IN THE MATTER OF THE NATIONAL PLANNING POLICY FRAMEWORK
AND IN THE MATTER OF THE SOUTH DOWNS NATIONAL PARK AUTHORITY

FURTHER OPINION

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1. I provided an opinion for the South Downs National Park Authority ('the NPA') on the meaning of "major development" in para. 116 of the National Planning Policy Framework ('NPPF') dated 31 July 2014 ("the July 2014 opinion"). I am now asked a number of additional questions.

2. First, in the July 2014 opinion at para. 26 I refer to consideration being given to whether there is the "potential to have a serious adverse impact on the natural beauty and recreational opportunities provided by a National Park … by reason of its scale, character or nature". The references to "natural beauty" and promoting "recreational opportunities" are indeed derived from s. 5 of the National Parks and Access to the Countryside Act 1949 (as amended) and which set out the purposes of National Parks. Thus s. 5(1)(a) refers to "conserving and enhancing the natural beauty" and s. 5(1)(b) to "promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public". I am asked whether consideration should also include any potentially serious adverse impact on wildlife and cultural heritage.

3. S. 5(1)(a) of the 1949 Act also refers to "conserving and enhancing … wildlife and cultural heritage". Given that it does seem clear to me that any consideration of what is "major development" should encompass this limb of the statutory purposes of a National Park.

4. Para. 115 of the NPPF says that "[g]reat weight should be given to conserving landscape and scenic beauty in National Parks …", but goes on to say that "conservation of wildlife and cultural heritage are important considerations … and should be given great weight in National Parks …". Those instructing me point out though that the National Planning Guidance ("NPG") says (emphasis added):

> **"How is major development defined in National Parks and Areas of Outstanding Natural Beauty, for the purposes of the consideration of planning applications in these areas?**
> Planning permission should be refused for major development in a National Park, the Broads or an Area of Outstanding Natural Beauty except in exceptional circumstances and where it can be demonstrated to be in the public interest. Whether a proposed development in these designated areas should be treated as a major development, to which the policy in paragraph 116 of the Framework applies, will be a matter for the relevant decision taker, taking into account the proposal in question and the local context. The Framework is clear that great weight should be given to conserving landscape and scenic beauty in these designated areas irrespective of whether the policy in paragraph 116 is applicable."

5. This text thus does not expressly mention "wildlife and cultural heritage" but that cannot in my view be decisive. The text in the NPG is really doing no more than seeking to summarize what is said in the NPPF in para. 115. Unfortunately it does so in an incomplete way but that is not decisive, the terms of para. 115 are of the NPPF are clear, as indeed is more importantly the relevant statutory provision which makes express reference to the conservation of wildlife and cultural heritage.

6. Second, as mentioned above para. 115 of the NPPF refers to the great weight in decision taking that should be given to, inter alia, conserving landscape and scenic beauty. The statutory purposes in the 1949 Act as amended refer only to conservation of "natural beauty", the concept of "scenic beauty" is not mentioned. Those instructing me ask for my views on the interpretation that should be given to the use of 'scenic beauty' and 'natural beauty'.

7. S. 114 of the 1949 Act says "[r]eferences in this Act to the preservation, or the conservation of the natural beauty of an area shall be construed as

including references to the preservation or, as the case may be, the conservation, of its flora, fauna and geological and physiographical features".

8. S. 99 of the Natural Environment and Rural Communities Act 2006 provides:

> "99 Natural beauty in the countryside
> The fact that an area in England or Wales consists of or includes–
> (a) land used for agriculture or woodlands,
> (b) land used as a park, or
> (c) any other area whose flora, fauna or physiographical features are partly the product of human intervention in the landscape,
> does not prevent it from being treated, for the purposes of any enactment (whenever passed), as being an area of natural beauty (or of outstanding natural beauty)."

9. This provision was introduced, at the same time as the amendments to s. 5 of the 1949 Act referring to wildlife and cultural heritage. It was a response to the decision of Sullivan J. in ***Meyrick Estate Management Ltd v Secretary of State for the Environment, Food and Rural Affairs*** [2006] J.P.L. 1049. Sullivan J. (as he then was) said as follows in relation to "natural beauty" in s. 5 of the 1949 Act prior to its amendment by the 2006 Act:

> "55. The claimants' argument that a number of the factors considered in designating the boundary of the NFHA were irrelevant for the purposes of deciding whether the "natural beauty" criterion in s.5(2)(a) had been met was either ignored, or more probably, in view of para.4.167 of the report, rejected.
> 56. Paragraph 4.167 began by referring to the "highly regarded designated landscape of the parkland, which is recorded and detailed on the Hampshire County Register of Historic Parks of Gardens, with English Heritage Grade I listing for the buildings it contains". Although the Assessor goes on to say that the "wider landscape" within which the parkland sits, "includes all the characteristics of its Heath Associated Landscape type which is a classic New Forest type found elsewhere within the NFNP", there is no suggestion that she considered that the undoubted historic or architectural interest of the Grade I house and its parkland setting, whilst highly relevant for many planning purposes, were not relevant for the purpose of para.(a) in subs.5(2). Indeed it would appear that the Assessor was, in practice, endorsing the criteria in the Draft Boundary Consultation Report (CD104) which had stated inter alia that features of scientific, historical or architectural interest situated on the margins of the National Park should be included where possible.
> 57. The Inspector agreed with the Assessor. His approach is best summarised in paras 4.190 and 4.191 of his report. The full text is set out above. For convenience I repeat the following extracts (with emphasis added):
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> > "From our extensive accompanied visit I am satisfied that the area has a very high quality, intact, well-maintained landscape containing considerable

elements of variety from broad parkland to intimate wooded valleys to the well-ordered woodland-fringed fields of the dairy farms. … This area of Heath-Associated Estates landscape is extensive and forms an important and integral part of the highly attractive ring of landscapes immediately surrounding the perambulation."

58. If the criterion in subs.5(2)(a) was a "highly attractive landscape" or the old development plan designation of Great or High Landscape Value, now more often described as Special Landscape Areas, one could well understand a conclusion that "well maintained" parkland on the Register of Historic Parks and Gardens and "well-ordered" fields of dairy farms, were a "highly attractive" or "high quality" landscape. But the criterion for designation as a National Park is an extensive tract of countryside that has the quality of natural beauty, not simply "dairy". In some contexts "natual" might simply mean rural, as opposed to urban, but "natural beauty" has to be understood in the context of s.5 which is concerned with the designation of "extensive tracts of country " which have the particular quality of natural beauty. I would endorse the approach of the Assessor in para.3.7 of Appendix 1 to the Inspector's report. For the reasons she gives, what is required is "a high degree of 'relative naturalness' ". Since the concept of naturalness is a relative one, there will be a spectrum with the "wildest" areas or the "more rugged areas of mountain and moorland" at one extreme. However, if the concept is one of relative "naturalness" (rather than visual attractiveness) "well-maintained" historic parkland providing the setting for a Grade I Listed building, and "well-ordered" dairy fields of dairy farms would seem to be the antithesis of naturalness. In such landscapes man has very obviously and deliberately tamed nature. As Ms Reynolds said "the parkland is a designed landscape and created for ornamental beauty and the control of nature …" This argument is nowhere addressed by either the Assessor or the Inspector.

59. The Assessor and the Inspector's approach effectively discarded the requirement for a high degree of relative naturalness and substituted a test of "visual attractiveness" or "landscape quality". The distinction between natural beauty and attractive landscape is well illustrated in terms of planning policy by the contrast between Areas of Outstanding Natural Beauty ("AONB"), which were originally designated under s.87 of the Act and now designated under s.82 of the Countryside and Rights of Way Act 2000, with the Areas of Great Landscape Value ("AGLV") designated by local planning authorities in the old-style Development Plans. There may or may not be a degree of overlap between the boundaries of an AONB and an AGLV (or its successor designation recognising an area of attractive landscape in the new Development Plan system).

…

61. I realise that the defendant may well consider that this is an unduly restrictive approach to the ambit of her and the Agency's powers under s.5(2). However, it must be remembered that the question is not what factors should, as a matter of good countryside planning practice in the 21st century, be taken into consideration in designating a National Park, but what factors may lawfully be taken into consideration under an enactment that is now over 55 years old. It might well be the case that "more modern" legislation would not be satisfied with such a straightforward and simple concept as "natural beauty". As an example of a more up-to-date approach to countryside planning the claimants mentioned the provisions of the National Parks (Scotland) Act 2000, which provides that an area may be designated for "outstanding national importance because of its natural heritage or a combination of its natural and cultural heritage". Recognition of the concept of cultural heritage is also to be found in subs.(1) of the Act, as substituted by the 1995 Act. Parliament had the opportunity in 1995 to bring subsection (2) up to date if it wished to do so. It did not. It left the "natural beauty" criterion in subs.(2) unchanged."

10. In the Court of Appeal ([2007] Env. L.R. 26) it was said of the amendments made by the 2006 Act:

> "27 The effect of the amendment to s.5 of the 1949 Act, in the present context, is twofold. First, when considering whether it is especially desirable that a tract of land be designated a National Park by reason of its natural beauty, Natural England is required to take into account its cultural heritage, so adopting what the judge described a "a more up-to-date approach to countryside planning". And, when the section is read with s.99 of the 2006 Act, it is clear that land is not prevented from being of "natural beauty" by the fact that it is used for agriculture or woodlands, or as a park, or that its physiographic features are partly the product of human intervention in the landscape. Second, when considering whether designation is especially desirable by reason of the opportunities afforded for open-air recreation, Natural England is required to take into account the extent to which "it is possible to promote" opportunities for the understanding and enjoyment by the public of the special qualities of the tract of land proposed for designation."

11. I am unaware of any more recent cases to consider the meaning of "natural beauty".

12. The NPPF also refers to "landscape and scenic beauty", as does the NPG. The phrase is not defined by the NPPF, NPG nor the relevant statutes. It seems clear that Sullivan J. in ***Meyrick*** regarded natural beauty as entailing something different from scenic beauty. The Judge saw visual attractiveness as a wider concept, because it did not require "relative "naturalness"". Thus he considered that a ""well-maintained" historic parkland providing the setting for a Grade I Listed building, and "well-ordered" dairy fields of dairy farms would" could be seen as visually attractive but were in his view "the antithesis of naturalness". That said I note that dictionary definitions of scenic suggest that this is concerned with "natural scenery" or "beautiful scenery". In any event Sullivan J. was, of course, considering the pre-2006 Act legislative definition of "natural beauty", which has widened that definition. Looked at from the perspective of the amended definition it does seem to me that "scenic beauty" can be seen as narrower that "natural beauty", that is to say as not easily encompassing "fauna" or even geological" features. It seems to me

that "scenic beauty" is concerned with what can be seen, and "natural beauty" as now defined by statute is clearly wider.

13. Third, at para. 31 of my July 2014 opinion I referenced an example of how different conclusions could be reached in relation to identical applications within the National Park. I am asked to clarify that "50 dwellings within a larger town" would in my view only apply to dwellings within the settlement boundary (e.g. usually a brownfield site) and not on a peripheral site which may extend the town into the countryside. I can confirm that this is indeed what I meant.

14. Fourth, I am asked for my views in relation to the implications of the 'major development' test in para. 116 of the NPPF in terms of policy making within the National Park. Presently, the National Park is looking to allocate some minerals and waste sites through the Local Plan process and discussion has been around whether allocation can only be made if the requirements of para. 116 are met.

15. It seems to me that para. 116 would have to be considered in this context. Para. 14 of the NPPF says that Local Plans should seek to "meet the development needs of their area" and to "meet objectively assessed needs" unless "specific policies in this Framework indicate development should be restricted". Footnote 9 then refers to a number of policies including those on AONBs and National Parks. That must include para. 116 which provides the relevant restriction on major development in such areas. That seems to me to mean that the matters in the bullet points in para. 116 would have to be addressed in the plan-making process. It seems to me likely also that a test of exceptionality needs to be applied. Such tests exist elsewhere in the NPPF in plan-making terms, see e.g. para. 83 which is concerned with amending Green Belt boundaries and which was considered in ***Gallagher Homes Limited v Solihull Metropolitan,Borough***

Council [2014] EWHC 1283 (Admin) at para. 125. Hickinbottom J. there went on to say that "each case is fact-sensitive and the question of whether circumstances are exceptional for these purposes requires an exercise of planning judgment" albeit that "what is capable of amounting to exceptional circumstances is a matter of law, and a plan-maker may err in law if he fails to adopt a lawful approach to exceptional circumstances".

16. Of course other parts of the NPPF would also be relevant, e.g. the first bullet in para. 157.

17. If there is anything else I can assist with, I can be contacted in Chambers.

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FURTHER OPINION

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