Neutral Citation Number: [2023] EWHC 575 (Admin)

Case No: CO/2321/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2023

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

GUILDFORD BOROUGH COUNCIL	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR LEVELLING UP HOUSING AND COMMUNITIES	**Defendants**
(2) CHRISTOPHER WEEKS	

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Mr Charles Merrett (instructed by **Sharpe Pritchard LLP**) for the **claimant**
Mr Piers Riley-Smith (instructed by **Government Legal Department**) for the **first defendant**
The second defendant did not appear and was not represented

Hearing date: 9 March 2023
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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 17 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

HH JUDGE JARMAN KC:

1. The claimant, as local planning authority (the authority) challenges by way of statutory review the grant of planning permission by an inspector appointed by the first defendant (the Secretary of State) dated 20 May 2022, to determine an appeal from its refusal to grant such permission. The planning permission is for the conversion of a garage to habitable accommodation with two storey side and rear extensions, a raised ridge height with three dormers, and a single storey side extension to the main house known as Foxwell Cottage, Hunts Hill Road, Normandy, in the Green Belt in the authority's area. Permission to bring the challenge was granted by Lane J on one ground only, that is that the inspector misinterpreted policy P2 (P2) of the Guildford Local Plan.

2. P2 deals with exceptions to the policy in National Planning Policy Framework (NPPF) at paragraph 149 that the construction of new buildings in the Green Belt is inappropriate. A number of exceptions are then set out in paragraphs 149 a) to f), two of which are relevant here:

> "c) the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building.
>
> d) the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces."

3. The phrase "original building" is defined in the glossary in appendix 2 of NPPF as "A building as it existed on 1 July 1948 or, if constructed after 1 July 1948, as it was built originally." The significance of that date is that it is the commencement date of the Town and Country Planning Act 1947 (the 1947 Act), which established the modern system of development control.

4. P2, so far as material, provides:

> "(1) The Metropolitan Green Belt, as designated on the Policies Map, will continue to be protected against inappropriate development in accordance with the NPPF. Inappropriate development will not be permitted unless very special circumstances can be demonstrated. Very special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm is clearly outweighed by other considerations.
>
> (2) The construction of new buildings in the Green Belt will constitute inappropriate development, unless the buildings fall within the list of exceptions identified by the NPPF. For the purpose of this policy, the following definitions will apply to those exceptions:

> Extensions or alterations
>
> (a) The "original building" shall mean either:
>
> i. the building as it existed on 1 July 1948; or
>
> ii. if no building existed on 1 July 1948, then the first building as it was originally built after this date.
>
> Replacement buildings
>
> (b) A new building will only constitute a "replacement" if it is sited on or in a position that substantially overlaps that of the original building, unless it can be clearly demonstrated that an alternative position would not increase the overall impact on the openness of the Green Belt."

5. The Metropolitan Green Belt was established under the London Home Counties (Green Belt) Act 1938 and the 1944 Greater London Plan to contain the outward sprawl of London. The boundaries of the Green Belt in the authority's area were defined in its 1987 local plan.

6. The factual background against which the inspector had to apply P2 was that Foxwell Cottage with the garage was built pursuant planning permissions in 2003 for the demolition of "existing bungalow" and the erection of "detached chalet bungalow." No papers relating to those permissions were put before the inspector or before me. Indeed the only documents relating to the demolished dwelling and the replacement dwelling were a Land Registry plan dated 1975 showing the dwelling before demolition and a map dated 2021 showing Foxwell Cottage as presently existing. The former was overlaid by the latter to show that the now demolished dwelling was slightly smaller and to the north, but overlapping, of Foxwell Cottage. These documents also appear to show that the garage which now exists at Foxwell Cottage did not exist in 1975, or at least not at the same location or of the same size as the present garage.

7. In determining whether the extensions and alterations applied for would result in disproportionate additions over and above the size of the original building, the inspector took the totality of the square meterage of Foxwell Cottage and the garage as a "normal domestic adjunct" and did not follow the authority's approach of assessing the two buildings separately. There is no challenge to this approach of the inspector.

8. Rather the challenge is put on the basis that in taking the square meterage of the existing buildings in making this assessment, the inspector misapplied P2. The authority submits that what he should have done was to take the measurements of the since demolished building, which were slightly smaller than the existing building, and which would have involved a significantly greater total uplift in total floorspace than the 23-28.6% suggested by the second defendant, as appellant.

9. The Secretary of State, however, submits that the factual situation here, where the demolished building did not exist at the time the inspector considered proportionality,

is not precisely covered by policy P2, and so it was a matter of planning judgment for the inspector to decide the base line of measurement. It is not in dispute as a matter of principle that where a policy does not precisely apply to the factual situation being considered, it is a matter of planning judgment of the decision maker how to proceed (see the decision of Dove J in *Tewksbury BC v Secretary of State for Housing Communities and Local Government* [2021] EWHC 2782 (Admin)).

10. Several other principles, in relation to statutory reviews under section 288 of the Town and Country Planning Act 1990 such as the present claim, are relied upon on behalf of the Secretary of State, which were not in dispute before me. These are summarised in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754 at paragraph 19 of the judgment of Lindblom J, as he then was. Of particular relevance is the fifth principle therein set out as follows:

> "When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment (*1993) 66 P. & C.R. 80, at p.83E-H)."

11. Moreover, courts should respect the expertise of specialist planning inspectors and start at least from the presumption that they will have understood the policy framework correctly. It is important to make a distinction between issues of interpretation of policy, which is appropriate for judicial analysis, and issues of judgment in the application of that policy, which is not (see *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37, at paragraphs 23 to 26 of the leading judgment of Lord Carnwath).

12. The relevant paragraphs of the inspector's decision letter are set out below. Although these are lengthy extracts it is necessary, to understand the respective arguments, to set them out in full.

> "8. Paragraph 149 of the NPPF states that new development is inappropriate in the Green Belt unless it falls within the given list of exceptions. Policy P2 of the Guildford Borough Local Plan: Strategy and Sites 2019 (LPSS) is consistent with this in that it gives a list of forms of development that are not inappropriate. One exception is the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building. Having regard to extensions to buildings, Policy P2 of the Local Plan states that the "original building" shall mean the building as it existed on 1 July 1948.
>
> 9. The Council states that the host property was built after being granted planning permission in 2003 on the same site as the original dwelling which shared the same name as the

existing. In this regard, the appellant has provided Land Registry documents from 1975 which demonstrate that the original building was named 'Foxwell' and sat within a plot that encompassed the appeal site as well as the neighbouring site to the north. The plot has since been sub-divided and the original building was demolished and replaced with the appeal dwelling known as 'Foxwell Cottage'. The neighbouring property which was constructed to the north is named 'Foxwell' but is not the original building known by the same name. It would appear that the appeal dwelling was erected in roughly the same location as the original building although the appellant highlights the fact it lies slightly to the south of where the original building was sited.

10. In their evaluation, the Council considers that the proposed single storey extension to the main property should be assessed as part of exception (c) of paragraph 149 of the NPPF with the demolished original building as the baseline. On the other hand, the proposed extensions to the annexe have been assessed with the existing garage as the baseline. With regard to replacement buildings, Policy P2 states that a new building will only constitute a replacement if it is sited on or in a position that substantially overlaps that of the original building. As Foxwell Cottage was built as a replacement dwelling and in a position that substantially overlaps the demolished original building, it can be taken that the 'original building' in this case would be the replacement dwelling itself, as originally built in 2003-2004, and that would form the baseline against which subsequent extensions and alterations should be measured. I therefore concur with the appellant's viewpoint that the totality of the extensions and alterations to the main dwelling as well as to the garage should be assessed against the existing replacement dwelling itself. Indeed, as the garage is a normal domestic adjunct and lies in close proximity to the main dwelling, it can be regarded as part of the dwelling and, therefore, an extension to the garage could be regarded as an extension to the house.

11. Whilst the Council states that the proposed extensions would be disproportionate, the appellant contends the total uplift in floorspace over and above the existing replacement dwelling would only represent approximately 23-28.6%. Whilst the development plan does not refer to a defined way of assessing and measuring proportionality, national guidance does give some guidance on measuring 'proportionality'. The NPPF refers to 'size' which can, in my view, refer to volume, height, external dimensions, footprint, floorspace or visual perception. In this case, the uplift in floorspace and footprint would be modest. Whilst the two-storey extension to the garage, the expansion of roofscape and the insertion of dormer

> windows would add visual bulk, it is not considered that this would be excessive. I do not find that the resultant width of the annexe would be unacceptably long as the proposed rear extension would be stepped down from the rest of the building with the ridge height of the roof being lower. This would help to reduce the perceived volume of the extension."

13. The inspector made no express finding as to when the demolished dwelling was built or whether it existed on 1 July 1948. Any dwelling which was built thereafter would have needed planning permission. The authority has no record of any such permission, and although it is possible, as suggested by Mr Merrett on its behalf, that records may have become lost or the demolished dwelling may have been built unlawfully without permission, in my judgment it is more likely that it was built prior to that date, when planning permission was not needed.

14. Mr Merrett submits that the application for planning permission in question involved extensions or additions, and not a replacement dwelling. The two types of application are dealt with separately in the NPPF and in P2, and what the inspector has impermissibly done is to elide the two. He should have taken the now demolished building as the baseline for the measurement of total uplift of floor space, as part of the exercise in evaluating proportionality, either as it existed in 1948 or as "the first building as it was originally built" after that date in line with P2. To approach the evaluation as the inspector did would give rise to the potential for incremental extensions and additions, which even if modest in themselves, may cumulatively result in disproportionate additions. Mr Merrett relies on the word "first" as showing that the policy contemplates that there may be more than one building, as there is in this case.

15. Mr Riley-Smith for the Secretary of State, relies heavily on the reference to "the building" in policy P2(2)(a)i. This must refer to the building which still exists, and it would be odd if, when considering proportionality, the baseline for measurement must be a building which no longer exists. It is more logical to take the baseline of measurement as those buildings which exist at the time of application to extend or to add to. Otherwise, where the demolished building is replaced by a smaller building, the latter may be extended or added to up to the size of the demolished building even if the extension or addition would be disproportionate to the building sought to be extended or added to. He also makes the point that subsequent buildings would need to be assessed on their merits when considering whether to grant planning permission for them.

16. In my judgment, it is clear on its face that P2 seeks to implement the NPPF in stipulating that new buildings in the Green Belt will be inappropriate unless it falls within the exceptions set out in NPPF. For the purpose of P2, a definition of the phrase "original building" is given, which expands somewhat on the definition given in the NPPF, in a way which in my judgment is not altogether clear. Whereas in the NPPF, the definition refers to "a" building, in P2 the reference is to "the" building. Moreover the reference to "the first building" does appear to contemplate that there may be subsequent buildings.

17. The phrase "as it was originally built" does appear to contemplate that there may be further extensions and additions, but yet requires that what must be considered in

those circumstances as the baseline measurement for evaluating proportionality is the first building as originally built and not any further extensions or additions. In other words, what must be considered is not the building as it existed at the time an application for extensions or additions is made, but the building as originally built. In my judgment this is likely to be directed at avoiding the cumulative effect of extensions and additions which may be modest in themselves but which may cumulatively amount to disproportionate development.

18. Mr Riley-Smith submits that P2 does not contemplate the situation where the original dwelling is demolished and replaced, which he describes as an unusual situation. In my judgment that situation is not that unusual and is contemplated in P2(2)(a)ii. It is notable that in that paragraph the building demolished to make way for the replacement building is referred to as the original building.

19. Had the intention been to make the replacement building the baseline for evaluating the proportionality of any extension or addition then it would have been easy to say so. On one reading of NPPF 149(c), taken on its own, the reference to the original building there may be to the building as existing prior to the proposed extension or addition. However, it is clear from the P2 definition of "original building", that what must be considered in the evaluation exercise is the original building as it existed on the coming into force of the 1947 Act or the first building as originally built after that date.

20. Mr Riley-Smith points to several practical difficulties in the authority's interpretation of P2. First, where a building is demolished and replaced, it may be difficult to determine the size of the demolished building. There was no difficulty in the present case as the authority put forward before the inspector the square meterage of the demolished building, presumably on the basis of the 1975 plan, although that is not entirely clear. Moreover, as Lane J observed when granting permission, any such difficulty is arguably an insufficient reason to depart from the natural meaning of the words in P2(2)(a). Second, the replacement building may be so different to the building it replaced as to make it unworkable to take the latter as the baseline. Again, that was not the case here, and in terms of development in the Green Belt it is difficult to envisage circumstances in which the exercise may be unworkable. Third, after demolition the site may remain empty so the decision maker would have to assume artificially that there was a building upon it. However, P2(2) clearly refers to NPPF 149 (c), each of which relates to a situation where there is a building.

21. In my judgment none of those potential difficulties are such as to justify departing from the wording of P2(2)(a) i and ii. I am persuaded that what the inspector has done in paragraph 10 of the decision letter is impermissibly to elide P2(2)(a) and P2(2)(b), which relate to different applications, the former to extensions or alterations, and the latter to replacement buildings. Although NPPF 149(d) is not expressly referred to, the wording in respect of replacement buildings under P2 is similar and that is the wording used by the inspector in paragraph 10 of the decision letter. The inspector does not say anywhere in the decision letter that he is adopting his approach because of a gap in P2 or that he is using his planning judgment to fill that gap. Mr Riley-Smith submits that it is clear from paragraphs 8 and 9 of the decision letter that this is the approach which the inspector adopted, but in my judgment on a fair reading of the decision letter as a whole, there is no justification to find that that is the approach he was adopting.

22. Had the square meterage of the demolished building been taken into account in the evaluation exercise of proportionality, then a materially larger percentage in the total uplift would have been arrived at. In my judgment therefore the inspector's decision must be quashed and the appeal must be resubmitted for redetermination.

23. I invite counsel to submit a draft order within 14 days of hand down of this judgment, agreed as far as possible, together with any written submissions on consequential matters which cannot be agreed. Those matters will then be determined on the basis of such submissions.