Case Name: *Weston Homes Plc, R (On the Application Of) v Secretary of State for Levelling Up, Housing and Communities & Anor* [2024] EWHC 2089 (Admin) (07 August 2024)

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Commentary: This was a successful statutory review claim by Weston Homes ("the **Claimant**") against an Inspector's decision on behalf of the Secretary of State for Levelling Up, Homes and Communities ("the **Defendant**") to refuse planning permission for 96 dwellings.

Relevant background facts

In 2022, the Claimant was refused planning permission on appeal by a Planning Inspector ("the **2022 Application**").

A revised scheme was prepared by the Claimant which reduced the size of the development area and the number of homes from 190 to 96. The revised application was made directly to the Defendant under section 62A of the Town and Country Planning Act 1990. This section was inserted in 2013 to allow major development applications in designated LPAs (who had underperformed) to be made directly to the Planning Inspector, to promote the efficient determination of applications. The s 62A application was refused by an Inspector in December 2023 and this was the decision being challenged by the Claimant ("the **2023 Application**").

The 2023 Application was prior to the mandatory 10% Biodiversity Net Gain (BNG) (i.e. before 12 February 2024). It was accepted during the 2023 Application that the BNG well exceeded 10% for the area habitat units and hedgerow units, but the gain for watercourse units was only 2.48%.

Successful Grounds

The Claimant was successful on four of the six grounds. It is to be noted that one of the successful grounds, being that the Defendant failed to give adequate reasons for their decision, was a "sweep up" ground not given separate treatment in the judgment. The three other successful grounds were as follows.

Ground 1

Under Ground 1 the Claimant argued the Defendant erred in law when he reduced the weight to be given to the estimated BNG for the proposal taking into account a future legal requirement for BNG (following the decision in *NRS Saredon Aggregates Ltd v Secretary of State for Levelling Up, Housing and Communities & Anor [2023] EWHC 2795*), and, alternatively, the reasons given by the Defendant in relation to their BNG assessment were legally inadequate.

Paragraphs 80 and 87-90 of the Inspector's Decision Letter ("DL") dealt with BNG. The key paragraph was DL80 which stated:

"80. Most of the list of claimed environmental credentials of the proposed development amounts to no more than policy-compliant measures and are neutral factors in the planning balance. The net biodiversity gain in excess of 10% I put at moderate only, given there was uncertainty over the estimated net gain for the watercourse units."

Holgate J (as he then was) found that DL80 was where the Defendant would have been expected to explicitly deal with any BNG below 10%. Given it had not been explicitly dealt with, Holgate J gave three possible explanations as to how it may have been dealt with by the Defendant in the first sentence of DL80, with all three explanations amounting to errors of law:

1. The Defendant took BNG below 10% into account when referring to "policy-compliant measures" (i.e. measures expressed through legislation). On that basis the Defendant treated the BNG below 10% as a neutral factor, and the decision was flawed given the *NRS Saredon* findings on a future legal requirement not applying to the development proposed.
2. The Defendant did not take into account BNG below 10%. Holgate J noted there was no other reference to that factor in the lead up to striking the planning balance and it was not taken into account in the balance.
3. The Defendant did not treat the BNG below 10% as a benefit. Holgate J found the Defendant did not say this and gave no explanation if that was their stance. On that basis there would have been a clear failure to give legally adequate reasons.

Holgate J also found Ground 1 succeeded as adequate reasons were not provided by the Defendant as to why the BNG over 10% was only given moderate weight in the planning balance. The Defendant only gave moderate weight to the BNG over 10% given the uncertainty over the estimated net gain of the watercourses. However, Holgate J found it was "wholly unclear" what the Defendant meant by the "uncertainty" referred to, given there was no dispute over the watercourse figures, and there was no reasoning or explanation in the DL that justified giving only moderate weight to the BNG in excess of 10%.

For all these reasons, Ground 1 was upheld.

Ground 2

Under Ground 2, the Claimant argued the Defendant failed to take into account an obviously material consideration, being the land for the expansion of a nearby primary school, and failed to give reasons to depart from the previous Inspector's finding this was a significant public benefit.

In the 2023 Application the Claimant proposed to provide both the land and a financial contribution of £0.5m. The Defendant treated the provision of the expansion land for the school as simply mitigation for the additional demands placed on the education system by the proposed development. Holgate J found that in doing so, the Defendant plainly failed to

take into account, as an obviously material consideration: (a) the financial contribution to deal with the effects of the development in addition to the expansion land and (b) the unchallenged finding of the previous Inspector that the school expansion land was a significant public benefit.

For these reasons, this ground of challenge was also upheld.

Ground 4

Under Ground 4 the Claimant argued that, in breach of the principles in *North Wiltshire District Council v Secretary of State for the Environment* (1992), the Defendant reached findings inconsistent with those of the Inspector in the 2022 Application without complying with their obligation to give legally adequate reasons for differing from those findings.

The inconsistency in decision-making related to the proposed developments harm to trees in the ancient woodland (Prior's Wood). The Defendant concluded the development had the potential to have indirect effects on the woodland, including air pollution. This conclusion materially differed from the previous Inspector, as the previous Inspector had said the indirect effects were mitigated by the proposed woodland Management Plan. The Defendant failed to identify what the indirect effects were and any specific reasons to disagree with the previous Inspector's finding on air quality.

For these reasons, Ground 4 was upheld.

Key Takeaways

This decision provides useful guidance on how BNG should be treated in the planning balance. It also upholds the previous findings in *NRS Saredon* in relation to how to assess BNG for applications prior to the new BNG regime.

It is also worth noting that whilst not of direct relevance to the successful grounds, Holgate J remarked about the s 62A process in his conclusions. He stated that whilst the procedure is intended to be efficient and aims to avoid unnecessary delays, he warned of the risks of these cases being conducted with more haste and less speed, which could give rise to legal challenges that could have otherwise been avoided.

Case summary prepared by Jack Curnow