Neutral Citation Number: [2017] EWHC 2416 (Admin)

Case No: CO/2364/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2017

Before :

MR JUSTICE GILBART

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Between :

THE QUEEN **on the application of** **GLYN MARSHALL**	**Claimant**
- and -	
EAST DORSET COUNCIL	**Defendant**
and	
BRIAN PITMAN	**Interested Party**

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Daniel Stedman-Jones (instructed by **Coles-Miller Solicitors LLP**) for the **Claimant**
Philippa Jackson (instructed by **Legal Services, Christchurch and east Dorset Councils**) for the **Defendant**
The Interested Party appeared in person

Hearing dates: 21st September 2017

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Approved Judgment

GILBART J :

1. This is an application by the Claimant for permission to bring judicial review proceedings against the Defendant Council ("EDDC") in relation to their handling as Local Planning Authority ("LPA") of an application made under the Town and Country Planning General Permitted Development Order 2015 ("GPDO 2015") Schedule 2 Part 6. That application was made by the Interested Party on 5th December 2016. It purported to be an application relating to a single scan agricultural building, to be erected at what it described as Pound Farm, Hinton Martell, near Wimborne, East Dorset. That land used to be farmed from the house known as Pound Farm, which is now owned by the Claimant.

2. The application was made for development which was said to be under Class A- "the carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area, (it is of just over 11 hectares) of works for the erection ……. of a building…. which are reasonably necessary for the purposes of agriculture within that unit". I shall have more to say about the terms of the application below. Plans were submitted showing the building and its proposed location, of which I shall also have to say more presently.

3. Under the procedure relating to this Class (see Class A paragraph A2(2), the developer must apply to the LPA for as determination of whether the prior approval of the authority will be required for the siting, design and external appearance of the building. The LPA may (see paragraph A2 (i)- (iv)

   i) state that prior approval is not required, or

   ii) state that it is, and approve the details provided, or

   iii) state that such approval is required, and if so, it must require the exhibit of a site notice so that representations can be made.

4. Development may not be begun before one of those steps has occurred, except that if 28 days have elapsed from the date of receipt of the application without the LPA determining whether approval is required or notifying the applicant of it, then development may commence.

5. The site of the proposed agricultural building lies in close proximity (less than 80 metres) of the house known as Pound Farm, and within 81 metres of a Grade II listed building, Uppington Cottage. Both are "protected buildings" for the purposes of the GPDO, both being occupied as houses.

6. Although the application stated that the building was reasonably necessary for the purposes of agriculture, the application described the reasons why it was necessary as

   > "the building is to be used (a) to winter house 45 ewes and their lambs through the winter period and (b) the storage of approximately 10 tonnes of potatoes which are grown on the adjoining land"

7. However, Class A is described by the GPDO paragraph A1 thus

   > "Development not permitted

Development is not permitted by Class A if

> (iii) it would consist of…. the erection of a building…. used or to be used for the accommodation of livestock……. where the building is or would be within 400 metres of the curtilage of a protected building."

8. The conditions to be applied under paragraph A2 prevent use of the building for such purposes except when the circumstances in paragraph D 1(3) apply, which permit it if there is no other suitable building or structure 400 metres or more of a protected building, and that it is for (in this case) the temporary accommodation of animals normally kept out of doors, if they are sick or giving birth, or newly born, or to provide shelter against extreme weather conditions.

9. EDDC failed to address the application properly. It did not seek discussion with the Interested Party until after the 28 day period had elapsed. Its officer prepared a report which went to a Committee meeting on 13th February 2017, the 28 day period for determination having elapsed on 8th January 2017. It noted the issue over the keeping of lambs, which had been raised with the Interested Party's agent, and informed the committee that the use of the building would be restricted by the condition referred to above. It concluded by noting that the failure to respond within 28 days prevented the Council from requesting details for prior approval. It did not address the effects of the siting or design on the surroundings of the building.

10. On 13th February 2017, the Council determined that prior approval was not required in relation to siting and design, but added an "informative" stating that

    i) the time for the Council to request the submission of details of the siting, design and external appearance of the building had expired, and

    ii) "the applicant is advised that as the proposed building would be sited within 400 m of a number of protected buildings its use for the keeping of livestock, other than in accordance with Schedule 2 Part 6 Class D1.3, would represent failure to comply with Schedule 2, part 6, Class A (A1(i)…….) and planning consent would be required.

11. Thus,

    i) EDDC purported to determine that prior approval was not required, whereas in fact it had not addressed any question of the effect of the siting and design;

    ii) It concluded that the agricultural user described in the application was not permitted under the GPDO.

12. The Claimant states that he was unaware of the application and determination until 29th March 2017. He immediately contacted the EDDC and its case officer. Mrs Adams replied on 11th April. Advance notice of it having been given on 28th April 2017, a pre action protocol letter was sent on 3rd May 2017 and the proceedings issued on 18th May 2017.

13. After the issue had been raised by the Claimant, an officer of EDDC, a Mr Keith Palmer, contacted the Interested party. Understandably, Mr Palmer raised the question (which

had been put to EDDC by the Claimant) of the viability of an agricultural business of sheep rearing and potato growing on a unit of just 11 hectares, Mr Pitman informed him that the building would also be used to house vehicles for an agricultural contracting business. Mr Palmer pointed out that use of the building to repair or store vehicles for his agricultural contracting business would constitute a change or use of the building.

14. Meanwhile the claimant sought advice from a Planning Consultant and then a solicitor. Work on the building has stopped.

15. On Ground 1 Mr Stedman-Jones contends that the development proposed must fall outside the scope of the permitted development rights, and that the question of its planning status is a "continuing" – see Ouseley J in *Hammerton v London Underground* [2002] EWHC 2307 Admin [2003] JPL 984. It would be appropriate for the Court to grant a declaration. The assertion in the application that the building would be used to house ewes in the winter precludes it being permitted development under Class 2A. He draws attention to the words of Richards LJ in *Murrell v SSCLG* [2010] EWCA Civ 1367 [2011] 1 P & CR 1 at [9] where he referred to paragraph E14 of the then guidance, in Annex E of Planning Policy Guidance 7. It was up to the EDDC to verify that the development would benefit from permitted development rights and would not require a planning application.

16. On Ground 2 he contends that the application was invalid, because the address was incorrect, and because the Interested Party does not control land of 11 hectares, but not more than 5.

17. As to ground 3, he contends that the Council should have considered the heritage impact of the development on the nearby buildings. He points out that the building is a substantial one (6.6 metres high by 18.3 metres long and 12.2 metres wide). He accepts that this is not a determination to which s 66 *Listed Buildings Act 1990* applies.

18. The Council through Ms Jackson argue that the application contended that the building was reasonably necessary for agriculture, and that, the Council having not determined the application, is now bound by the effect of the automatic grant of permitted development rights. It contends that the matter was dealt with by the informatives. She contended that the application was an attempt to pre-empt the Council from approaching the issue of enforcement in the usual way.

19. She relied on *Murrell* as showing that the powers of the Council to go behind the application were limited.

20. Mr Pitman told the Court that he kept sheep, and that every year it would be necessary for them to have a place to shelter if there was snow on the ground or when giving birth.

21. Should permission to apply for judicial review be granted? It is difficult to avoid three central facts

    i) The application's justification for the building being reasonably necessary for the purposes of agriculture within that unit was in conflict with the terms of paragraph A1 (i) as the decision notice accepts and asserts;

ii) The Council failed to do what the law expected of it, which was to address the application properly within 28 days. It failed ever to consider issues of siting or design, notwithstanding the presence of protected buildings (one being listed) close by;

iii) Mr Pitman has acted on the failure of the Council to give notice, and contends that he now has permitted development rights.

22. I consider it at least arguable that the effect of the application was such that it was incapable of being permitted, being for a development expressly falling outside the permitted development class. Mr Pitman's submissions to the Court demonstrated that the building had been planned so as to house animals in the winter. It is arguable that a development constructed so as to benefit from the exception cannot be said to be permitted under Class A.

23. Ground 3 does not attack the determination as such, but complains that at no stage did the Council address the important issues of siting and design. The difficulty with it is that if the application was lawful (and therefore the automatic bar on development starting is lifted in the absence of determination) then the time for raising such issues has passed.

24. This case raises some interesting questions. Was the act of development of starting the construction of the building rendered lawful by the 28 day period having expired, or does that paragraph A2 (i)- (iv) have the effect of rendering it immune from enforcement? Do those affected by the failures of a LPA to address an application timeously and appropriately have the ability to complain of the terms of the application, when the applicant can claim the right to start development because of the Council's delays and inaction? Is the Claimant's remedy confined to redress from the Ombudsman for what happened, and to hope that the Council take enforcement action? That will depend on whether any of the exceptions have been established, and on monitoring the use of the building, to see that its use is related to the unit. None of that will give a clear cut answer.

25. On the other hand, is the effect of the GPDO to give a cut off mechanism designed so that a farmer can get on with his business once the 28 day period has elapsed?

26. I consider that the case is arguable. I grant permission on each ground. I have considered the issue of delay. In the circumstances of this case, there was no formal or other basis for neighbours to be informed, and I consider that once the Claimant knew of what happened he acted expeditiously.