Case Name: *Protect Dunsfold Ltd v Secretary of State for Levelling Up, Housing and Communities & Ors* [2023] EWHC 1854 (Admin) (20 July 2023)

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Commentary:
A developer, UKOG, appealed Surrey County Council's refusal of permission for an exploratory hydrocarbon well and associated highway works at land in Dunsfold. The Secretary of State recovered and allowed the appeal, granting planning permission. Protect Dunsfold and Waverley Borough Council both brought statutory reviews of the Secretary of State's decision pursuant to s.288 of the Town and Country Planning Act 1990. This case heard the reviews jointly and they were ultimately unsuccessful.
On recovery by the Secretary of State, the inspector provided a report finding conflict with relevant policies due to impacts on the adjacent AONB and its setting, but that the benefits of the scheme outweighed the harms and so recommended that the appeal be allowed. The Secretary of State agreed with most of the inspector's findings, save that he gave greater weight to the scheme's benefits.

The grounds of challenge in the present case were:
Ground 1: the Secretary of State had failed to give greater weight to harm to the AONB as required by the NPPF and the Waverley Borough Local Plan; and
Ground 2: Secretary of State had failed to explain substantial inconsistencies with his Ellesmere Port appeal decision, published on the same day as the challenged decision.

With respect to Ground 1, the claimants relied on paragraph 176 of the NPPF which requires decision makers to give great weight to conserving and enhancing landscape and scenic beauty in the AONB. They cited judicial authority (the judgments of Holgate J and Linblom LJ in the Court of Appeal decision Monkhill Ltd v Secretary of State for Housing Communities and Local Government) for the view that increased weight should be given to any harm to AONB identified. The inspector (and the Secretary of State who agreed with him) failed to do this, as evidenced by a section in the inspector's report in which harm was identified to the AONB, in policy terms due to the choice of site, and to a nearby wedding business, but those harms were considered collectively to attract moderate weight; this, they submitted, showed that greater weight had not been given to the harm to the AONB.

The judge in this case, Steyn J, rejected this argument. She cited case law on the interpretation of inspectors' reports generally (St Modwen Developments Ltd v Secretary of State for Communities and Local Government) and in relation to expressions of weight of harm (including Bayliss v Secretary of State for Communities and Local Government), noting that it can be assumed that national planning policy is familiar to the Secretary of State and his inspectors and there is a presumption that a specialist planning inspector will have understood it. It is to be assumed that an inspector took

account of that guidance unless his decision letter clearly indicates otherwise.
In this case she found:

“the Inspector expressly recorded Surrey's (undisputed) submissions that great weight is to be accorded to harm to the AONB, and Surrey's note reminding him that this was a point with which UKOG's planning witness had agreed, before stating in terms that he had taken account of those submissions. No one contended that the Inspector should depart from the policy in the first sentence of paragraph 176 of the Framework, and there is nothing in the Inspector's Report or the decision to suggest the Inspector or the Secretary of State chose to do so. It follows that unless there are clear, positive indications to the contrary I should assume – and indeed consider the only reasonable assumption is – that the Inspector applied that policy.”

She found there were no clear indications to the contrary and dismissed the ground of challenge accordingly.

Turning to ground 2, the Ellesmere Port decision concerned an appeal against the decision of Cheshire West and Cheshire Council to grant permission for works relating to a shale gas hydrocarbon test well.

As in the case of the challenged decision, the appeal had been recovered for the Secretary of State's determination. The inspector had recommended dismissal of the appeal and the Secretary of State agreed, considering the unmitigated greenhouse gas emissions conflicted with NPPF policies on climate change.

The claimants argued that this decision was irreconcilable with the challenged decision in their approach to unmitigated carbon emissions.

Steyn J summarised the relevant law on consistency of decision making, finding that the question for the court is whether the earlier decision is one which no reasonable decision-maker would have failed to take into account in the circumstances.
While there were similarities in the two cases, she found that the Ellesmere Port decision was not one which no reasonable decision-maker would have failed to take into account.

The sole reason the local planning authority refused permission for the Ellesmere Port proposal was climate change whereas Surrey did not refuse the Dunsfold proposal on climate change grounds. No one in Dunsfold had suggested that the emissions weighed against the development, or rendered the development contrary to the NPPF. Neither the Inspector nor the Secretary of State could be criticised for not addressing a point no one had raised.

Furthermore, the policy context for the exploration and extraction of shale gas was

different to the policy context for exploration and extraction of conventional gas. As such, the decisions were not sufficiently similar to trigger application of the consistency principle, and it was clear that in the circumstances the Ellesmere Port decision was not one which no reasonable decision-maker would have failed to take into account.

For those reasons, Ground 2 was also dismissed and the statutory challenge failed.

Case summary prepared by Dougal Ainsley