**Case Name:** *Persimmon Homes (Thames Valley) Ltd v Worthing Borough Council* [2023] EWCA Civ 762 (30 June 2023)

**Full case:** Click Here

**Commentary:** This was an unsuccessful appeal by Persimmon Homes Ltd ("the Appellant") against the decision by Lang J in the High Court, to quash a decision by an inspector ("the Inspector") to grant outline planning permission for a mixed-use development including 475 dwellings in Goring-by-Sea ("the Development"). The Development was proposed to be situated at a site which was outside the boundary of the built-up area (as defined by the Worthing Core Strategy 2011) and within the setting of the South Downs National Park.

Background
The Appellant applied for planning permission from the Worthing Borough Council ("the Council") for the Development in August 2020. The Council refused planning permission and the Appellant brought an appeal under s.78 of the Town and Country Planning Act 1990 ("TCPA 1990"). As a result of the inquiry conducted, the Inspector decided to grant outline planning permission for the Development. The Council then challenged the Inspector's decision under s.288 of TCPA 1990.

The s.288 challenge was brought on 4 grounds of which the following two were successful in the High Court in front of Lang J:

a) The Inspector failed to take into account the proposal's conflict with two emerging policies in the Submission Draft Worthing Local Plan, namely Policies SS1 and SS4, or to provide adequate reasons for his assessment of it against those two policies; and
b) The Inspector erred in law by failing to perform his duty under s.11A of the National Park and Access to Countryside Act 1949 by not applying the policy in paragraph 176 of the National Planning Policy Framework ("the NPPF").

The Appellant brought this appeal against Lang J's decision on both of the above two grounds.

In effect, there were two questions for the Court of Appeal to answer in this case:

1. Did the Inspector err in his treatment of the draft policies, namely SS1 and SS4, in the emerging local plan?
2. Did the Inspector err in considering the development's effect on the setting of the National Park?

Issue 1
In the High Court, it was held that the Inspector had failed to consider emerging Policies

SS1 and SS4, which set out strategies for development within and outside the "Built Up Area Boundary". However, in the Court of Appeal, Sir Keith Lindblom held that, on a fair reading of the Inspector's decision letter, it was clear that the Inspector had taken into account Policies SS1 and SS4 by discussing the Development's conflict with Policy 13 in the Worthington Core Strategy. The Court recognised the Development's conflict with Policy 13 was the same as its conflict with Policies SS1 and SS4, namely that the site for the Development was outside the Built Up Area Boundary and that it was undeveloped land. Therefore, the Court held that it can be inferred from the Inspector's decision letter that he saw the Policies SS1 and SS4, for the purposes of the Development, as being substantively the same as Policy 13. As a result of this, the Court held that Inspector did take into account Policies SS1 and SS4 and provided proper reasons for his conclusion.

Issue 2
As per paragraph 176 of the NPPF, "great weight" should be given to conserving and enhancing landscape and scenic beauty in National Parks. In the Hight Court, Lang J held that the Inspector failed to demonstrate that he had given "great weight" to any potential harm that could arise from the Development to the setting of the National Park. The Court of Appeal noted that, in order for a court to conclude that the policy in paragraph 176 of the NPPF was applied correctly, there was no need for inspectors to mention the words "great weight" or even to explicitly refer to paragraph 176 of the NPPF by name. However, the assessment should demonstrate that the inspector approached the question of harm to the National Parks with the principle of "great weight" in mind. The Court of Appeal held, in this instance, that it was not clear from the Inspector's decision letter, whether he had given "great weight" as per paragraph 176 of the NPPF.

Sir Keith Lindblom outlined two issues in this regard in relation to the Inspector's decision letter. First, at paragraph 47 of the decision letter, the Inspector concluded that the harm was "moderate adverse and not significant" but at paragraph 49 he concluded that the setting of the National Park would not be materially affected – these two conclusions were found to be inconsistent. Second, the Court held that, even if those two conclusions could be regarded as consistent with each other, it is still unclear whether, in his exercise of determining the planning balance, the Inspector had given any weight to this harm. Moreover, if any weight was given, it was unclear whether this was compatible with the "great weight" principle under paragraph 176 of the NPPF.

For the above reasons, the appeal was dismissed and the Inspector's decision remains quashed.

Commentary
In a related note, the Court of Appeal did briefly consider whether the expression "great weight" in paragraph 176 carries a similar meaning to the expression "considerable

importance and weight" in the assessment of harm to heritage assets. Lang J in the High Court had left the question undecided and considered herself bound by the Court of Appeal's decision in Bayliss v Secretary of State for Communities and Local Government [2014] EWCA Civ 347. In Bayliss, the Court of Appeal had held that giving "great weight" to harm to a National Park under the policy does not compel a decision-maker to give it any specific amount of weight in a particular case – there is a range of weight that can be attributed to the harm based on the level of harm itself. This, Lang J in the High Court held, was contrary to the approach taken in cases where there was potential harm to heritage assets (see [138] of the High Court decision in this case). Sir Keith Lindblom held that he saw no reason to differ from the interpretation of the policy as stated in Bayliss. This was because heritage assets are protected by s.66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 which prescribes a duty to "have special regard" to the desirability of preserving a listed building or its setting; whereas s. 11A(2) of the National Park and Access to Countryside Act 1949 prescribes only a duty to "have regard" to the relevant statutory purposes, and parallel duties elsewhere in the planning legislation.

*Case summary prepared by Chatura Saravanan*