England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2010] EWHC 250 (Admin)
Case No: CO/12308/2009

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX
17/02/2010

B e f o r e :

MR JUSTICE FOSKETT

Between:

SIMON WILLIAM DAVID FEATHER	**Claimant**
- and -	
CHESHIRE EAST BOROUGH COUNCIL	**Defendant**
-and-	
CHRISTOPHER WREN AND SUSAN WREN	**Interested Parties**

Jonathan Easton (instructed by Cobbetts LLP) for the Claimant
Ian Albutt (instructed by Christopher Chapman, The Borough Solicitor) for the Defendant
Hearing date: 12th February 2010

HTML VERSION OF JUDGMENT

Mr Justice Foskett :

1. This is a renewed application for permission to apply for judicial review, permission having been refused on the papers by His Honour Judge Pelling QC on 4 December 2009.

2. The application relates to a planning permission granted by the Cheshire East Borough Council on 24 July 2009 for development comprising a replacement dwelling situated at Broad Heath House, Over Alderley, Macclesfield, a property owned by Mr and Mrs Christopher Wren. The Claimant, Mr Simon Feather, owns and lives at Broad Heath Farm, adjacent to Broad Heath House. Both properties are in the Green Belt and Green Belt planning policies govern the approach to development in the area.

3. The relevant planning policies for the purposes of this application were considered in *Guildford Borough Council v Secretary of State for Community and Local Government* [2009] EWHC 3531 (Admin). The particular provision that underlies the arguments in this application is PPG 2 (Green Belts) which Cranston J helpfully set out and described in paragraphs 13 and 14 of his judgment in that case:

> 13. PPG 2 (Green Belts) sets out the policy guidance which applies throughout the country in relation to Green Belt development. Paragraph 3.1 provides that there is a general presumption against inappropriate development within the Green Belt and that such development should not be approved except in very special circumstances. Under paragraph 3.2 that inappropriate development is by definition harmful to the Green Belt. It is for an applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development the guidance explains that the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development.
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> 14. Paragraph 3.4 continues that the construction of new buildings inside the Green Belt is inappropriate development unless it is for certain purposes, including the "limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below)". Paragraph 3.6 then provides:
>
> > "Provided that it does not result in disproportionate additions over and above the size of the original building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

4. The focus of the argument in this case, as it was in the *Guildford Borough Council* case (and the *Heath and Hampstead* case referred to below), is on the words "not materially larger than the dwelling it replaces".

5. The background, very shortly, is this: on 2 February 2009 Mr and Mrs Wren sought planning consent from the Macclesfield Borough Council for a replacement dwelling. The current property is a 5-bedroomed detached house on a site of 2.67 acres. An aspect of the proposed dwelling was that there was to be a basement area that was "fully subterranean", a feature that also figures in the planning application that underlies this application.

6. Mr Feather wrote objecting to that application. In due course, on 8 April 2009, the application was rejected as constituting inappropriate development in the Green Belt. The planning officer's report that recommended the refusal of that application (a) excluded the proposed basement area from the calculation as to whether the new building would be materially larger than the dwelling it would replace, but (b) concluded that a 42% increase in floorspace in the rest of the building (680m² compared with 480m²) was sufficient to make the new building materially larger than the dwelling it would replace.

7. As I understand the chronology, on the day before the rejection of that application, Mr and Mrs Wren lodged the application that is the focus of the present proceedings. As a result of local government reorganisation the planning authority for the area as from 1 April 2009 was Cheshire East Borough Council, the present Defendant.

8. As I have indicated, the proposal that formed the subject of that application also contains a substantial basement with its own floor area of about 688m² designed to accommodate a swimming pool, games room, changing facilities and associated plant and equipment.

9. I need not say a great deal about the precise design for present purposes other than to say that since the basement area is "fully subterranean" it would not seem to have an obvious impact on the visual amenities of the surrounding area. As will be apparent from what follows, it was this consideration that, in summary, led to the recommendation for approval in principle by the planning officer responsible for considering the application (who, incidentally, was the same officer as the officer who considered the first application). In her report of 9 July 2009 she found that the overall footprint of the building would decrease by 11% compared with the existing building, but that the floorspace would increase by 30%. However, the floorspace comparison omitted the 688m^2 of gross floor area provided in the basement. What she said in her report was that -

> "... the overall scale and appearance of the dwelling is considered relatively similar to the existing. The proposed replacement dwelling would provide a smaller footprint, approximately a reduction of 11%. The amount of floorspace would increase by approximately 30%. This increase in floorspace ... must be considered in conjunction with the overall scale and appearance of the dwelling. The increase in floorspace is noted, however, it is considered that as the overall appearance of the building would be broadly similar, therefore it is not considered that the replacement dwelling would be materially larger; therefore it is considered that the proposal would comply with paragraph 3.6 of PPG 2."

10. Whilst, for present purposes, the precise mathematical calculation is not relevant, it is obvious that the exclusion of the basement area would have an effect on the percentages (whether increased or decreased) put forward. It is not disputed that the overall footprint of the building would decrease, but the Claimant asserts (and it is not, as I understand it, seriously disputed) that if the basement of the proposed building is included (a) the increase in floorspace would be in the region of 240% and (b) the increase in built volume would be between approximately 8-20% depending on which elements of the buildings are taken into account.

11. The Claimant's short point is that Defendant's assessment of the proposed development did not take into account the floorspace provided in the basement and no volumetric comparison was undertaken either. If they had (and certainly if the former had) been taken into account and had been applied to the relevant test in paragraph 3.6 of PPG 2, the conclusion would have been that the proposed replacement dwelling would be "materially larger" than the existing building and accordingly it would constitute inappropriate development in the Green Belt. This being the case, it is argued that the Defendant should have gone on to give substantial weight to the harm to the Green Belt consequent upon the inappropriateness of the development (paragraph 3.2 of PPG 2) and then to consider whether there were any "very special circumstances" that outweighed such harm. Since, it is argued, the Defendant did not carry out the assessment in this way its conclusion was not reached in accordance with the appropriate policy and should be set aside.

12. Mr Jonathan Easton, in his Skeleton Argument in support of this application, says that if it is correct to exclude the basement from the evaluation and to focus only on the question of external impact, it would be possible to justify any development that PPG 2 considers to be "inappropriate by definition" merely by pointing out that the external appearance has no impact on openness or visual amenity, or has a lesser impact than the building it will replace. This is not, he argues, the interpretation that the Court of Appeal placed on PPG 2 in the *Heath and Hampstead* decision. In *R (Heath and Hampstead Society) v. LB Camden* [2008] 2 P & CR 13, he says the issue was expressed as follows, namely, "whether the "materially larger" test imports, solely or primarily, a simple comparison of the size of the existing and proposed buildings; or whether it requires a broader planning judgment as to whether the

new building would have a materially greater impact than the existing building on the interests which [the] policy is designed to protect." He argues that the test is tightly drawn so as to prevent the gradual accretion of extensions to (or replacements of) dwellings which Carnwath LJ illustrated by reference to the proposition that "an extension three times the size of the original, however beautifully and unobtrusively designed, could not, in my view, be regarded as "proportionate" in the ordinary sense of that word." He also said this:

> "The words "replacement" and "not materially larger" must be read together and in the same context. So read, I do not think that the meaning of the word "material", notwithstanding its use in planning law more generally, can bear the weight which the authority sought to give it. Size as Sullivan J said is the primary test. The general intention is that the new building should be similar in scale to that which it replaces."

13. Mr Ian Albutt for the planning authority has submitted that the reports to the planning committee show that the correct question was asked, namely, whether the replacement building will be materially larger, that the relevant issues (including whether the building would be materially larger) were taken into account and the question was approached objectively taking into account physical dimensions as well as factors such as floorspace and footprint. He argues that these are essentially matters of planning judgment and that it is not for the court to substitute its own decision on the facts for that of the decision maker(s) once the correct tests have been identified and applied.

14. He does not dispute that the assessment of whether a proposal is "materially larger" than the existing building that the issue of size is the primary test, but argues that it is not the exclusive test. The test is not solely concerned with a mathematical comparison of relevant dimensions, but with a broader appreciation of the planning merits. e argues that this is supported He submits that this is supported by the *Heath and Hampstead* case where Carnwarth LJ, he argues, recognises the importance of site specific issues stating that "a small increase may be significant or insignificant in planning terms, depending on such matters as design, massing, and disposition on the site. The qualification provides the necessary flexibility to allow planning judgement and common sense to play part, and it is not a precise formula." This approach, he submits, was followed by Sir Thayne Forbes in *Hobson v The Secretary of State for Communities and Local Government and Guildford Borough Council and Robert Brown and Marlene Brown* [2009] EWHC 981.

15. Mr Easton's general response to this is to submit that paragraph 3.6 of PPG 2 represents a threshold test of appropriateness of a development in the Green Belt, questions concerning the impact on openness and visual amenity and other features of "planning judgment" not arising unless the quantitative increase is, as he puts it, marginal. He contends that the planning officer's approach, as recorded in paragraph 9 above, even before carrying out the objective size comparison involves a qualitative judgment as to the "appearance" of the two buildings, the impact of the proposed replacement dwelling on openness and visual amenity being a primary consideration in determining whether it was "materially larger" than the building it will replace. Whilst it is my expression and not his, he is effectively arguing that the cart has been put before the horse.

16. His Honour Judge Pelling QC, in rejecting this application on the papers, gave as his reasons the following:

> "The reports prepared by the officers of the defendant show that the correct question (would the replacement building be materially larger) was asked. A perusal of the relevant reports suggests that the Defendant took into account that which it was required to take into account and did not take into account anything that it should not have taken into account in deciding whether the replacement building would be materially larger. The question was approached objectively by taking account of physical dimensions as well factors such as floor space and footprint. Once that correct test and the correct factual matters relevant to the application of that test have been identified, the answer is one for planning judgment. It is not open to the court to substitute its own decision on the facts for that of the decision maker once the court is satisfied that the correct tests have been identified and applied unless possibly the ultimate decision can be regarded as *Wednesbury* unreasonable which is not what is alleged here."

17. I can see the force of that conclusion, but Judge Pelling did not have the advantage of the Skeleton Arguments and the short oral submissions I have received from Mr Easton and Mr Albutt. I am bound to say that my mind has wavered whilst considering the matter, but that seems to me to be as good a reason as any for saying that the court should have the advantage of sustained argument on the issue. It may be that, in due course, the arguments that found favour with Judge Pelling will prevail, but I am unable to say at this stage that the Claimant's argument is so clearly unarguable that I should not grant permission. It was agreed that if I did so, it would be wise to provide for a full day's hearing and to give the judge hearing the substantive application a half day to read the papers.

18. In the circumstances, I will say nothing further other than to say that I grant permission.

19. Since seeing the draft of this judgment the parties have agreed the terms of the order which are as follows:

> (1) That permission to apply for judicial review is granted.
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> (2) That the costs of the permission hearing to be costs in the case
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> (3) That the Defendant shall serve any written evidence within 35 days after service of the Order giving permission.
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> (4) That the Claimant (if so advised by the Claimant's Counsel) shall file any further written evidence in response within 21 days following receipt of any evidence served by the Defendant.
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> (5) That the application for judicial review shall be listed for a substantive hearing on the first available date following the exchange of evidence referred to in paragraphs 3 and 4 with a time estimate of 1 full day with reading time for the Judge hearing the application of 1/2 day.
