Case Name: *Worthing Borough Council v Secretary of State for Levelling Up, Housing And Communities & Anor* [2022] EWHC 2044 (Admin) (01 August 2022)

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Commentary:
This was a successful claim under section 288 of the Town and Country Planning Act 1990. The Council (the "Claimant") had refused an outline application for planning permission for a mixed-use development comprising 475 residential units and a local centre.

The reasons for refusal centred on incompatibility with a policy in the adopted local plan which resisted development outside the built-up area and prematurity in the context of the emerging local plan. Planning permission was subsequently granted on appeal by an Inspector on behalf of the Secretary of State (the "Defendant"). The Council challenged the validity of the Inspector's decision.

The first ground of challenge was that the Inspector had failed to achieve the standard of reasoning required following the decision of the House of Lords in *South Buckinghamshire District Council v Porter* [2004] UKHL 33. The Claimant argued that it was left in genuine doubt as to the Inspector's conclusions on the impact of development on a gap between settlements, and that the Inspector had failed to reach a conclusion at all as to whether the development would conflict with a policy in the emerging plan. Giving judgment, Lang J observed that two express reasons had been provided by the Inspector to support his conclusion that the gap between the settlements would not be "materially undermined". The Judge further found that the Inspector had reached a conclusion as to the conflict with the emerging policy, albeit that this was characterised as a "potential conflict" attracting limited weight since the final form that the policy would take was not clear at the time of the appeal inquiry. The standard of reasoning in *South Bucks* having been satisfied, the first ground was unsuccessful.

The Claimant had more success with ground two, in which it sought to establish that the Inspector had not taken account of a conflict with two policies within the emerging local plan. The first of these policies set out the overarching spatial strategy and the second which addresses the principle of development outside the built-up area. The Council submitted that it was unable to discern from the decision whether the Inspector had identified a conflict with these policies and if he had, how much weight he had attributed to it. The Secretary of State's position was that the Inspector had had regard to the emerging policies and that in any event, the outcome would have been no different since the issues covered by the policies in question were addressed in a policy within the adopted plan to which the Inspector had expressly had regard.

The Judge found that the relevant policies were clearly material and that the Inspector's omission to consider them properly "was probably an oversight".

In considering the second part of this ground (related to outcome), Lang J distinguished the instant case from the findings of the judge in *West Oxfordshire District Council v Secretary of State* [2018] EWHC 3065 (Admin), who had held that a failure to have regard to emerging policies was not always necessarily fatal to a decision. Having considered the wording of the relevant emerging and adopted policies in some detail, Lang J noted that the circumstances in which the policies were developed were different, finding that the adopted policy was protective in nature and prepared in the context of a much lower housing requirement, whereas the emerging plan has been formulated on the basis that the Council will not be able to meet its needs. At the local plan examination, that Inspector had apparently accepted this position, but in determining this appeal the Inspector decided to depart from policy on the basis that the Council could not meet its housing need. Though the Judge found it likely that the Inspector would have identified a conflict with the emerging policies, she was unable to predict the assessment that the Inspector would have made on this complex issue and so she could not conclude that the Inspector's decision would have been the same if he had properly considered the emerging policies. Accordingly, ground two succeeded.

The third ground concerned whether or not the Inspector had taken into account a material consideration, though in the final analysis Lang J held that the matter in question "could not amount to anything more than background information." The Claimant contended that the Inspector should have taken into account its explanation for there being no policy designation for specific gaps in its currently-adopted core strategy, which was apparently due to the prevailing guidance applicable during the period of the South East Plan. The Claimant argued that the Inspector's failure to appreciate this context led him to attribute less significance than he would otherwise have done to the importance of the site to the strategic gap between settlements. Applying the law on the relevance of extrinsic evidence to the construction of planning policies, Lang J dismissed this ground.

The fourth and final ground turned on the Inspector's conclusions in respect of the impact of development on the South Downs National Park. The Inspector had found that there would be a "moderate adverse" impact on views, but despite this determined that neither the setting of the National Park or views from within it would be materially affected. It was submitted that the Inspector had failed to comply with his statutory duty under Section 11A of the National Parks and Access to the Countryside Act 1949, which enjoined him to have regard to the purpose of conserving and enhancing the natural beauty of the National Park. It was further submitted that the Inspector had failed to apply paragraph 176 of the NPPF, for "great weight" to be given to conserving and enhancing landscape and scenic beauty in National Parks.

The Defendant pointed out that the National Park Authority had not objected to the proposal. However, the Judge observed that the Inspector had made no reference to the

National Park in his planning balance and this had led him to give any weight at all to the moderate adverse effect that he had acknowledged. Lang J also decided that the Inspector had failed to discharge his s11A duty, since he had failed to have regard to the statutory purpose when conducting his planning balance. As the Judge could not conclude that the Inspector's decision would have been the same if he had applied the correct tests, ground four was successful and the claim for statutory review was allowed.

Commentary: Aside from the interesting delve (at paragraphs 99 to 106) into the context in which the adopted and emerging spatial strategies were prepared, this judgment is a handy reminder of the distinction between "great weight" in paragraph 176 of the NPPF, and "great weight" in paragraph 199 of the NPPF. The heritage-related line of case law holds that considerable weight and importance must always be given to harm to heritage assets (see *East Northamptonshire District Council v Secretary of State* [2014] EWCA Civ 137). In contrast in landscape impact cases, the courts have found that the decision maker is entitled to attach a different weight to the impact of a proposal on a designated landscape depending on the degree of harm, notwithstanding the direction given in the NPPF for great weight to be given (see *Bayliss v Secretary of State* [2014] EWCA Civ 347). Though paragraph 138 of the judgement suggests that Lang J might have had some sympathy with the claimant's argument that the same analysis as in East Northamptonshire should be applied here, she was bound by the doctrine of precedent to apply Bayliss "unless or until the Court of Appeal takes a different view".

Case summary prepared by Aline Hyde