Neutral Citation Number: [2017] EWHC 356 (Admin)

Case No: CO/2574/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2017

Before:

MR JOHN HOWELL QC
Sitting as a Deputy High Court Judge

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Between :

BARRY THORPE-SMITH (1) **EIBHLIN THORPE-SMITH** (2)	**Claimants**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT (1) **NORTH DEVON DISTRICT COUNCIL** (2)	**Defendants**

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Ms Celina Colquhoun (instructed by Irwin Mitchell LLP) for the **Claimant**
Ms Katrina Yates (instructed by the Government Legal Department) for the **First Defendant**

Hearing dates: 14th and 15th February 2017

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Judgment Approved

Mr John Howell QC:

1. This application seeks to impugn a decision dismissing the Claimants' appeal against the refusal of their application for planning permission.

2. The Claimants, Mr and Mrs Thorpe-Smith, applied to North Devon District Council ("*the Council*") in May 2014 for outline planning permission to construct an Assisted Living residential scheme and associated works. The site for the proposed development consisted of the northern half of a field on the western edge of Ilfracombe immediately to the south of a recent housing development known as Langleigh Park. The Claimants' intention was to provide 30 one bedroom units for those aged 55 and above with a facility to summon assistance at all hours together with certain communal facilities and warden accommodation.

3. The Council refused their application for planning permission on October 16th 2014. The Claimants then appealed against that decision to the Secretary of State for Communities and Local Government under section 78 of the Town and Country Planning Act 1990 ("*the 1990 Act*"). Following a local public inquiry held over four days between March 8th and March 11th 2016 and a site view, the Inspector appointed by the Secretary of State to determine the appeal, Mr Nick Fagan, dismissed it in a letter dated April 11th 2016 ("*the DL*"). The Claimants seek to have

that decision quashed in their application to this court under section 288 of the 1990 Act. Permission to make this application was granted by His Honour Judge Sycamore, sitting as a Deputy Judge in this court, on June 22nd 2016.

4. The bases on which this Court may quash a decision under section 288 of the 1990 Act are well established: see eg *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) per Lindblom J at [19]. They need no repetition.

5. On behalf of the Claimants, Ms Celina Colquhoun, contended that the Inspector's decision falls to be quashed on such grounds. These grounds concern the Inspector's treatment of questions relating to (i) the disturbance to nearby homes which access to the development would cause; (ii) its impact on the character and appearance of the area's landscape; and (iii) the "planning balance" and whether the development benefited from the presumption in favour of sustainable development given the absence of a five year housing land supply.

DISTURBANCE TO NEARBY HOMES

i. Background

6. The Claimant's application for planning permission for their Assisted Living residential scheme was in outline with all matters reserved. As the Inspector noted, however, it was likely that it would contain 30 individual flats and various communal facilities and access to the site would be achieved through the site of 37 Langleigh Park, a two storey detached house that would be demolished to make way for that access. That property is on a small cul de sac off Langleigh Park. The third main issue that the Inspector considered was whether the proposed development would "result in significant noise and disturbance to the immediate neighbours at 36 & 38 Langleigh Park due to the proximity of the access and the associated traffic generated."

7. The assessment in the Transport Statement submitted with the application for planning permission was that between 0700 and 1900 there would be 142 two-way pedestrian trips (12 per hour) and 72 two-way vehicle trips (6 per hour) as well as additional trips outside these hours. The Claimants' noise evidence was that the increase in the ambient noise level in the morning and evening peaks (which the Inspector was unconvinced was the best way to assess the overall noise impact realistically) would be negligible and that the ambient noise climate would increase by 1dB(A) over that twelve hour period.

8. The Inspector stated that:

> "38. Whilst such a level of traffic could not be described as heavy or significant on a normal residential street, such an increase must have regard to the existing situation. There are 7 houses in this small cul-de-sac off Langleigh Park. The majority of the surface of this quiet enclave is brick paved and the front gardens of the houses facing onto it are open. I have heard evidence from neighbours that children from these houses regularly play in the front gardens and on the cul-de-sac itself and, given its design and the fact that these are family houses, this is to be expected.

> 39. Demolishing No 37 and putting in its place an access road to the proposed development, likely to comprise 30 individual flats, would clearly result in a marked proportionate increase in the levels of traffic into this cul-de-sac. It would also be likely to result in different types of traffic, for instance ambulances and HGVs delivering supplies for the care elements in the scheme. Such an increase would result in significant disturbance to the adjoining neighbours at Nos 36 and 38.
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> 40. Even assuming the occupiers of Nos 36 and 38 would not suffer significant noise as the appellants' evidence maintains, the introduction of a vehicular and pedestrian access route so close to their side boundaries running past their rear gardens and No 36's side windows would undoubtedly result in significant disturbance compared with the relative peace and tranquillity that the neighbours in these houses currently enjoy.
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> 41. For these reasons I conclude that, whilst the level of traffic generated by the development would, on balance, be unlikely to significantly increase noise levels for the occupiers of Nos 36 and 38, it would result in significant disturbance relative to the existing situation in this small quiet cul-de-sac. LP Policy DVS3 (Amenity Considerations) states that development will not be permitted where it would harm the amenities of any neighbouring uses or the character of the surrounding area. For the above reasons the proposed development would not comply with this Policy."

Policy DVS3 provides *inter alia* that:

> "Development will not be permitted where...it would harm the amenities of any neighbouring uses or the character of the surrounding area..by virtue of any of the following:- loss of privacy or daylight, light intrusion, noise and vibration or unpleasant emissions."

ii. Submissions

9. Ms Colquhoun contended that the Inspector acted in an unfair manner when addressing the Claimants' noise evidence. She submitted that the only form of disturbance identified in the local authority's reasons for refusal was from traffic to Nos 36 and 38 Langleigh Park. She submitted that the Inspector drew a series of adverse inferences in relation to the Claimants' expert's assessment of the noise impact when he expressed concerns about aspects of it in part of the DL (before that quoted above), notwithstanding the fact that the local planning authority had not adduced any expert evidence on the issue. At no stage prior to cross-examination had the local planning authority suggested that the noise assessment was inadequate. As Jackson LJ put it in *Secretary of State for Communities and Local Government v Hopkins Development Limited* [2014] EWCA Civ 470, [2014] PTSR 1145, ("*Hopkins Development*") at [47], "any participant in adversarial proceedings is entitled (a) to know the case which he has to meet and (b) have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case." She submitted, therefore, that it cannot be right that an appellant understands

that there may be issues relating to the expert evidence it adduces only after presenting that evidence in chief and that in this case the Claimants were materially prejudiced as a result.

10. Further Ms Colquhoun submitted that the Inspector's reasoning is unintelligible. Despite concluding that the level of traffic would be unlikely to significantly increase noise levels at the two relevant properties, he still concluded that the proposed access and traffic would result in significant disturbance. If ambient noise levels at the properties are not significantly increased, then, so she submitted, any disturbance to them from traffic could not be significantly increased at least not in this case.

11. On behalf of the Secretary of State Ms Katrina Yates submitted that the Council's reason for refusal identified as objectionable "increased disturbance due to the close proximity of the proposed access [to 36 and 38] and the associated traffic generated". The Council had called evidence to support that objection which relied on a qualitative appraisal of the impact of the traffic having regard to the existing local circumstances. There was no unfairness in the Inspector expressing the concerns that he did about the Claimants' evidence in the circumstances and he was entitled to take the view of it that he did. But, in any event, since he accepted that evidence, the Claimants have suffered no material prejudice. She further submits that the reasons given by the Inspector were intelligible given the nature of the main parties' cases before him.

iii. Consideration

12. The Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 provide a framework for the fair conduct of Inquiries by Inspectors. These Rules provide for the appellant and the local authority to provide a full statement of case; to furnish their proofs of evidence in advance; and to prepare a statement of common ground. They also require the Inspector *inter alia* to identify at the start of the Inquiry what in his opinion the main issues to be considered at the Inquiry are and any matters on which he requires further explanation. But that does not preclude any one entitled or permitted to appear at the Inquiry from referring to issues which they consider relevant to the consideration of the appeal and the Inspector may take into account any written representations or evidence or any other document received by him before the Inquiry opens or during the Inquiry provided that he discloses it at the Inquiry: see rule 15(2), (3) and (12). He may also take into account any evidence given under cross-examination allowed: see rule 15(5), (6).

13. The framework imposed by the Rules, however, does not exhaust what fairness may require of an Inspector. In *Hopkins Development supra* Jackson LJ (with whom Christopher Clarke LJ agreed) stated (at [61]) that "the duty of the Inspector [is] to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the hearing." The fact that any issue may have emerged during the hearing, for example during cross-examination, therefore, does not in itself necessarily render the proceedings unfair. The real question is whether a party has had a reasonable opportunity to present its case on a live issue and, if that party has not had such an opportunity, whether it has suffered material

prejudice as a result: see also in *Hopkins Development supra* per Jackson LJ at [49] and Beatson LJ at [88], [90].

14. The Inspector expressed three concerns about the Claimants' noise assessment, two of which related to its content. The first of these concerns was that it did not contain evidence of what the actual noise readings for the am and pm peak were. The second was that it was unclear how the estimated increase of 1dB(A) over the 12 hour period had been calculated (as the relevant table had not been included in the expert's report and it had been ruled inadmissible given the Council's objection to its belated production). Both of these concerns were factually accurate but neither affected the fact that the Inspector accepted the Claimants' evidence, and proceeded on the basis, that the development would not significantly increase the ambient noise levels at Nos 36 and 38 Langleigh Park, as paragraphs 40 and 41 of the DL demonstrate. His third concern was that he was unconvinced that assessment of ambient noise at peak hours was the best way realistically to assess the overall noise impact of the development. Even if it could be said that that was not a point which emerged from the proof of evidence of the Council's Planning Officer, Mr Adrian Deveraux, it was a point that had been put to the Claimants' expert, Mr John Goodwin, in cross examination and on which he had, therefore, been given an opportunity to respond. It was also a matter on which the Claimants had the opportunity to make submissions to the Inspector.

15. In my judgment, therefore, the complaint that the proceedings were unfair has no substance.

16. Ms Colquhoun further contended, however, that the reasoning of the Inspector was unintelligible: if ambient noise levels at Nos 36 and 38 Langleigh Park would not be not significantly increased, then the disturbance at the premises from traffic likewise could not be significantly increased at least in this case. In my judgment the Inspector's reasoning is intelligible. The Inspector recognised that the cul de sac from which access to the site would be obtained was a small, quiet enclave containing 7 houses (see paragraph [38] of the DL) and that there would be a proportionate increase in traffic from 30 individual flats. In his view that would be significantly disturbing to the adjoining neighbours given both the introduction of different types of traffic and the fact that the vehicular and pedestrian movements would also be past their rear gardens and side windows (see paragraphs [39] and [40]). That analysis is consistent with his acceptance of the Claimants' evidence that such traffic was unlikely to increase ambient noise levels significantly given an understanding of what the Claimants' noise evidence involved. The ambient noise level calculated by Mr Goodwin, both for the peak hours and for the 12 hour period between 7am and 7pm, represented the average ambient noise levels in those periods. Such average levels can mask the impact of particular noisy events in a quiet environment. Those events may still be disturbing even if the difference in the average noise levels over a period to which they give rise is imperceptible. In his witness statement Mr Goodwin states that he was cross examined on the audibility of particular events and that his response was that it was the level of noise which must be considered if a problem will occur, not just on the test of audibility. In my judgment the Inspector was entitled to form his own judgment on how best to determine whether there would be any significant disturbance to the amenities of neighbouring properties. Ms Colquhoun does not suggest that his conclusion was not one which a reasonable Inspector could have reached. Her case is merely that he

has not explained why he did so. In my judgment his reasoning discloses no legal defect.

17. For these reasons the challenge to the Inspector's findings about the effect of the proposed development on the amenity of Nos 36 and 38 Langleigh Park fails.

IMPACT ON THE CHARACTER AND APPEARANCE OF THE LANDSCAPE

i. Background

18. As I have mentioned, the site of the proposed development comprises the northern part of a field outside Ilfracombe's settlement boundary. It lies within the North Devon Coast Area of Outstanding Natural Beauty ("*AONB*"), a Coastal Preservation Area ("*CPA*") and Heritage Coast ("*HC*").

19. The application site slopes fairly steeply upwards from north to south. The illustrative scheme accompanying the application showed a development (comprising 8 linked blocks of two-storey self-contained flats linked at the western end by a flat roofed single storey element of communal space) cut into the lower half of the field such that its rear windows would be below the level of the retained part of the sloping field behind. The 'fill' from this 'cut' was to be used to form a 3m high bund along the northern boundary of the site, to be planted with trees and shrubs, to screen the development from the existing houses in Langleigh Park.

20. As the Inspector noted:

> "The Council's evidence at the Inquiry was presented by the AONB's consultant and was confined to addressing the proposed development's effect on landscape character and did not specifically address its visual effects. However, there is inevitably an overlap generally between landscape character and visual effects because a change in landscape character must be visible from some viewpoints, and this would be the case here, as acknowledged by the appellants."

21. The main parties' witnesses identified three areas of potential impact from the scheme. Area A was essentially the Langleigh valley rising westwards towards the coast, including the steep sided slopes to its north and south, and the rising land of the town to the east that overlooks it. Area B was the area immediately beyond it up to approximately 2km from the site, including the whole of the western part of the town, the 'Seven Sisters' and coastal headlands. Area C was the area beyond that. The sensitivity of Areas A and B was agreed to be "High" and the Inspector also agreed that "Area A is the key area of impact because...[the development's] impact on landscape character would be only really fully perceived from within Area A."

22. The principal issue between the main parties' witnesses in relation to Area A was concerned with the "Magnitude of Effect" of the proposed development. Mr Leaver, who supported the Council's case, considered that it would be "Large Adverse". Ms Tinkler, the Claimants' expert, considered that it would be "Small Adverse". In accordance with the method of appraisal both used, the "Overall Effect" of the development fell to be ascertained by combining the "Magnitude of Effect" with the "Sensitivity of the Receptor" (which the parties agreed to be "High" in the case of

Area A). Thus, for example, a "Large Adverse Effect" becomes a "Major to Moderate" "Overall Effect" and a "Small Adverse Effect" becomes a "Moderate to Minor" "Overall Effect". Ms Tinkler also sought to identify a "Residual Effect", reducing the "Overall Effect", when new planting matured.

23. The Inspector's appraisal was as follows:

> "14. The condition of the site itself is good in that there is no landscape deterioration or detracting activities taking place on it. It is located regionally within the North Devon High Coast Landscape Character Area (LCA) and locally within the Coastal Slopes and Combes with Settlement Landscape Character Type (LCT), which are described respectively as being of exceptionally high scenic quality and exhibiting a strong sense of containment often limited by steep wooded combe slopes. The overall strategy for this LCA and LCT is to protect the distinctive linear and contained settlement pattern of the combes and the strong sense of place within the AONB. The AONB Management Plan 2014-19 encourages the preservation and enhancement of this unique landscape, including the nineteenth century field enclosures above Ilfracombe.
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> 15.......The overall impression of the site and its surroundings is rural, albeit that it abuts the western edge of Ilfracombe's settlement boundary.
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> 16. The proposal would keep the western field boundary and strengthen the northern hedge boundary, which currently has a number of gaps in it. But the development would cut into the rising land disturbing the historic field pattern and the proposed landscape bund along the northern boundary would also be alien to the combe's natural form. Although the new housing would be no higher than the highest parts of Langleigh Park itself it would introduce new urban development into this essentially rural area, masking and permanently altering the shape of the lower part of the combe, whose natural contours are crucially important to the landscape character of this part of the AONB.
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> 17. The AONB boundary is topographically defined by the wooded east facing slopes of the Slade valley to the south of the site and Lower Torrs Park to the north. The residential development at Langleigh Park and indeed Upper Torrs Park extend into the AONB and breach this strong physical boundary. However, that is not a reason to further degrade it; on the contrary, it points to the importance of retaining what is left of the natural form of the combe and retaining its original field pattern....
>
> 18. The western boundary of the town is defined, with the exception of Langleigh Park itself, by Leigh Woods on the south slope of the combe and by the rising NT land to the

> north-west, which essentially contain the urban development in a bowl surrounded by the higher land in the AONB. The proposal would extend it up the southern slope of the combe.
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> 19. The effects of such a residential development would be permanent because once the flats were sold to individual buyers it would not be practical to reverse it. For the above reasons the proposals are at considerable variance to the landscape and would degrade its integrity; there would be a notable alteration to landscape function resulting from the development of the site; and the 'cut' and 'fill' nature of the development would be an uncharacteristic noticeable change to key aesthetic and perceptual qualities. The magnitude of effect would therefore be large adverse. For these reasons I conclude that the proposed development would substantially harm the character and appearance of the area's landscape."

ii. Submissions

24. Ms Colquhoun contended that the Inspector failed properly to distinguish visual and landscape character impacts and to understand how each should be assessed. Although the reasons for refusal had referred to the detrimental impact of the development on the "character and appearance" of the landscape, it was made clear at the Inquiry that the Council was not taking any issue with regard to its visual effects. The Inspector fell into error, so she submitted, when referring to an inevitable overlap, on the basis that a change in landscape character must be visible from some viewpoints. An assessment of impact on landscape character is not dependent on finding particular vantage points. The fact that the Inspector identified vantage points in the DL and the fact that his conclusion related to both character and appearance demonstrates that he failed to recognise that visual effects were not in issue.

25. Ms Colquhoun further submitted that the reasoning in paragraph [19] of the DL is flawed. There is no reasoning to explain how the Inspector concluded that there would be a large adverse effect given that Area A is a local area. Using the definitions in Table LVIA6 (which the Inspector expressly did) for "large adverse" "the geographical extent of change is large, and would influence the landscape at regional level." Impact at a local level would be "small adverse". Further there is no explanation why there would be a large adverse effect having had regard to the mitigation measures proposed by the Claimants. Mr Leaver had accepted that mitigation could reduce the large adverse effect that he claimed the development would have. There is moreover nothing to explain the transition from a large adverse effect to the conclusion of substantial harm to the character and appearance of the area's landscape as the Inspector has overlooked the need to consider the Overall and Residual Effect of the proposed development.

iii. Consideration

26. In my judgment there is no merit in the complaint that the Inspector failed to distinguish visual and landscape character impacts and to understand how each should be assessed. There is of course a potential overlap given that, on the basis of the method of appraisal being employed, part of any landscape character assessment

includes an appraisal of "how [the landscape] is experienced". What the Inspector derived from the viewpoints from which the development would be seen was (as is clear from paragraphs [10] and [11] of the DL) his view about "the extent of the landscape impact". What the parties agreed was not in issue between them (as Ms Tinkler stated in her first witness statement) were "effects on visual receptors". But, as is apparent from the parts of the DL that I have quoted, the Inspector did not address the question, nor did he express any view on, how any particular viewpoint would be affected by the proposed development. What he addressed were the likely changes in the landscape character of the area. The fact that, in his conclusion in paragraph [19], he referred to the effect of the proposed development on "the character and appearance of the area's landscape" is consistent with that exercise. One of the matters, for example, that the method of the landscape analysis being used required to be considered in order to determine the "Magnitude of Effect" was an appraisal of the effect of the proposed development on the landscape's "aesthetic or perceptual qualities". Doing so necessarily involves considering the appearance of the landscape, which is part of how it is experienced.

27. Table LVIA6 provides definitions of the various "Magnitudes of Effect". For each category of effect there are various impacts to be considered. For example, for "Large Adverse" there are six and for "Small Adverse" there are five. Geographical extent of the change is one type of impact common to both. In paragraph [19] the Inspector concluded that the proposed development would satisfy at least 4 of the 6 types of impact of a "Large Adverse" effect. It also follows that he necessarily considered that its effect would be greater than four of the corresponding types of impact associated with a "Small Adverse" effect. The only type of impact on which the effect of the proposed development would more closely approximate to "Small Adverse" was its geographical extent. In such circumstances, therefore, the Inspector had to make a judgment about which category of adverse effect best fitted his findings. He concluded that it was "Large Adverse". In my judgment his reasoning would be readily understood by an informed reader who consulted the definitions to which the Inspector specifically drew attention at this point in his DL.

28. The Inspector was equally entitled to form his own view of the "Magnitude of Effect". Provided that an Inspector does not act unreasonably, he or she can take a different view from that of any expert. There is no basis for any suggestion that the Inspector failed to take any proposed mitigation measures into account when determining the "Magnitude of Effect". The problem from the Claimants' point of view was that one of the primary mitigation measures proposed, the cut and fill (creating a landscaped bund) would, in the Inspector's view, "be an uncharacteristic noticeable change to key aesthetic and perceptual qualities" of the area (as he stated in paragraph 19 of the DL). In other words, far from mitigating the effect of the proposed development, it would aggravate it.

29. The complaint that the Inspector has overlooked the need to consider the "Overall Effect" and "Residual Effect" of the proposed development and that there is, therefore nothing to explain the transition from a Large Adverse effect to the conclusion of substantial harm to the character and appearance of the area's landscape is likewise devoid of merit. As an informed reader would have known, there was no issue what the "Overall Effect" in Area A would be given a decision on the "Magnitude of Effect". There was no requirement for the Inspector to spell that out. Nor in my judgment is there any basis for any suggestion that the Inspector failed to consider what mitigating effect (if any) any maturing planting would have

when considering why the development would have the effects he described in paragraphs [15] to [18] of the DL In fact the Claimants' Statement of Facts and Grounds states that the Inspector conducted "his own analysis of the effects of [the mitigation] measures": see paragraph [87]. Moreover the reasons he had given in those parts of the DL (which I have quoted) make it abundantly plain why the Inspector concluded that the proposed development would substantially harm the character and appearance of the area's landscape. The complaint that the Inspector failed to give reasons for his decision on the landscape issue, therefore, is devoid of any merit.

30. For these reasons the challenge to the Inspector's findings about the effect of the proposed development on the character and appearance of the area's landscape fails.

SUSTAINABILITY AND THE PLANNING BALANCE

i. Background

31. Paragraph [49] of the National Planning Policy Framework ("*NPPF*") states that:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

32. The object of the guidance in paragraph [49] in the context of the NPPF is to engage the presumption in favour of sustainable development in paragraph [14] of the NPPF. That paragraph provides that:

> "At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
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> ...
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> For decision-taking this means [unless material considerations indicate otherwise]:
>
> - approving development proposals that accord with the development plan without delay; and
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>   - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>   - specific policies in this Framework indicate development should be restricted.[9]"

"Restricted" in this context does not mean "refused": see *Forest of Dean Council v Secretary of State for Communities and Local Government* [2016] EWHC 421 (Admin) per Coulson J at [28]-[29]. Footnote 9 states inter alia:

> "For example, those policies relating to.... land designated as....an Area of Outstanding Natural Beauty, Heritage Coast..."

33. In this case the Council were unable to demonstrate a five-year supply of deliverable housing sites. In the light of the decision of the Court of Appeal in *Suffolk Coastal District Council v Hopkins Homes* [2016] EWCA Civ 168, [2016] PTSR 1315 ("*Suffolk Coastal*"), the Inspector treated certain "saved" Local Plan policies (with which he considered that the proposed development would conflict, given the substantial harm it would cause to the character and appearance of the area's landscape) as being out-of-date. Accordingly, as he accepted, the proposed development fell to be considered by reference to paragraph [14] of the NPPF.

34. He then stated that:

> "44. Footnote 9 on page 4 of the NPPF makes clear that this second exception includes policies relating to land designated as AONB and HC, in other words those set out in NPPF paragraphs 109, 114 and 115. I have concluded above that the development would be contrary to these policies. The two exceptions to the default position of granting permission quoted above are expressed in the alternative: they are 'either or' exceptions; it is not necessary to demonstrate compliance with both. The second exception clearly applies here.
>
> 45. However, in the alternative and in order to separately assess whether the proposal would constitute sustainable development, I will also consider the first exception to the presumption to grant planning permission as quoted above. In effect this means weighing up the 3 dimensions of sustainable development: economic, social and environmental."

35. His view on these dimensions were (i) that, in providing 30 dwellings, the proposal would have "an important social benefit" (paragraph [46]); (ii) that it would have a an economic benefit proportionate to its size in terms of construction jobs and the additional spending power of its residents and the attendant multiplier effects on Ilfracombe's economy, a benefit to which he did not attach great weight in the circumstances (paragraph 47); and (iii) that there would be substantial harm to the AONB, CPA and HC contrary to the development plan and NPPF polices that would outweigh these social and economic benefits (paragraph 48).

36. His conclusions were:

> "49. In these circumstances I conclude that the above adverse effects of the development would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole. It would not be sustainable development and there are no other material considerations that suggest it should be allowed."

ii. Submissions

37. Ms Colquhoun contended that, by approaching paragraph 14 of the NPPF as he did in paragraph [45] of the DL, the Inspector has failed to comply with the guidance it contains. The case law demonstrates, so she submitted, that no further or separate exercise is required to assess whether a development amounts to sustainable development. Ms Colquhoun further contended that, when considering the first exception in paragraph [14] of the NPPF to the presumption in favour of the grant of planning permission, the Inspector wrongly imported (in paragraph [47] of the DL) the test set out in paragraph 116 of the NPPF. That paragraph requires that there should be exceptional circumstances before a "major development" can be permitted in an AONB and that it must also be demonstrated that the development is in the public interest. One of the factors that should be assessed when considering that test (in accordance with paragraph [116]) is "the...scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way." In this case, as the Inspector had found, the proposed development was not a "major development" to which paragraph [116] applied. But he nonetheless relied on that matter in paragraph [47] of the DL to discount the benefits of the proposed development he was considering.

38. The Inspector had found in paragraph [47] that:

> "[the proposed development] would also have an economic benefit proportionate to its size in terms of construction jobs on the site and the additional spending power of the completed scheme's residents and the attendant multiplier effects on Ilfracombe's economy. But these proportionate benefits could clearly be achieved by building in other nearby locations, such as the proposed Southern Extension land allocation, which lie outside the AONB, CPA and HC and so I do not give them great weight."

39. That conclusion, Ms Colquhoun submitted, was inconsistent with the evidence, with paragraphs 47 and 49 of the NPPF and with his conclusion that paragraph [116] of the NPPF was inapplicable. Moreover the reason given for not according the benefits great weight was irrational. The additional benefits, which the proposed development would provide, would still be provided even if all the land forming part of the housing land supply identified by the Council in other nearby locations were developed.

40. Moreover, in considering the first exception to the presumption in favour of granting permission, Ms Colquhoun submitted that the Inspector also wrongly revived (in the DL at paragraph [48]) policies about the environmental impact of the development that he had recognised were out-of-date.

iii. Consideration

41. In *Suffolk Coastal* the Court of Appeal held (i) that paragraph [14] of the NPPF does not supplant, but operates within, the framework for determining planning applications provided by section 70(2) of the 1990 Act and section 38(6) of the Planning and Compulsory Purchase Act 2004 (see at [42]); (ii) that, where the grant of planning permission would not be in accordance with the development plan, the

question will be whether other material considerations, including relevant policies in the NPPF, indicate otherwise (see at [43]); (iii) that the weight to be given to the policy in paragraph [14] itself is a matter for the decision maker provided that he does not act unreasonably (see at [42]); (v) that the relevant "policies for the supply of housing" comprise "relevant policies affecting the supply of housing", which may include those whose effect is to influence that supply by restricting locations where it may be provided (see at [32]-[33]); (vi) that which policies are such relevant policies is itself a question of planning judgment for the decision maker (see at [45]); (vii) that, where there is not a 5 year supply of housing, the relevant "policies for the supply of housing" should be treated as being out-of-date or not up-to-date, there being no difference in this context, and thus as engaging paragraph [14] of the NPPF (see at [30]); but (viii) that that does not mean that such policies are irrelevant: the weight to be given to them in the circumstances remains a matter of planning judgment for the decision maker (see at [46]-[47], [70] and *Edward Ware Homes Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 103 (Admin), [2016] JPEL 767, per Holgate J at [7] and [26].)

42. The question has arisen whether planning permission may still be granted for a development that is not in accordance with the development plan and which does not benefit from the presumption in favour of sustainable development as explained in paragraph 14 of the NPPF. In *Cheshire East BC v Secretary of State for Communities and Local Government* [2016] EWHC 571 (Admin) Jay J held that in effect paragraph [14] of the NPPF defines what constitutes sustainable development: see at [23]. Accordingly the NPPF does not otherwise provide for the identification of a development as sustainable which might benefit from any such presumption. Although Coulson J held by contrast that the NPPF could otherwise permit the identification of such a development in *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] EWHC 592 (Admin), [2016] PTSR 675, like others, I prefer Jay J's conclusion: see *Trustees of the Barker Mill Estates v Secretary of State for Communities and Local Government* [2016] EWHC 3028 per Holgate J at [116]-[135], *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 2973 (Admin) at [33]. Of course a development which does not accord with the development plan and which does not benefit from the presumption in favour of sustainable development under paragraph [14] of the NPPF may be unlikely to warrant the grant of planning permission (particularly if it satisfies the first exception to the presumption in favour of granting permission in that paragraph), but, nonetheless, as a matter of law, it is possible that other material considerations might still indicate otherwise.

43. In my judgment the Inspector correctly interpreted paragraph [14] of the NPPF as providing two alternative cases in which the presumption it provides in favour of granting planning permission is rebutted. Where relevant policies are out-of-date, the presumption in favour of granting permission is rebutted if either of the two conditions mentioned in paragraph [14] is satisfied. The use of "or", rather than "and", to describe the relationship between the two conditions makes that plain. Accordingly, having decided that the second condition applied, the Inspector had no need to consider "alternatively" whether the first also did.

44. At that point the Inspector had in effect found (i) that the proposed development was not in accordance with the development plan; and (ii) that the benefits of providing the housing proposed given the absence of a 5 year housing land supply in the

Council's area did not indicate, on the basis of the guidance in paragraph [14] of the NPPF (which he had plainly decided to follow), that planning permission should nonetheless be granted. The question then was whether there was any other material consideration that indicated that his decision should not be in accordance with the development plan. In paragraph [49] of the DL he found, given that it was not sustainable development, that "there are no other material considerations that suggest it should be allowed". Ms Colquhoun did not suggest that there were any.

45. The Inspector is, of course, free to depart from the approach the NPPF recommends since it is only guidance. But in this case it is plain that the Inspector was seeking to comply with it. It might appear, therefore, that the Inspector's consideration of the first exception to the presumption in favour of granting permission (at which Ms Colquhoun's submissions were directed) was unnecessary and that, even if it had involved any legal error, the Inspector's decision would necessarily have been the same regardless.

46. Ms Yates submitted that there had been no need for the Inspector to consider the first exception and that his decision would have been the same had he not done so. But she also submitted that the Inspector still had to carry out an exercise in which he considered whether material considerations indicated otherwise, albeit one that did not need to comply with the particular balancing exercise the first exception in paragraph [14] of the NPPF requires. The fact that he did carry out that particular exercise, however, did not prejudice the Claimants.

47. Ms Colquhoun's complaint is that the Inspector said that he was doing so, not merely "alternatively", but also "in order to separately assess whether the proposal would constitute sustainable development". In my judgment this does not indicate that the Inspector thought that the development might have benefited from a presumption in favour of granting planning permission by reference to some test of what constitutes sustainable development outwith paragraph 14 of the NPPF. His conclusion to that part of his decision, in the DL at paragraph [49], was that "the...adverse effects of the development would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole." That is a conclusion reached in the terms of the first condition in paragraph [14] itself, not a conclusion reached by some other test.

48. Ultimately this complaint, that the Inspector misdirected himself in undertaking this exercise, would only have practical significance if the Inspector had found that the presumption in favour of granting permission under paragraph [14] was not rebutted on the basis of the first exception and had then wrongly treated the fact that it was not rebutted as meaning that the presumption in favour of granting planning permission still applied notwithstanding the fact that it was rebutted (as he had found) on the basis of the alternative, second exception. That the Inspector never did. Undertaking the exercise which he did undertake did not prejudice the Claimants nor could it have done even if its conclusion had been different.

49. In my judgment the particular complaints which Mr Colquhoun advances in respect of the Inspector's reasoning dealing with the first exception to the presumption in favour of granting planning permission in paragraph [14] of the NPPF are likewise without substance.

50. Paragraph 116 of the NPPF states that:

> "Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:
>
> • the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> • the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and
>
> • any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

51. The Inspector found that paragraph [116] of the NPPF did not apply as the proposed development was not a "major development". The contention that the Inspector was nonetheless erroneously applying, or importing, it in paragraph [47] of the DL, therefore, merely because he considered whether there was scope for the development to be provided outside the AONB and other landscape designations would require strong justification.

52. There is nothing in the DL to suggest that the Inspector applied, or was seeking to apply, the test in paragraph [116] of the NPPF. Nor is there any reason to resort to paragraph [116] to explain why the Inspector may have attached significance to there being other locations outside the AONB, CPA and HC on which the proposed development could be built. Policies that may affect the location of housing are still capable of being material considerations even when there is no five year land supply: see *Edward Ware Homes Ltd supra* at [35]-[38]. The weight to be given to them is a matter for the decision maker. The advice in paragraph [215] of the NPPF is that, since 2013, "due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)." In this case the Inspector had already found (in paragraph 21 of the DL) that the proposed development did not require a rural location (as the Claimants had agreed at the Inquiry) so that it was, for that reason alone, in conflict with Local Plan policy ENV1. He had also found (in paragraph 26 of the DL) that "the proposed development would....fail to comply with the most relevant policies in the development plan, in other words those relevant to the countryside and areas designated for their landscape beauty, and to similar national policy in the NPPF with which they accord" and (in paragraph [33] of the DL) that the failure to conserve the landscape and scenic beauty in the AONB constituted "harm [which] is a significant element in the planning balance..". The fact that the Inspector considered (in paragraph [47] of the DL) whether the economic benefits which he considered that the proposed development would have could be achieved outside the AONB, CPA and HC does not need to be explained, much less justified, therefore, by reliance on paragraph [116] of the NPPF or by the importation of anything from it. The weight to be accorded to the benefits would inevitably be affected to the extent that they could be achieved without conflict with such policies.

53. During the course of her submissions Ms Colquhoun submitted that the reason given in paragraph [47] for not according great weight to the benefits identified in that paragraph was irrational. The additional benefits, which the development would provide, would still be provided even if all the land forming part of the housing land supply identified by the Council including those in nearby locations were developed. In my judgment this contention fails to recognise the nature of benefits under consideration in this paragraph. It is not directed at the social benefit that providing 30 dwellings in the Council's area would have. That was addressed in paragraph [46]. Paragraph [47] is directed at the economic benefits the proposed development might provide to Ilfracombe's economy. That was why the Inspector considered whether the development could be built at "other nearby locations" which lie outside the AONB, CPA and HC. In that context it was a matter of judgment for the Inspector to determine what weight should be given to the economic benefits which this development would bring to Ilfracombe's economy given that it could also be provided elsewhere in nearby locations. The Inspector's decision in this case not to give them great weight cannot be regarded as irrational. The type of economic benefits he was considering may result from the provision of housing but they were different both in kind and area of benefit than the benefit of more accommodation. The consequential economic benefits from more development in a particular local area need not necessarily be regarded as a matter of great weight merely because in the local planning authority's area as a whole there is not a five year housing land supply.

54. Ms Colquhoun also submitted that Inspector treated the effect of footnote 9 as "reviving" the "out-of-date" policies. I had great difficulty in understanding this complaint given that Ms Colquhoun accepted that paragraph [49] of the NPPF does not render the policies to which it applies immaterial, and that it does not affect the weight which may be given to them, as a matter of law. But in any event since, for the reasons I have given, that is the law, the complaint is devoid of merit.

55. I have considered various other points that Ms Colquhoun raised during the course of her submissions. In my judgment all the complaints made about the Inspector's approach given the absence of a five-year housing land supply are devoid of substance. In the circumstances there is no need to consider the submissions made that, if the Inspector had made any error, the decision would necessarily have been the same. Had it been necessary to do so, however, that is the conclusion I would have reached.

CONCLUSION

56. For the reasons given above, this application is dismissed.