard to the legitimate purposes of protecting the local distinctive character, and maintaining a balanced range and mix of housing within the New Forest National Park, as sought by local plan policy DP36".
35. Ms Wigley QC points out t that, in the appeal statement of the Planning Authority before the inspector, there was reference to the fact that the GPDO was much more restrictive in these ways in a national park, and that there was no national policy that permitted development rights should be withdrawn.
36. It is not known how the inspector came to make the mistake which he did. I have no witness statement in relation to that. She submits that, from paragraph five of the decision letter, it is clear that the inspector realised that an assessment of the rights removed was appropriate.
37. Mr Dale-Harris submits that too much should not be read into the reference in that paragraph by the inspector to his assessment of such rights as removed. However, it does seem to me, reading that in the context of the decision letter as a whole, that there was an assessment, and it is clear that the inspector made a site visit to the property on 10 August 2021.
38. Ms Wigley QC therefore submits that the inspector made a clear error in relation to what may be permitted by way of side extensions to this property in the National Park. It is also the case that he may have done so, although it is not certain that he did so, in relation to what could be done with rear extensions.
39. She submits that, because the decision letter is succinct, there was nothing irrelevant in it. The inspector did not restrict himself to the policy. He had regard to the aims. A site visit would not have been necessary if the exercise were purely an arithmetic one to determine whether the 30% limit – and it is a limit – under DP36 would be exceeded.
40. She submits, therefore, that there was an element of planning judgment in having regard to the aim to protect the locally distinctive character, and to keep a balance in the range and mix of housing stock. The policy itself does not require conditions in the form of condition one and three.
41. Mr Dale-Harris, for the Secretary of State, submits that the extent of permitted development rights was not a significant part of the decision letter. He relies on the principles in *Simplex*.
42. The starting point, he submits, is that the inspector was not required to consider any specific extension proposal. The question was whether it was necessary and reasonable to impose conditions which prevented such extensions coming forward, without a requirement to seek a further planning permission from the Authority.

43. The Authority had concluded that such conditions were necessary and reasonable, and had done so on the basis of policy DP36, which had been subjected to examination. That was recognised in paragraph three of the decision letter.
44. Mr Dale-Harris referred to the requirement to have regard to the development plan, which would include this policy, unless other material considerations indicate otherwise, under section 38(6). He referred also to the aims of the policy. The conditions relate only to dwellings outside villages.
45. He submitted that applicants can first obtain planning permission for extensions of dwellings within the National Park, and then use permitted development rights so as to circumvent the 30% limit in the policy. The conditions, therefore, are to protect the effectiveness of that policy.
46. The conditions do not remove permitted development rights wholesale but ensure that they are not used in conjunction with planning permission for extensions.
47. Accordingly, the purpose is not to prevent an increase of more than 30% but to require an application for planning permission, and for that to take place. That, submits Mr Dale-Harris, was particularly relevant to what the inspector was considering.
48. The history of this particular site was, first, an application for an extension which extended beyond the 30%. That was refused. There was then the application which resulted in the 2020 permission but with conditions. Then there was the application which the inspector was considering to remove those conditions.
49. It is clear, therefore, Mr Dale-Harris submits, that the removal of these conditions would undermine the aims of the policy, and that is the central thread running through the decision letter.
50. He submits that the critical reasoning of the inspector is to be found in paragraph eight of the decision letter. He accepts that to show the mistake which the inspector made was not material, and the decision would have been the same in any event, is a high bar but, nevertheless, submits that the bar has been reached in the present case.
51. Despite his focused persuasiveness, I have come to the conclusion that the mistake which was made was material to the decision. As Ms Wigley submits, if it were a pure arithmetical exercise of whether the 30% limit would be increased, then there would be no need for a site visit.
52. The inspector had regard, in particular, to the aims of the policy. It is clear from paragraph five, in my judgment, that the inspector did carry out an assessment of the permitted development rights removed, and came to the conclusion that works might include large side and rear additions that alter the appearance of the dwelling, and significantly increase its overall scale and mass.
53. In my judgment, that is a very clear finding. It not just a matter of plucking words out of context. Those words would not have been necessary or relevant if the exercise was simply an arithmetical one. That is clear, in my judgment, from the following words in paragraph five: “as well as the 30% limit referred to in the policy”.
54. In my judgment, it clear from that, that the inspector was having regard to two matters. That is reinforced by his reference in paragraph nine to, “a further incremental, unsympathetic extending of the dwelling to the detriment of the area’s character and the local housing stock”, and his conclusion in paragraph 10, where he says, “Therefore, the additions one and three are necessary and reasonable”.
55. In my judgment, that must refer back to his reasoning which includes not just the 30% limit but the other matters which he set out in paragraph five.

56. Accordingly, I am satisfied that the mistake in this case was a substantial or significant mistake, and I am not satisfied that the decision would necessarily have been the same decision had that mistake not been made.
57. Accordingly, in my judgment, it is appropriate to quash the decision and to remit it for reconsideration by the Secretary of State.
58. I finish by expressing my thanks to Ms Wigley QC and to Mr Dale-Harris for their focused and clear submissions in writing, and orally before me.

End of Judgment

Transcript of a recording by Ubiqus
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This transcript has been approved by the judge.