# Dodd and Hands v Secretary of State for the Environment Transport and The Regions

CO/3513/2001

High Court of Justice Queen's Bench Division (The Administrative Court)

22 January 2002

**Neutral Citation Number: [2002] EWHC 84 Admin**

**2002 WL 45299**

Before: Mr Justice Sullivan

Tuesday 22nd January, 2002

## Representation

Mr H Richards (instructed by Wall James & Davies Solicitors, Stourbridge, West Midlands DY8 1QW) appeared on behalf of the Claimant.

Mr P Coppel (instructed by The Treasury Solicitor, London) appeared on behalf of the 1st Defendant.

The 2nd Defendant did not Attend and was not Represented.

## JUDGMENT

1. This is an application under section 288 of the Town and Country Planning Act 1990to quash a decision made by a planning inspector contained in a decision letter dated 1st August 2001. In that decision letter the Inspector dismissed the claimants' appeal against the decision of the Wychavon District Council, the second respondent, to refuse to grant planning permission for four houses on the site of the old station goods yard at Anchor Lane, Harvington, Evesham, Worcestershire.

2. The claimants are the owners of the site. The railway ceased to function as such in the 1960s. The claimants sought outline planning permission to erect four houses on the site which they described as a “derelict goods yard”.

3. In a letter dated 1st February 2001 accompanying the application, solicitors on their behalf contended that the local plan had become “out of step on the matter of the re-use of previously developed land by the issue of PPG3”. The letter said:

> “The housing proposed in this application is on the site of former goods yard for Harvington Railway Station, and does not extend beyond it anywhere.”

4. The letter referred to the definition of previously developed land in Annex C to PPG3 and contended that the application site fell within that definition.

5. The Council did not agree. Planning permission was refused for two reasons. The first contended that the proposed development was outside the defined development boundary in the Wychavon District Local Plan. The claimants do not quarrel with that reason for refusal.

6. They do, however, take issue with the second reason for refusal which was as follows:

> “The application site consists of a former railway station site which ceased to function as

> such upon the closure of the railway in the 1960's. Little in the way of physical remains exists of this former use. There is a station platform and another brick structure adjacent to Station House. These structures occupy a relatively small portion of the application site and, until recently cleared of some of the vegetation covering it, the former platform was largely overgrown in common with other parts of the site. The overall impression of the site is one where over time evidence of the former use has largely disappeared and blended into the landscape. In addition, inadequate evidence has been submitted to properly justify the claim that the site has no alternative use(s), or that it has not had alternative use or uses since the cessation of its use as a railway station. The site proposed for housing does not, therefore, fall within the definition of previously developed land contained within Planning Policy Guidance Note No. 3 …"

7. The claimants appealed to the Secretary of State and their appeal was decided by written representations. The Inspector made a site visit on 18th July 2001. In their submissions the claimants said, inter alia:

> "The Appellants accept that this development does not meet the Development Plan criteria, but in this case material considerations in the form of PPG3 override the strict terms of the Development Plan which pre-dates PPG3."

8. In paragraph 4.1 of their submissions the appellant's arguments were set out:

> "4.1 We accept that following policy guidance in the WDLP on its own without having regard to the material consideration of PPG3 means there has to be a refusal. The question (we suggest) however is whether or not the definition of "previously developed land" as set out in the Annex PPG3, applies.
>
> 4.2 There is no argument by the LPA that the appeal site is the site of the former railway line, station platform and goods yards at Harvington. The principle disagreement with the LPA is as to whether or not the site has "blended into the landscape" in such a way as is referred to in PPG3 so as to take it outside the definition of "previously developed land". On this precise point the Appellants and the LPA disagree.
>
> 4.3 The railway lines either side of the platform were taken up when the railway was closed (at a date which we cannot confirm), but the railway platform is still in situ. Although a lot but not all of ballast would appear to have been removed at the same time as the rails, the ground where the railway sidings at the rear of the platform and the railway line in front of it were sited, is not capable of either being cultivated or for that matter of providing anything other than the poorest of support for vegetation. None of the appeal site has been cultivated as a garden (contrary to the assertion of a local resident) and owing to the nature of the surface and its impossibility for use as a garden, the site has simply been left vacant. The LPA are perfectly correct when they say that there was growth of some vegetation over parts of the site, but this was cleared in no more than a day or so for the Appellants and nothing in any way indicated during that period that the site provided good or reasonable growing conditions for even unkempt vegetation. The expression "blended into the landscape" is used in PPG3 and of course that is a matter of personal judgment, but looking at the site presently, it is clear that it has not and is not physically blended into the landscape — it is true that high hedges partially screened the site, but such screening around the edges of the site does not blend itself into the landscape, and it is clear from looking at it now that it is not presently blended into the landscape at all. We take the view that this site therefore complies with the PPG3 definition of "previously developed land". (That view disagreed with by the LPA, but on this ground only, namely that it has as a fact blended into the landscape)."

9. The claimants' representations went on to explain that paragraph 30 of PPG3, which includes a sequential approach, was not applicable because that approach applied when local planning authorities were identifying sites to be allocated in local plans and did not apply to planning

applications.

10. The planning authority referred in its written submissions to paragraph 30 of PPG3 and expressed concern inter alia, that the site had come forward on an ad hoc basis and had not come forward as part of a sequential approach. But the Council said that on the main issue, that is to say whether the site fell within the definition of previously developed land, its view was set out in the second reason for refusal. It made three points in that context, the second of which was:

> "… it is the Council's view that the site has physically degenerated to a large degree and that it has blended back into the landscape over the course of time. The recent removal of many years' vegetative growth to highlight the limited remains of railway infrastructure does not justify the site's proposed transformation to residential use.
>
> Third, the Council is very concerned that an undesirable precedent may be set if permission for residential development is granted …"

11. Before turning to the Inspector's decision letter it is convenient to refer to the relevant passages in PPG3 which was published in March 2000. Paragraph 21 explains:

> "The Government is committed to promoting more sustainable patterns of development, by:
>
> * concentrating most additional housing development within urban areas;
>
> * making more efficient use of land by maximising the re-use of previously-developed land …"

12. Paragraph 23 says:

> "The national target is that by 2008, 60% of additional housing should be provided on previously-developed land and through conversions of existing buildings."

13. The final sentence of paragraph 23 refers one to the definition of previously-developed land in Annex C to the guidance.

14. Under the heading "Identifying Areas and Sites" paragraphs 28–31 of the guidance advise local planning authorities that:

> "… development plans should provide clear guidance as to the location of new development so that it meets housing requirements in the most sustainable way".

15. Paragraph 30 says:

> "… local planning authorities should follow a search sequence, starting with the re-use of previously-developed land and buildings within urban areas",

when identifying sites to be allocated for housing in local plans and UDPs. A number of criteria are set out in paragraph 31.

16. Paragraphs 37 onwards deal with determining planning applications. The point is made that:

> "It is important that plans are kept up to date and properly reflect national policy guidance. Local planning authorities should revise their plans to take account of the guidance set out in this PPG: they should seek to do so as quickly as possible by incorporating revised policies and proposals either in replacement plans or by alteration

of existing housing policies.

38. In consideration planning applications for housing developments in the interim, before development plans can be reviewed, local authorities should have regard to the policy contained in this PPG as material considerations which may supersede the policies in their plan."

17. The definition of previously-developed land in Annex C is as follows:

"There are various definitions of previously-developed land in use. For the purposes of this guidance, such land is defined as follows:

Previously-developed land is that which is or was occupied by a permanent structure, (excluding agricultural or forestry buildings), and associated fixed surface infrastructure. The definition covers the curtilage of the development. Previously-developed land may occur in both built-up and rural settings. The definition includes defence buildings and land used for mineral extraction and waste disposal where provision for restoration has not been made through development control procedures.

The definition excludes land and buildings that are currently in use for agricultural or forestry purposes, and land in built-up areas which has not been developed previously (e.g. parks, recreational grounds, and allotments — even though these areas may contain certain urban features such as paths, pavilions and other buildings). Also excluded is land that was previously developed but where the remains of any structure or activity have blended into the landscape in the process of time (to the extent that it can reasonably be considered as part of the natural surroundings), and where there is a clear reason that could outweigh the re-use of the site — such as its contribution to nature conservation — or it has subsequently been put to an amenity use and cannot be regarded as requiring redevelopment."

18. Against that policy background, the Inspector identified two main issues:

"… whether the proposal would harm the aims of local policies to protect the countryside by containing development within defined settlement boundaries and if so whether the previous use of the land should outweigh any such objection."

19. The Inspector concluded in respect of the first main issue that the proposal abutted but was outside the settlement boundary defined in the local plan and that none of the exceptions which permitted housing development in certain circumstances outside a settlement boundary applied to the present case.

20. In paragraph 8 of her decision letter she said:

"The site forms a narrow "tail" at the south eastern extremity of Harvington with the new A46 by-pass just to its east. The site is at the end of an intermittent ribbon of dwellings the more easterly of which have the appearance of a past association with the railway, which closed in the 1960s. That part of Anchor Lane seemed to me different in character and somewhat detached from the main part of the village, partly perhaps because there is only one house on the south side of the lane … The site is not an obvious natural extension to Harvington, which otherwise may have met the Structure Plan Policy H18 exception. I conclude that the proposal is contrary to Development Plan policy, with which my decision should accord unless material considerations indicate otherwise."

21. Then turning to the second issue she said:

"9. The Structure Plan pre-dates by 17 years and the Local Plan by 2 years the advice in PPG3 about the efficient use of land in urban areas, the re-use of previously

> developed sites and the general considerations that should inform the selection of suitable housing sites. The appellants consider the Development Plan out of date because of that. The land was previously developed and that consideration should outweigh those policies.
>
> 10. The station platform still remains though about a third of it is within the private area of the Station House. I saw that the area of the goods yard is poorly drained. Most of the ballast was long ago removed and I saw no evidence of any remaining. Nonetheless the condition of the site is compatible with some form of hard surface remaining beneath the poor grass and weeds that cover much of it. Apart from the one narrow platform and glimpses of a hardtop surface, there is now no evidence of the previous use.
>
> 11. I am mindful that paragraph 30 of PPG3, which refers to selection of potential allocation sites in Local Plans, refers to 'previously developed land within urban areas'. Harvington is a large village but it is clearly not regarded as "urban" in the same way as Droitwich, Pershore and Evesham in the Local Plan. It is unlikely to have the range of jobs, services and public transport options that national guidance in PPG3 and 13 advise is necessary to give a site priority for housing development.
>
> 12. A fence encloses the land but otherwise it is open and surrounded by trees and hedges. Despite the fence, its appearance and character is little different to other open land and it provides a clear boundary to contain the settlement. There is no requirement in Annex C of PPG3 that a site as blended into the "natural" landscape as referred to in the ground of appeal, for it to be excluded from the definition of previously developed. I agree with the Local Planning Authority that for "Annex C" purposes the land has blended into the landscape and does not meet the definition of "previously developed". As the Council also say, allowing the appeal would encourage proposals on other land that contributes to the open character of the countryside around settlements but which has had another use in the past. Cumulative and serious harm to rural character would result."

22. In the remaining paragraphs the Inspector considered and rejected the Council's proposition that there had been an intervening use and the claimants' submission that there might be a storage use on the land and that housing would be preferable to such an alternative use.

23. On behalf of the claimants, Mr Richards' primary submission is that the Inspector erred in her approach in paragraph 12 of the decision letter to the definition of previously-developed land. He submits that there is no dispute that the former railway goods yard falls within the first part of the definition of previously-developed land, that is to say it is land which is or was occupied by a permanent structure and associated fixed surface infrastructure.

24. Turning to the question of whether the site is within the exclusions, there is no suggestion that it is within any of the descriptions of land and buildings contained in the first exclusionary sentence. So far as the second sentence is concerned, he submits that both limbs of the exclusion must be met, that is to say to be excluded from the definition of previously-developed land, the Inspector had to conclude not merely that the remains of any structure or activity had blended into the landscape in the process of time to the extent that they could reasonably be considered as part of the natural surroundings, she also had to conclude that there was a clear reason that could outweigh the re-use of the site, such as its contribution to nature conservation.

25. Thus to be excluded a site must meet a two-fold test, its blending into the natural surroundings must be coupled with some other clear and site-specific reason as to why re-use would be inappropriate.

26. He submitted that the Inspector had failed to have regard to the second limb of the dual test and had, therefore, misunderstood and misapplied the policies contained in PPG3.

27. Secondly, he submitted that she had erred in identifying precedent as a material consideration. If the site was within the definition of previously-developed land then no question of adverse precedent could arise.

28. Finally, he submitted that she erred in taking account of paragraph 30 of PPG3 since that related to the identification of sites in local plans and not the consideration of applications for planning

permission.

29. In my judgment, the first of those issues is the critical matter. If the Inspector correctly concluded that the site did not fall within the definition of previously-developed land in Annex C to PPG3 then there was no issue but that the appeal had to be dismissed in view of the provisions of section 54Aof the Act. The claimants realistically acknowledged in their submissions that this was the position. Thus, even if the Inspector had misdirected herself as to the advice set out in paragraph 30 of PPG3, that would have been of no consequence if she was correct that the site was not previously-developed land; on the other hand, if she erred in the latter respect, then plainly there would be a fundamental flaw in the decision letter which would have to be quashed regardless of her other conclusions.

30. All the Inspector was doing in paragraph 11 of the decision letter was responding to the rival submissions; the Council was submitting that paragraph 30 was applicable and the sequential approach had not been followed, the claimants were arguing that the sequential approach did not need to be followed because this was an application for planning permission and the Council was not seeking to identify sites to be allocated in a Local Plan.

31. In response to those rival submissions, the Inspector concluded that paragraph 30 was of little assistance because it related to the re-use of previously-developed land and buildings within urban areas identified by an urban housing capacity study and Harvington, whilst it was a large village, was not really to be regarded as an urban area. So in that sense the rival contentions about the applicability of paragraph 30 of PPG3 were simply placed on one side.

32. So far as the precedent point is concerned, if the site is properly to be regarded as previously-developed land then clearly the decision letter would have to be reconsidered in the light of that conclusion; on the other hand, if the site is not properly to be regarded as previously-developed land, there is no doubt that the Inspector was entitled to accept the Council's concerns about the precedent effect and the cumulative and serious harm to rural character that would result.

33. I turn, therefore, to Mr Richards' principal submission. On behalf of the Secretary of State, Mr Coppel acknowledges that there are two possible interpretations of the second exclusionary sentence in the definition set out in Annex C. The competing interpretations are more clearly seen if one restructures the definition in the following manner:

> “Also excluded is land that was previously-developed but:
>
> (a) where the remains of any structure or activity have blended into the landscape in the process of time (to the extent that it can reasonably be considered as part of the natural surroundings), and
>
> (b) where there is a clear reason that could outweigh the re-use of the site — such as its contribution to nature conservation — or it has subsequently been put to an amenity use and cannot be regarded as requiring redevelopment.”

34. The question is whether both (a) and (b) must be satisfied in order for the exclusion to apply or whether either (a) or (b) will suffice for the exclusion to apply. He submits that, as a matter of syntax, (a) and (b) are better viewed as two separate sets of circumstances, satisfaction of either of them being sufficient for the exclusion to apply. He points to the repetition of the word “where” which he submits signifies the introduction of a second set of circumstances to which the exclusion in respect of land that was previously developed is to apply. Had the draftsman intended that (a) and (b) were to be cumulative, the word “where”, as well as the comma before “and” would not have been included.

35. Mr Richards pointed to what he submitted were the three groups of exclusions. The first related to land and buildings currently in use for agricultural or forestry purposes; the second to land in built-up areas which has not been developed previously and allotments; the third to land that was “Also excluded …”. So far as the second exclusionary sentence is concerned, he submitted that it contained two subcategories divided by the words “or”. Thus land was excluded, if it had been previously developed but the remains had blended into the landscape and there was a clear reason

that would outweigh the re-use of the site, or if it had been subsequently put to an amenity use and could not be regarded as requiring redevelopment.

36. As a matter of syntax, I prefer Mr Coppel's approach to the interpretation of the exclusion. If the draftsman had intended that both requirement (a) and (b) should be complied with there would have been no comma before the word “and”, and the second “where” would have been omitted. But I would prefer not to base my judgment upon a pedantic analysis of the wording in Annex C. The Court is not here concerned with the interpretation of some complex commercial agreement or with the niceties of a taxing statute. It is concerned with a policy document which is intended to provide practical guidance for local planning authorities and developers. Thus considerations of common sense and planning policy should loom large in any approach to the proper interpretation of the definitions in Annex C.

37. It is readily understandable why sites where the remains of any structure or activity have blended into the landscape in the process of time to such an extent that the site can reasonably be considered as part of the natural surroundings should have been excluded from the definition of previously-developed land. It makes no sense to require a further “clear” reason why such a site ought not to be re-used. Mr Richards made the point, quite properly, that PPG3 is concerned to use brown field rather than green field sites, but once the remains of any structure or activity have blended into the landscape and have become part of the natural surroundings it is difficult to see why such a site should, for planning policy purposes, be treated any differently from a green field site.

38. Looking at exclusion (b), if there is a “clear reason that could outweigh the re-use of the site”, such as the contribution of the site to nature conservation, it is difficult to see why that should not suffice to exclude the land from the definition of previously-developed land; or to see why it should also be necessary to establish that the site has blended into the landscape. To take an example not very far from the circumstances of the present case: there are a number of disused railway lines where the remains of structures have not blended into the landscape but where the disused line does make a significant contribution to nature conservation. On Mr Richards' argument that would not be sufficient to exclude such land from the definition of previously-developed land. So in policy terms PPG3 would encourage its re-use. But such an approach that would not be consistent with other policy advice relating to nature conservation.

39. In simple terms, if there is a clear reason that could outweigh the re-use of the site, that is sufficient to exclude it from the definition of previously-developed land. No sensible reason has been advanced as to why both (a) and (b) must be found to exist before land is excluded from the definition.

40. For these reasons, I am quite satisfied that as a matter of syntax, but much more importantly as a matter of common sense and, in the light of the planning policy considerations that I have mentioned, the construction which Mr Richards seeks to place upon the exclusion, is not well-founded.

41. For the sake of completeness, I should mention that Mr Coppel also submitted in his skeleton argument that the Inspector had fairly dealt with the arguments as they had been presented to her in the written representations. I have set out the relevant extracts. She had been told by the claimants that the critical issue was whether or not the site had blended into the landscape. She saw the site, concluded that she preferred the Council's submissions on that point and, therefore, Mr Coppel submitted, she could not fairly be criticised for failing to consider the “double-barreled” test now argued for by Mr Richards.

42. Having looked at the rival submissions that that too is a fair point, but that matter does not strictly speaking arise because I am quite satisfied for the reasons set out above that the exclusion is not double-barreled, a shot from either of the barrels will suffice to exclude the land from the definition of previously developed. It follows that this application must be refused.

MR COPPEL: My Lord, I ask for my costs. A summary has been prepared and served upon the claimant.

MR JUSTICE SULLIVAN: Can you resists in principle or detail?

MR RICHARDS: My instructions are to resist neither, my Lord.

MR JUSTICE SULLIVAN: Thank you very much. Then the formal order is that the application is dismissed. The claimants are to pay the Secretary of State's costs. They are to be summarily

assessed in the sum of £3,050. Anything else?

MR RICHARDS: No, my Lord.

MR JUSTICE SULLIVAN: Thank you both very much.

MR COPPEL: Thank you.