NORTH FALLS

Offshore Wind Farm

New Forest National Park Authority v Secretary of State for Housing, Communities and Local Government and Mr Simon Lillington [2025] EWHC 726

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Case No: AC-2024-LON-001685

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2025

Before :

MR JUSTICE MOULD

- -

Between :

NEW FOREST NATIONAL PARK AUTHORITY	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
- and –	
(2) MR SIMON LILLINGTON	**Defendants**

- -
- -

POONAM PATTNI (instructed by **New Forest National Park Authority**) for the **Claimant**
HUGH FLANAGAN (instructed by **Government Legal Department**) for the **First Defendant**

Hearing date: 4th December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 27th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MOULD

MR JUSTICE MOULD :

Introduction

1. This is an application by the Claimant under section 288 of the Town and Country Planning Act 1990 **["the 1990 Act"]** challenging the validity of the decision of an inspector appointed by the First Defendant to allow the Second Defendant's planning appeal under section 78 of the 1990 Act. The decision under challenge was made by letter dated 8 April 2024.

2. The Second Defendant's appeal was from the refusal by the Claimant, acting as local planning authority, of his application for planning permission for the construction of a first floor, rear extension to an existing detached dwelling known as [redacted] **["the proposed development"]**. The inspector visited the site on 13 February 2024. He determined the appeal on the basis of the parties' written representations. He allowed the appeal and granted planning permission subject to conditions.

3. On 10 July 2024 [redacted] gave the Claimant permission to bring their claim.

4. The Claimant's application for planning statutory review proceeds on two grounds –

   (1) Ground 1 - The Claimant contends that the inspector misdirected himself on policy DP36 of the New Forest National Park Local Plan 2016-2036 **["the Local Plan"]**.

   (2) Ground 2 - The inspector failed to discharge the enhanced duty now imposed by virtue of section 11A(1A) of the National Parks and Access to the Countryside Act 1949 **["the 1949 Act"]** which he was required to fulfil in making his decision on the Second Defendant's planning appeal.

The Local Plan

5. In the light of the issues raised in this claim and the inspector's decision, it is necessary at the outset to refer to two policies of the Local Plan, together with the reasoned justification given for those policies. The Local Plan forms part of the statutory development plan for the New Forest National Park.

6. Policy DP36 is headed *"Extensions to dwellings"*. It provides as follows –

   "Extensions to existing dwellings will be permitted provided that they are appropriate to the existing dwelling and its curtilage.

   In the case of small dwellings and new dwellings permitted by Policies SP19 to DP31 of this Local Plan, the extension must not result in a total internal habitable floor space exceeding 100 square metres. In the case of other dwellings (not small dwellings) outside the Defined Villages the extension must not increase the floorspace of the existing dwelling by more than 30%.

   In exceptional circumstances a larger extension may be permitted to meet the genuine family needs of an occupier who works in the immediate locality. In respect of these exceptional circumstances, the total internal habitable floor space of an extended dwelling must not exceed 120 square metres.

Extensions will not be permitted where the existing dwelling is the result of a temporary or series of temporary permissions or the result of an unauthorised use".

7. Paragraphs 7.79 of the Local Plan provides the justification for the controls imposed by policy DP36 –

"7.79… proposals to incrementally extend dwellings in a nationally designated landscape can affect the locally distinctive character of the built environment of the New Forest. In addition, extensions can over time cause an imbalance in the range and mix of housing stock available. For these reasons it is considered important that the Local Plan continues to include a clear policy to guide decisions for extensions to dwellings. Successive development plans for the New Forest have included such policies which strike an appropriate balance between meeting changes in householder requirements and maintaining a stock of smaller sized dwellings. The extension limits apply outside the Defined Villages as extensions in these locations are likely to have a greater impact on the protected landscape of the National Park".

8. Paragraph 7.80 of the Local Plan states that in all cases, the planning authority will have regard to the scale and character of the core element of the original dwelling, rather than subsequent additions to it, in determining whether the proposed extension is sympathetic to the dwelling.

9. Paragraph 7.82 explains the terms used in policy DP36, which include the following –

"For the purposes of applying Policies DP35 and DP36:

- ***original dwelling*** *means the dwelling as first built*
- ***existing dwelling*** *means the dwelling as it existed on 1 July 1982, or as the dwelling was originally built or legally established, if the residential use postdates 1 July 1982*
- ***small dwelling*** *means a dwelling with a floor area of 80 sq. metres or less as it existed on 1 July 1982, or as the dwelling was originally built or legally established, if the residential use postdates 1 July 1982*
- ***floorspace of original, existing and small dwellings*** *will be measured as the total internal habitable floorspace of the dwelling but will not include floorspace within conservatories, attached and detached outbuildings (irrespective of whether the outbuildings current use is as habitable floorspace)".*

10. Policy SP17 of the Local Plan is headed *"Local distinctiveness"*. It provides as follows –

"Built development and changes of use which would individually or cumulatively erode the Park's local character, or result in a gradual suburbanising effect within the National Park will not be permitted".

11. Paragraphs 6.19 to 6.21 explain the planning objectives which justify policy SP17 –

"6.19 The different villages and landscapes in the National Park all have a distinctive character, although they are also all recognisably part of the New Forest, linked by its particular history, economy and culture.

6.20 The first National Park purpose, together with national planning policy, recognises the importance of conserving and enhancing an area's local character. The level of development pressure within the National Park is evidenced by the level of planning applications received by the Authority each year. Since becoming a Local Planning Authority in 2006 the Authority has determined an average of just under 900 planning applications per year.

6.21 Whilst the vast majority of these applications entail minor development, increasing amounts of such small-scale household development can result in a creeping suburbanisation of the National Park, slowly eroding the Forest's distinctive character".

The inspector's decision

12. In paragraph 3 of his decision letter **["DL3"]** the inspector stated that the main issue in the appeal was –

"whether the proposed development complies with local policies which seek to limit the scale of extensions to rural dwellings, with particular regard to the effect of the proposed development on the locally distinctive character of the built environment of a New Forest and the range and mix of housing stock available".

13. In DL4, the inspector said that [redacted] was an attractive, detached dwelling situated within a rural area and largely surrounded by woodland, with fields to the north and some built development towards the north-west of the site. In DL5, he said that Badger Cottage had previously been extended. He referred to calculations put forward by the Claimant, and not disputed by the Second Defendant, that those previous extensions had resulted in an increase in floor area of approximately 56% (including the existing conservatory) above and beyond the floor area that existed in July 1982. On the basis of those calculations, in DL5 and DL6 the inspector found the proposed development to be in conflict with policy DP36 of the Local Plan -

"5…On this basis, [redacted] *currently breaches Policy DP36 of the [Local Plan], which provides that, amongst other things, in the case of other dwellings (not small dwellings) outside the defined villages an extension must not increase the floorspace of the existing dwelling by more than 30%.*

6. The proposed development would exacerbate the identified conflict with Policy DP36. The LPA have calculated that the proposed development would result in a floor area increase of approximately 76.3% (including the conservatory) above-and-beyond the floor area which existed in 1982, and the appellant's figures do not suggest a significantly different percentage increase".

14. In DL7-DL10 the inspector considered two matters. Firstly, in DL7-DL9 he looked at the impact of the proposed development on the locally distinctive character of the built environment of the New Forest. Secondly, in DL10 he turned to the question whether

the proposed development, if permitted, would have any material impact on the balance of housing, including small dwellings, available within the area of the National Park –

"7. Nevertheless, the proposed first floor rear extension would merely add an extra bedroom to [redacted]*, resulting in a modest increase in its overall size and scale. Specifically, although the proposed development would raise the existing single-storey ridge it would be sufficiently lower than the ridge height of the main part of* [redacted] *such that the extension would remain subservient to it. Additionally, the roof pitch of the proposed extension and the materials used would complement the appearance of* [redacted] *The proposed development would accordingly retain the rural character of* [redacted]

8. Due to the proposed development being to the rear of [redacted] *and the dense vegetation which surrounds much of the plot, the proposed development would likely be imperceptible from public vantage points.*

9. Hence, the proposed development would not erode the National Park's local character, or result in any meaningful gradual suburbanising effect within the National Park, which Policy SP17 of the Local Plan seeks to address. Thus, the proposed development would not have an adverse impact on the locally distinctive character of the built environment of the New Forest. The landscape and scenic beauty of the National Park would also be conserved.

10. Although the LPA have referred in general terms to the mix and range of housing within the National Park, and to house prices, few details have been provided to demonstrate that the addition of one extra bedroom to [redacted] *would result in any adverse impacts in these respects in real terms. In contrast, the appellant has provided information regarding the sizes and prices of houses in the local area. From the details provided it is clear that extending* [redacted] *from 2 to 3 bedrooms would not alter its status as a mid-range property in terms of its floorspace and price in its local context".*

15. In DL11, in the light of his conclusions on those two matters, he stated the weight that he gave to the conflict with policy DP36 of the Local Plan –

"11. For the above-mentioned reasons, whilst the proposed development would exacerbate the existing conflict with Policy DP36, very little weight is given to this matter".

16. Having given his reasons in DL12 for finding the proposed development to differ from a previous appeal decision also determined on the application of policy DP36, in DL13 and DL14 the inspector drew together his conclusions on the question whether the proposed development was in accordance with the development plan –

"13. I therefore find that, whilst the proposed development would exacerbate the existing conflict with Policy DP36, it would not cause adverse impacts with respect to the locally distinctive character of the built environment of the New Forest and the range and mix of housing stock available.

14. It follows that the proposed development would not undermine the relevant aims and objectives of Policies SP17 and DP36 of the Local Plan. Taking all of the above

into account, as a matter of planning judgement I find that the proposed development would not conflict with the development plan when read as a whole".

Legal framework

17. In determining the Second Defendant's appeal against the refusal of planning permission, the inspector was required to have regard to the provisions of the development plan, so far as material to the application for planning permission, and to any other material considerations: sections 70(2) and 79(4) of the 1990 Act. The inspector may determine the appeal as if made to him in the first instance: section 79(1) of the 1990 Act.

18. By virtue of section 38(6) of the Planning and Compulsory Purchase Act 2004 **["the 2004 Act"]**, the inspector was required to determine the appeal in accordance with the development plan unless material considerations indicated otherwise –

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

19. The seminal case on the effect of section 38(6) of the 2004 Act is City of Edinburgh Council v Scottish Secretary [1997] 1 WLR 1447, which considered the equivalent enactment in Scotland, section 18A of the Town and Country Planning (Scotland) Act 1972. At page 1458B and 1458F, [redacted] said that section 18A had introduced a priority to be given to the development plan in the determination of planning matters. However, the priority to be given to the development plan was not a mere mechanical preference for it. There remained a valuable element of flexibility: if there are material considerations indicating that the development plan is not to be followed, then a decision contrary to its provisions can properly be given.

20. At pages 1458G-1459A of his speech in *City of Edinburgh*, [redacted] then explained the impact of the duty now found in section 38(6) of the 2004 Act on the decision maker's evaluation of the facts and circumstances of a planning application –

"[Section 38(6)] has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It is thus introduced to potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As [redacted] *observed in Loup and Secretary of State for the Environment (1995) 71 P&CR 175, 186:*

"What section [38(6)] does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues".

21. In St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643 at [6], [redacted] set out seven principles which guide the court in determining a challenge to a planning appeal decision by an inspector brought under section 288 of the 1990 Act. Four of those principles bear upon the issues raised in the present claim –

(1) Planning appeal decision letters are to be construed in a reasonably flexible way. Such decisions are written principally for the parties who know what the issues between them are and what evidence and argument has been deployed on those issues. Inspectors need not rehearse every argument or cover every point raised before them.

(2) The proper interpretation of a planning policy is ultimately a matter of law for the court. The application of relevant policy is for the inspector. Statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration.

(3) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he or she thought the important planning issues were and decide whether it appears from the way that he or she dealt with them that the inspector must have misunderstood the policy in question.

(4) The weight to be attached to any material consideration and all matters of planning judgment are for the inspector and not for the court to determine. An application under section 288 of the 1990 Act does not provide an opportunity for the court to review the planning merits of the proposed development.

Ground 1 – policy DP36 of the Local Plan

The Claimant's submissions

22. For the Claimant, Ms Poonam Pattni submitted that the inspector had misdirected himself in relation to policy DP 36 of the Local Plan. Policy DP36 was the development plan policy of principal relevance to the proposed development. Its purpose was to maintain strict control over extensions to existing dwellings in the National Parks.

23. Counsel submitted that on the correct interpretation of policy DP36, the question whether a proposed extension is *"appropriate to the existing dwelling and its curtilage"* is to be determined by reference to the floorspace limits. The policy neither contemplates not permits a broader based assessment of whether an extension is appropriate. In the case of dwellings (other than small dwellings) located outside Defined Villages, the focus of the policy is upon the increase in the size of the dwelling that would result from the addition of the proposed extension. That provides the relevant control. Moreover, that question is to be answered by reference to the totality

of increments in the size of the dwelling when measured against the dwelling as it existed in July 1982 (or as originally built).

24. Ms Pattni submitted that on its true construction, any proposed extension which either increased or further increased the size of the existing dwelling beyond prescribed floorspace limit of 30% was, under the terms of policy DP36, inappropriate. In any such case, the proposed extension would be in conflict with policy DP36 unless there were found to be exceptional circumstances of the particular kind stated in the third paragraph of the policy; that is to say, that the extension was to meet a genuine family need of an occupier who works in the immediate vicinity.

25. It was submitted that the inspector had impermissibly adopted a different approach to policy DP36. Having found in DL6 that the proposed development would result in an overall increase in the floorspace of the existing dwelling of over 75%, he had neither acknowledged that the proposed development was accordingly inappropriate nor gone on to consider whether there were exceptional circumstances which justified its acceptance within the strictly circumscribed terms of policy DP36. Instead, in DL7-DL10 the inspector had gone on to make a broader assessment of the significance of the impact of the proposed development. In so doing, the inspector had impermissibly diluted the strict control on development imposed by policy DP36. Properly directing himself, he should have concluded that the proposed development was in conflict with the principal, relevant policy of the Local Plan and so did not accord with the development plan.

Discussion

26. I accept counsel's submission that the question whether a proposed extension to an existing dwelling is appropriate for the purpose of policy DP36 of the Local Plan is to be answered principally by applying the floorspace limits stated in the second paragraph of that policy. I also accept that an extension that exceeds those floorspace limits will be in conflict with DP36 unless justified on the basis of the exceptional circumstances stated in the third paragraph of that policy. A proposed extension to an existing dwelling which both exceeds those floorspace limits and is not justified on the basis of those exceptional circumstances is, within the terms of policy DP36, not appropriate to the existing dwelling and its curtilage.

27. I do not, however, accept that the Claimant is correct in its argument that the inspector has misinterpreted policy DP36 of the Local Plan and misdirected himself in applying that policy to the circumstances of the planning appeal in this case.

28. The proposed development seeks to extend an existing dwelling located outside any Defined Village in the New Forest. It is not a small dwelling. Policy DP36 of the Local Plan requires that the proposed development must not increase the floorspace of the existing dwelling, [redacted], by more than 30% over and above its total, internal habitable floorspace (excluding the conservatory) on 1 July 1982.

29. The Claimant produced evidence in response to the planning appeal which showed that extensions to [redacted] since July 1982 had already increased its floorspace by around 56% above that which had existed at that date. The proposed development would result in an overall increase in floorspace above that which existed in July 1982

of some 76%. That evidence was not seriously disputed by the Second Defendant. In DL5 and DL6, the inspector accepted the Claimant's evidence.

30. On that basis, the inspector found that since July 1982 [redacted] had already been extended beyond the applicable limit, which was no more than a 30% increase in floorspace. In DL6, he said that the proposed development would exacerbate the identified conflict with policy DP36. It is obvious what he meant by that. The dwelling in this case had already been extended in excess of the applicable limit imposed by policy DP36. The proposed development would result in the overall exceedance over that floorspace limit which was materially greater than was already the case.

31. For these reasons, there can be no room for doubt that, as he explained in DL5 and DL6, the inspector found the proposed development to be in conflict with policy DP36. He arrived at that finding by following the correct approach as advocated on behalf of the Claimant. He identified the overall degree of exceedance of the permitted increase in floorspace resulting from the proposed development, taken together with the extensions which had been made to the existing dwelling since 1 July 1982. The fact that he did not expressly identify the proposed development as not being *"appropriate"* does not give rise to any real doubt as to the inspector's conclusion, which he repeated in DL13, that the proposed development was in conflict with DP36. In stating that the proposed development would exacerbate the existing conflict with that policy, the inspector clearly had in mind the need to apply DP36 in this case on the basis of the total increase in floorspace at [redacted] resulting from successive extensions to that dwelling since 1 July 1982.

32. It is a misreading of policy DP36 to argue that it required the inspector then to consider whether the overall increase in the size of the existing dwelling was justified on the basis of exceptional circumstances. Neither the Claimant nor the First Defendant had suggested that the proposed development fell within the limited scope of the exceptional circumstances identified by policy DP36. It was not contended that such circumstances existed here to provide a potential justification for a larger extension than was acceptable on the ordinary application of the floorspace limit imposed by policy DP36. It is unsurprising, therefore, that the inspector did not find it necessary to consider that element of policy DP36 in his decision. Such consideration would have been wholly otiose, since the absence of such circumstances was not in dispute.

33. I turn to the Claimant's contention that, having found that the proposed development was in conflict with policy DP36, the inspector then impermissibly undermined the strict controls which that policy sought to apply by reference to the analysis which he carried out in DL7-DL10.

34. It is important to understand correctly what the inspector was doing in DL7-DL10.

35. As I have already said, he had made a clear finding of conflict with policy DP36 of the Local Plan. It was nevertheless necessary for him to consider the weight that he should give to that conflict with development plan policy. The inspector's conclusion on the degree of weight that he should give to the conflict with policy DP36 is clearly recorded in DL11. He gave it very little weight. He also recorded that he did so for the reasons that he had given in previous paragraphs, which is plainly to be understood as a reference to what he said in DL7-DL10.

36. As I have pointed out, in DL7-DL10 the inspector considered two matters –

(1) The impact of the proposed development on the locally distinctive character of the built environment of the New Forest.

(2) Whether the proposed development, if permitted, would have any material impact on the balance of housing, including small dwellings, available within the area of the National Park.

37. Those two matters correspond to the objectives of policy DP36 which are explained in paragraph 7.79 of the Local Plan. In justifying the need for policy DP36, the Claimant states that incremental extensions to dwellings in the National Park can affect the locally distinctive character of the built environment of the New Forest. Moreover, such extensions can over time lead to an imbalance in the range and mix of housing stock available within the National Park. Policy DP36 is intended to enable such proposals to be properly controlled, so that an appropriate balance is struck between meeting changes in household requirements and maintaining a stock of smaller sized dwellings, particularly in areas outside the Defined Villages where the impact of incremental extensions on the protected landscape is likely to be greater.

38. It is obvious that where a planning decision maker wishes to assess the weight that they should give to a policy in the development plan with which the planning application before them is in conflict, they will take account of the policy's purpose. They will consider what the policy maker seeks to achieve through the application of the policy. Policy does not exist in a vacuum. It is promulgated for a practical purpose. Planning policies, whether at national or local level, are adopted for the purpose of furthering particular objectives or purposes in relation to the development and use of land.

39. Policy DP36 has not been adopted in the Local Plan because the Claimant or the local community happens to have a predilection for small scale extensions to dwellings in the New Forest. It has been adopted because the Claimant seeks to maintain the local distinctive character of the built environment of the New Forest and a balance of housing stock in terms of both size and mix in the National Park.

40. Those policy objectives are consistent with the strategic policy which is concerned to maintain *"local distinctiveness"*, policy SP17 of the Local Plan. That policy is concerned with built development which would erode the local character of the National Park or result in a gradual suburbanising effect within its area. Paragraph 6.20 of the Local Plan indicates that the purpose of policy SP17 is to control householder development which might undermine the statutory purpose in section 5(1)(a) of the 1949 Act, of conserving and enhancing the natural beauty, wildlife and cultural heritage of the New Forest National Park. The particular risk identified in paragraph 6.21 is of *"creeping suburbanisation"* of the National Park and the slow erosion of its distinctive character.

41. In DL7-DL10, the inspector carefully considered whether the proposed development, if permitted, would undermine or conflict with these aims and objectives of policies DP36 and SP17 of the Local Plan.

42. In DL7 he found that the proposed development would retain the rural character of [redacted]. He explained why that was so by reference to the modest size and scale

of the proposed extension, its design and choice of materials. In DL8, he attached weight to the fact that the proposed development would be unlikely to be perceptible from public vantage points. For those reasons, in DL9 he judged that the proposed development would neither erode the local character of the National Park nor contribute to a gradual suburbanising effect within the Park. In the light of that analysis, he concluded that there would be no adverse impact on the locally distinctive character of the built environment of the New Forest. The landscape and scenic beauty of the National Park would be conserved.

43. In DL10, the inspector addressed the question whether the proposed development would result in any material impact on the balance of housing, including small dwellings, available within the National Park. Both parties had produced evidence on that matter. Having considered the evidence, as he explained in DL10, he found it to be clear that, even if further extended following implementation of the proposed development, [redacted] would remain a mid-range property in terms of both floorspace and price in the local area.

44. In summary, the inspector considered the performance of the proposed development against the stated purposes of policies DP36 and SP17 of the Local Plan. He did so in order to form his judgment of the weight that he should properly give to the fact that the proposed development was in conflict with policy DP36 of the Local Plan. Having done so, he stated his conclusion in DL11 that, whilst the proposed development would exacerbate the existing conflict with policy DP36, he gave very little weight to that conflict.

45. In R v Rochdale Metropolitan Borough Council ex parte Milne [2001] Env LR 22, [redacted] said that it was *"untenable"* to argue that if there was a breach of any one policy in a development plan, a proposed development cannot be said to be in accordance with the plan –

"50. For the purposes of [section 38(6)] it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein".

46. In DL13 and DL14 the inspector summarised the position. Whilst the proposed development was in conflict with policy DP36, he judged it to be in keeping with the planning purposes which policies DP36 and SP17 sought to fulfil – the *"aims and objectives"* of those policies. That provided the basis for his judgment that proposed development accorded with the development plan when read as a whole.

Conclusions

47. It is beyond argument that the inspector's assessment in DL7-DL14 was firmly rooted in his finding in DL5-DL6, that the proposed development was in conflict with policy DP36 of the Local Plan. As I have explained, that finding involved no misinterpretation of that policy. The inspector did not misdirect himself in omitting to consider whether there were exceptional circumstances in this case which fell within the scope of the policy and so justified the proposed development as compliant with it. No such circumstances were put forward by either party to the planning appeal. The inspector made a clear finding that the proposed development was in conflict with policy DP36.

48. That finding was, however, not of itself necessarily determinative of the question whether the proposed development was in accordance with the development plan. Whether that was the position was for the inspector to determine in the light of the whole of the material before him. In particular, it was necessary for him to decide the degree of weight that he gave to the conflict with policy DP36. As [redacted] said in *City of Edinburgh*, it was for the inspector to assess the relative weight to be given to all the material considerations in the appeal. In the words of [redacted] in *Loup*, section 38(6) of the 2004 Act did not tell the inspector what weight he should accord to that policy conflict. That was a matter for the inspector to determine in the exercise of his planning judgment, and in the light of the whole material before him.

49. The inspector carried out that evaluation. His approach and the material upon which he relied in so doing was clearly explained in his decision. The inspector acted reasonably in considering the performance of the proposed development by reference to the aims and objectives of both policies DP36 and SP17 of the Local Plan. He gave clear and proper reasons for concluding that he would give very little weight to the conflict with policy DP36.

50. For these reasons, ground 1 is rejected.

Ground 2 – section 11A(1A) of the 1949 Act

The statutory framework

51. The purposes for which National Parks are designated are well known. They appear in section 5 of the 1949 Act –

> *"5(1) The provisions of this Part of this Act shall have effect for the purpose -*
>
> *(a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and*
>
> *(b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.*
>
> *(2) The said areas are those extensive tracts of country in England ... as to which it appears to Natural England that by reason of -*
>
> *(a) their natural beauty, and*
>
> *(b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population,*
>
> *it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.*
>
> *(3) The said areas, as for the time being designated by order made by Natural England and submitted to and confirmed by the Minister, shall be as known as, and are hereinafter referred to as, National Parks".*

52. Section 11A of the 1949 Act imposes duties on certain categories of *"relevant authority"* in relation to the purposes for which National Parks are designated, as

specified in section 5(1) of that Act. The duty imposed under subsection 11A(1A) is relied upon by the Claimant as the basis for ground 2 of the present claim –

"11A(1A) In exercising or performing any functions in relation to, or so as to affect, land in any National Park in England, a relevant authority other than a devolved Welsh authority must seek to further the purposes specified in section 5(1) and if it appears that there is a conflict between those purposes, must attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park".

53. Both the Claimant and the First Defendant are a *"relevant authority"* for the purposes of section 11A of the 1949 Act.

The issue

54. It was not in dispute that the inspector as the First Defendant's appointee was under the duty now imposed by subsection 11A(1A) of the 1949 Act when he came to determine the planning appeal on 8 April 2024. Nor is it disputed that in determining the planning appeal, he was exercising or performing a function in relation to and so as to affect land in the New Forest National Park. The inspector was accordingly under a duty to seek to further the statutory purposes under section 5(1) of the 1949 Act in making his determination of the Second Defendant's planning appeal.

55. The issue is whether the inspector discharged that duty.

Discussion

56. Section 11A(1A) of the 1949 Act was enacted in its current terms by virtue of section 245 of the Levelling-Up and Regeneration Act 2023 which, with effect from 26 December 2023, substituted that enactment in relation to National Parks in England in place of section 11A(2) of the 1949 Act –

"11A(2) In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park".

57. As can be seen by comparing the words of section 11A(1A) with those of the former section 11A(2) of the 1949 Act, the material change in the duty placed upon relevant authorities in relation to National Parks in England is they must now *"seek to further"* the statutory purposes for which a National Park has been designated; whereas previously, their duty was to *"have regard to"* those statutory purposes.

58. The Claimant characterises the more forceful expression of a relevant authority's duty under section 11A(1A) of the 1949 Act as the *"strengthened"* statutory duty. That seems to me to be a fair way of characterising the change from a requirement to have regard to the statutory purposes, to being required to seek to further those purposes.

59. Unsurprisingly, the strengthened duty enacted by subsection 11A(1A) of the 1949 Act has yet to receive any judicial consideration.

60. In Howell v Secretary of State for Communities and Local Government [2014] EWHC 3627 (Admin) at [46] [redacted] said that a duty *"to have regard to"* a matter means that -

"that matter must be specifically considered, not that it must be given greater weight than other matters, certainly not that it is some sort of trump card. It does not impose a presumption in favour of a particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making".

61. As a matter of ordinary English, to *"further"* a stated purpose is to promote or to facilitate that purpose. Therefore, the duty imposed by section 11A(1A) of the 1949 Act upon a planning authority determining a planning application requires more than merely weighing the effect of the proposed development on the section 5(1) purposes in the overall balance. In order to discharge the strengthened duty, the planning authority must determine whether the proposed development is consistent with the promotion of the statutory purposes. If the planning authority determines that the proposed development is in conflict with the statutory purposes or would undermine the fulfilment of the section 5(1) purposes, they must the consider whether the grant of planning permission would be in accordance with their duty to seek to further those purposes.

62. The strengthened duty is expressed in qualified terms. The planning authority is required *"to seek to further"* the section 5(1) purposes. It is it not under a duty necessarily to fulfil those purposes. Nevertheless, in my view, in any case in which the planning authority determines that a planning application proposes development which is in conflict with the section 5(1) purposes or will undermine their fulfilment, the authority ought both to consider whether and to explain why they have decided that planning permission may justifiably be granted. The planning authority's consideration of those matters will necessarily be informed by the circumstances of the given case, including the size and scale of the development under consideration and the extent and severity of its conflict with the section 5(1) purposes. These are matters of judgment, but a duty *"to seek to further"* the section 5(1) purposes necessarily invests the planning decision maker with the responsibility to judge, firstly, whether the planning application before them for decision proposes development which interferes with the fulfilment of those purposes; and if it does, whether and if so why the grant of planning permission is justified.

63. The planning authority may need to consider whether and if so, how the proposed development may be mitigated in order to address the identified conflict with the statutory purposes. They may need to consider whether any compensatory measures are available which might offset the identified conflict with the statutory purposes. They will need to consider the imposition of conditions or the need to obtain planning obligations to secure such measures.

64. Counsel's researches did not discover any case in which a duty *"to seek to further"* a stated purpose or purposes has been judicially considered. However, counsel helpfully drew attention to R (Friends of the Earth) v Welsh Ministers [2015] EWHC 776 (Admin); [2016] Env LR 1. In that case, the court was asked to consider the provisions

of section 28G(2) of the Wildlife and Countryside Act 1981. That enactment imposed a duty on the Welsh Ministers, when deciding whether to adopt a plan for a motorway extension affecting protected nature conservation areas, *"to take reasonable steps, consistent with a proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest"*.

65. At [132]-[133], [redacted] said –

"132. ...the section 28G duty does not seek to protect SSSIs by weighting the desirability of their protection as against other factors, but by requiring relevant authorities to take reasonable steps to "further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest". I gain some comfort that my view, based upon the wording of the relevant statutory provision, appears to be shared by the academic authors to whom I was referred (see [redacted] on Environmental Law, 3rd Edition (2012) at paragraph 9/087).

133. The question I have to consider is, therefore, not whether the Minister gave the desirability of conserving and enhancing these features particular enhanced weight, but whether she took reasonable steps to conserve and enhance those features. It is rightly common ground that "conserve and enhance" includes "not damage" the features".

66. In my view, the court will follow essentially the same approach when asked to review whether a local planning authority, or on a planning appeal, an inspector has properly discharged the duty under section 11A(1A) of the 1949 Act in granting an application for planning permission in relation to land in a National Park. The court will review whether the decision maker has properly addressed the question whether the proposed development is consistent with the section 5(1) purposes, or would conflict with and undermine those purposes. In a case where the decision maker has found the proposed development would conflict with or undermine the section 5(1) purposes, the court will review the justification given by the decision maker for concluding that planning permission can be granted, including any relevant conditions imposed and planning obligations taken, in order to judge whether the decision properly seeks to further the conservation and enhancement of the natural beauty, wildlife and cultural heritage of the National Park; and to promote opportunities for the public's understanding and enjoyment of its special qualities.

67. Following that approach to review, the first issue is whether the inspector has properly addressed the question whether the proposed development is consistent with the section 5(1) purposes, or would conflict with and undermine those purposes.

68. There are certain very well-established principles of review which are of assistance in addressing that issue.

69. Firstly, the question whether the duty has been discharged in the course of determining the planning appeal is a question of substance, not form. By that I mean that it is not fatal to the performance of the duty that the inspector has omitted any express reference to the duty in his reasons. See Jones v Mordue [2016] 1 WLR 2682 at [28] and Save Rottingdean Ltd v Brighton and Hove Council [2019] EWHC 2632 (Admin) at [85].

70. Secondly, the question whether the inspector has failed to discharge the duty is to be judged by considering the reasons he gives for his decision. It is relevant to ask whether those reasons give rise to a substantial doubt as to whether he has erred in law by failing to perform the statutory duty under section 11A(1A) of the 1949 Act which is engaged by the subject matter of the planning appeal: *Jones v Mordue (ibid.).*

71. In Palmer v Herefordshire Council [2016] EWCA Civ 1061; [2017] 1 WLR 411 at [7], [redacted] said that –

"It is not for the decision maker to demonstrate positively that he has complied with that duty: it is for the challenger to demonstrate that at the very least there is substantial doubt whether he has".

72. Those cases concerned the statutory duties imposed under sections 66 and 72 of the Planning (Listed Building and Conservation Areas) Act 1990. Nevertheless, in my view, the principles of review to which I have referred are applicable to the Claimant's complaint on ground 2 of the present claim.

73. The first statutory purpose under section 5(1)(a) of the 1949 Act is one of *"conserving and enhancing"* the natural beauty, wildlife and cultural heritage of the National Park.

74. Both Ms Pattni and Mr Flanagan helpfully drew my attention to case law which has considered the correct approach to the discharge of positive duties imposed by sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 when determining planning applications. Section 66 has as its purpose the preservation of listed buildings and their settings. Section 72 has as its purpose the preservation or enhancement of the character or appearance of conservation areas.

75. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 states –

"In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions of [the planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area".

76. In South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141, 150B-F, the House of Lords approved the following passage from the judgment of [redacted] in the Court of Appeal in construing the statutory predecessor of section 72(1) –

"In seeking to resolve the issue I start with the obvious. First, that which is desirable is the preservation or enhancement of the character or appearance of the conservation area. Second, the statute does not in terms require that a development must perform a preserving or enhancing function. Such a requirement would have been a stringent one which many an inoffensive proposal would have been inherently incapable of satisfying. I turn to the words. Neither 'preserving' or 'enhancing' is used in any meaning other than its ordinary English meaning. The court is not here concerned with enhancement, but the ordinary meaning of 'preserve' as a transitive verb is 'to keep safe from harm or injury; to keep in safety, save, take care of, guard'.... In my judgement character or appearance can be said to be preserved where they are not harmed. Cases may be

envisaged where development would itself make a positive contribution to preservation of character or appearance. A work of reinstatement might be such. The parsonages board never advocated the new vicarage on that basis. It was not a basis which the inspector was invited to address but importantly he did not have to address it because the statute does not require him to do so. The statutory desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved".

77. Adopting the same approach to the language of section 5(1)(a) of the 1949 Act, in my view it is beyond argument that *"conserving"* in that enactment is used in its ordinary English meaning. It means *"to preserve intact or to maintain in an existing state"* and *"to prevent something of natural or environmental importance from being damaged or destroyed"*: *Oxford English Dictionary, 2nd ed, OED Online – revised entry (2010)*.

78. In R (Great Trippetts Estate Limited) v Secretary of State for Communities and Local Government [2010] EWHC 1677 (Admin) at [10], [redacted] referred to the duty under section 85(1) of the Countryside and Rights of Way Act 2000 to have regard to the purpose of *"conserving and enhancing"* the natural beauty of an area of outstanding natural beauty (AONB) and said –

"Both the legislation and the approach in policies has tended to use "and" and "or" interchangeably in relation to enhancing and conserving. In reality it is common ground, and indeed it must be the case, that they are disjunctive…".

79. Again, in my view, the same approach should be followed in relation to section 5(1)(a) of the 1949 Act. Where a planning application proposes development of land in a National Park which is found at least to leave the Park's natural beauty, wildlife and cultural heritage unharmed, that provides a proper basis for the decision maker to conclude that the development will further the section 5(1)(a) purpose of conserving and enhancing those characteristic features of the Park. That conclusion suffices as a proper discharge of the decision maker's duty under section 11A(1A) of the 1949 Act in determining that planning application.

80. Ms Pattni submitted that it was not enough to be satisfied that the proposed development would conserve the natural beauty, wildlife and cultural heritage of the New Forest National Park. She argued that the strengthened statutory duty requires the decision maker to address both conservation and enhancement. The inspector was required to demonstrate on the evidence what measures could be taken to further the statutory purpose. A positive act was required. If such measures were found to be impracticable, the decision maker was required to explain why.

81. Counsel drew attention to the observations made by Natural England in a statutory consultation response made on 15 December 2023 in proceedings on an application for a development consent order. Natural England referred to the *"enhanced"* duty to seek to further the statutory purposes of a National Park or AONB as –

"an active duty, not a passive one. Any relevant authority must take all reasonable steps to explore how the statutory purposes of the protected landscape… can be furthered.

The new duty underlines the importance of avoiding harm to the statutory purposes of protected landscapes but also to seek to further the conservation and enhancement of the protected landscape. That goes beyond the mitigation and like for like measures and replacement. A relevant authority must be able to demonstrate with reasoned evidence what measures can be taken to further the statutory purpose. If it is not practicable or feasible to take those measures the relevant authority should provide evidence to show why it is not practical or feasible.

The proposed measures to further the statutory purposes of a protected landscape, should explore what is possible in addition to avoiding and mitigating the effects of the development, and should be appropriate, proportionate to the type and scale of the development and its implications for the area and effectively secured. Natural England's view is that the proposed measures should align with and help to deliver the aims and objectives of the designated landscape's statutory management plan. The relevant protected landscape team/body should be consulted".

82. I do not accept these submissions. In my view, it is not a necessary prerequisite for the proper discharge of the duty under section 11A(1A) of the 1949 Act that the decision maker also determines whether the planning application proposes development which would enhance those characteristic features of the National Park.

83. I have referred to the principle established in *South Lakeland*, that a positive duty which has as its purpose the preservation or enhancement of the historic built environment is discharged by establishing that proposed development will, if permitted, leave the historic building or conservation area unharmed. In the case of section 11A(1A) of the 1949 Act, the positive duty has as its purpose the conservation and enhancement of those characteristic features which justify the designation of a National Park. I can see no basis in either the statutory language or the legislative context for applying a different standard for the purposes of the discharge of that positive duty to that authoritatively stated by the House of Lords in *South Lakeland*.

84. Insofar as the observations of Natural England to which I was referred suggest otherwise, I do not accept them. In fact, it seems to me that Natural England's approach is consistent with the position established in *South Lakeland*, since they say that the strengthened duty underlines the importance of avoiding harm to the statutory purposes of protected landscapes. Although they go on to speak of exploring possible measures to further the statutory purposes in addition to avoiding or mitigating the effects of development, they recognise the need for a proportionate approach to what is realistic in the circumstances of the given case. Moreover, the focus of Natural England's observations was upon a particular major road scheme, the Lower Thames Crossing, the effects of which on the protected landscape of the Kent Downs AONB will hardly be comparable to the effects, if any, of a first floor rear residential extension to an existing medium sized dwelling in the New Forest National Park.

85. I note that section 11A(2A) of the 1949 Act empowers the Secretary of State to make regulations which make provision about how a relevant authority is to comply with the strengthened duty. When made, such regulations may shed light on the matters I have addressed in the foregoing paragraphs.

86. As things now stand, in my judgment, when determining an application for planning permission in relation to land within the area of a National Park, it is necessary for the

decision maker to consider whether the proposed development will leave unharmed the natural beauty, wildlife and cultural heritage of the National Park in its existing state. If the decision maker is satisfied that the proposed development will leave the natural beauty, wildlife and cultural heritage of the National Park unharmed, he or she may grant planning permission on the basis that he or she has thereby discharged the duty under section 11A(1A) of the 1949 Act to seek to further the statutory purpose under section 5(1)(a) of that Act. In such a case, the decision maker will have properly sought to further the statutory purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the National Park, by satisfying themselves that to grant planning permission for the proposed development will leave the specified characteristics of the National Park unharmed.

87. The same analysis applies in relation to the second statutory purpose under section 5(1)(b) of the 1949 Act. Provided that the decision maker is satisfied that the proposed development will, if permitted, not diminish the opportunities for the understanding and enjoyment of the special qualities of the National Park by the public, he or she will have discharged the duty under section 11A(1A) of the 1949 Act.

88. Applying that approach, I turn to consider whether the inspector can be seen to have discharged the duty imposed by section 11A(1A) of the 1949 Act.

89. The starting point is to acknowledge that the inspector made no reference to the strengthened duty under section 11A(1A) of the 1949 Act in the decision letter. It is therefore necessary to analyse his reasoning to see whether there is at least a substantial doubt that he performed that duty.

90. The inspector concluded that the proposed development was in accordance with the development plan, read as a whole. However, I accept Ms Pattni's submission that given his clear finding of conflict with policy DP36 of the Local Plan, that in itself is an unreliable indicator of his having sought to give effect to the statutory purposes of designation of the National Park.

91. It is, therefore, necessary to look more closely at the inspector's reasoning. The following findings are, in my view, of assistance –

(1) The proposed extension would retain the rural character of [redacted] (DL7).

(2) The proposed development would be likely to be imperceptible from public vantage points (DL8).

(3) The proposed development would not harm the local character of the National Park. There would be no adverse impact on the distinctive character of the built environment of the New Forest. Allowing the proposed development to proceed would nevertheless conserve the landscape and scenic beauty of the National Park (DL9).

(4) A condition was imposed requiring a precautionary method of working and low-level lighting in order to avoid any risk of harm to bats that might roost at Badger Cottage (DL18).

(5) There was no evidence to suggest any real risk of impact from the storage of building materials, vehicles parking and construction activity on an adjacent site of special scientific interest (DL22).

92. It is clear from the inspector's reasons that he considered carefully whether the proposed development would conserve the natural beauty, wildlife and cultural heritage of the New Forest National Park. He found that the proposed development would do so. His findings provided a clear justification for the conclusion that the proposed development would leave the specified characteristics of the New Forest National Park under section 5(1)(a) of the 1949 Act unharmed.

93. The inspector did not deal in his reasons with the second statutory purpose under section 5(1)(b) of the 1949 Act. In my view, he did not need to do so. It formed no part of the Claimant's case on the planning appeal that the proposed development would have any meaningful effect on existing opportunities for the public's understanding and enjoyment of the special qualities of the National Park. Nor did the Claimant suggest that the proposed development could realistically contribute to the promotion of such opportunities. Given the nature of the proposed development, it is very difficult if not impossible to see how it might do so. The absence, therefore, of any discussion of that point in the decision letter provides no arguable basis for contending that the inspector failed to discharge his duty under section 11A(1A) of the 1949 Act in relation to section 5(1)(b) of that Act.

94. During argument, I asked counsel how the Claimant acting as local planning authority now seeks to discharge the duty under section 11A(1A) of the 1949 Act in the course of determining planning applications. I was told that the Claimant's approach is to form a judgment whether the development for which planning permission is sought is in accordance with the development plan. If there is no conflict with policy, the Claimant considers that the grant of planning permission is consistent with discharge of the strengthened duty and no further analysis is needed. Whereas in a case in which there is judged to be a conflict with development plan policy, the Claimant proceeds to consider whether the grant of planning permission is consistent with their proper discharge of the strengthened duty.

95. I understood the underlying logic of that approach to be that the Local Plan is founded upon the statutory purposes stated in section 5(1) of the 1949 Act. Paragraph 1.3 of the Local Plan states that those statutory purposes *"form the golden threads running through the Local Plan"*. Paragraph 1.3 also states that the strategic objectives of the Local Plan are drawn from those statutory purposes. To grant planning permission for development which is judged to accord with the policies of the Local Plan may therefore be taken to be a proper discharge of the strengthened duty under section 11A(1A) of the 1949 Act.

96. Ms Pattni sought to draw the distinction with a case, such as the present one, where there had been found to be a conflict with policy in the Local Plan. In such a case it was necessary for the planning decision maker, whether the Claimant as local planning authority or the First Defendant on appeal, to consider whether the grant of planning permission was consistent with the proper discharge of the strengthened duty. The present claim involved such a case. The inspector had failed to consider whether to allow the planning appeal would be consistent with his proper discharge of the strengthened duty.

97. I do not accept these submissions. Whatever may be the approach taken by the Claimant in its own planning decision making, the question for the court is whether the Claimant has established that the inspector omitted to discharge the duty placed upon him by section 11A(1A) of the 1949 Act in determining the planning appeal in the present case. For the reason I have given, the Claimant has failed to do so.

Conclusion

98. In my judgment, there is no justification for drawing the adverse inference that, in determining the planning appeal and granting planning permission for the proposed development, the inspector failed to discharge his duty under section 11A(1A) of the 1949 Act to seek to further the statutory purposes under section 5(1) of that Act. Ground 2 accordingly fails.

Disposal

99. The claim is dismissed.

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