Neutral Citation Number: [2016] EWHC 2973 (Admin)

Case No: CO/2856/2016

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 22/11/2016

Before :

MR JUSTICE GREEN

- -

Between :

East Staffordshire Borough Council	**Claimant**
- and -	
Secretary of State for Communities and Local Government (1)	
Barwood Strategic Land II LLP (2)	**Defendants**

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- -

Mr Hunter (instructed by **Sharpe Pritchard**) for the **Claimant**
Mr Lewis (instructed by **Government Legal Department**) for the **First Defendant**
Mr Choongh and Mr Corbet Burcher (instructed by **Bird, Wilford & Sale Solicitors**) for the **Second Defendant**

Hearing date: 28th October 2016

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Approved Judgment

MR JUSTICE GREEN :

A. Introduction: The Issue – the scope and effect of paragraph [14] NPPF

1. This case raises an issue about the scope and effect of paragraph [14] of the National Planning Policy Framework ("NPPF") on the presumption in favour of the grant of planning approval to sustainable developments which are consistent with Local Plans. The application raises three issues of some wider significance: First, the existence and scope of the discretion to approve a development which is *inconsistent* with a Local Plan; second, the duty of decision makers to address the weight and significance of the particular reasons why a proposed development is inconsistent with a Local Plan; and third, the relevance of a finding by an Inspector that a proposed development which is inconsistent with a Local Plan is nonetheless "*sustainable*".

2. The significance of the issues arising in relation to the scope of paragraph [14] NPPF has been brought into sharp relief because that paragraph and the test it sets out have been the subject of conflicting decisions of the High Court. Paragraph [14] has also been applied in a number of different and inconsistent ways in decisions of Inspectors.

3. In the present case, on the 29th April 2016, the Inspector allowed an appeal from a decision of East Staffordshire Borough Council ("ESBC") which had refused permission for the erection of up to 150 dwellings with associated landscaping, public open space, access, drainage, associated infrastructure, earth works and other ancillary neighbouring works ("the Proposed Development") on land at Red House Farm, Lower Outwoods Road, Burton upon Trent, Staffordshire ("the Site").

4. The Inspector decided to grant permission even though the proposed development was inconsistent with the Local Plan and in particular a variety of strategic policies ("SP") in the Plan. Paragraph [14] NPPF creates a presumption in favour of sustainable development. It does this by reference to whether a proposal is consistent or otherwise in relation to a Local Plan; and it considers the position where no up-to-date Local Plan exists. On the application of the test set out in paragraph [14] it is common ground in this case that the Proposed Development was in conflict with the Local Plan. In coming to the conclusion that he could nonetheless approve the proposal the Inspector stated that he was entitled to apply a broader presumption in favour of sustainable development which operated outwith paragraph [14] and which applied wherever a decision maker concluded that a development (including a development inconsistent with the Local Plan) amounted to a "*sustainable development*". In this connection he took into account a judgment of the High Court in *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] EWHC 592 (Admin) ("*Wychavon*") handed down on the 16th March 2016 in which the Judge held that even where a proposed development did not fall within the four corners of a Local Plan it could nonetheless be approved because a broad and overarching presumption in favour of the approval of sustainable developments should be taken into account as a material consideration when applying section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"). However, the Inspector did not have his attention drawn to a judgment of the High Court, also handed down on the 16th March 2016, which in substance held that there was no significant discretion for decision makers to apply a broader test of sustainable development operating independently of paragraph [14]: See *Cheshire East Borough*

Council v Secretary of State for Communities and Local Government [2016] EWHC 571 (Admin) ("*Cheshire*") per Jay J.

5. ESBC has challenged the Inspector's decision and argues that the Inspector has misdirected himself in law as to the test he should apply. The Secretary of State (as a Defendant) served an AOS in these proceedings indicating that he did not contest the claim and he has also served written submissions and made oral representations at the hearing opposing a broad interpretation of the presumption in favour of sustainable development in paragraph [14]. He therefore does not support the grant of permission to the development in issue and he considers that the application should be allowed.

B. Inconsistency of the Proposed Development with the Local Development Plan

6. The Local Plan for the area in which the development was to be situated includes the East Staffordshire Local Plan 2012 – 2031 ("the Local Plan"). The majority of the Site is located within Outwoods Parish with the Site access falling within Horning Glow and Eton Parish. As a result the Outwoods Neighbourhood Plan and the Horninglow and Eton Neighbourhood Plan also form part of the Development Plan in relation to the Site. There are three SP's of particular relevance to the present case. The spatial strategy of the Local Plan encapsulated in SP2 focuses development within the settlement boundaries in a hierarchy of main towns. Burton upon Trent is at the top of the hierarchy followed by strategic villages and then local service villages. SP4 identifies housing allocations in the Local Plan for main towns and villages. SP8 strictly controls and disapproves of development outside the settlement boundaries but it also sets out a lengthy list of exceptions to this negative starting position. In paragraph [10] of his decision the Inspector stated:

> "10. The appeal site lies next to, but outside, the settlement boundary for Burton upon Trent. As a result, for planning policy purposes it lies within the open countryside where Strategic Policy 8 strictly controls development. **As the proposal would not comply with any of the exceptions set out in this policy and the site is not a strategic allocation in the Local Plan the scheme would be contrary to Strategic Policies 2, 4 and 8.** In terms of the Neighbourhood Plans, the location of the proposed development would not be contrary to their policies."
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> (Emphasis added)

7. It follows that the point of departure for the analysis is that the Proposed Development is contrary to SP 2, 4 and 8 of the Local Plan and on the normal application of the NPPF the application for approval would be refused.

C. Sustainable Development and Paragraph 14 NPPF

8. The analysis of the issue must be performed in the context of: (a) paragraphs [6] – [16] of the NPPF which specifically covers sustainable development; and also (b), the remainder of the NPPF. The NPPF lays great store by the encouragement of sustainable development. It records that international and national bodies have set out broad principles of sustainable development. In particular Resolution 42/187 of the

UN General Assembly defines the concept as development which meets the needs of the present without compromising the ability of future generations to meet their own needs. The UK Sustainable Development Strategy "*Securing the Future*" set out five guiding principles of sustainable development, namely: "*living within the planet's environmental limits; ensuring a strong, healthy and just society; achieving a sustainable economy; promoting good governance; and using sound science responsibly*".

9. Paragraph [7] NPPF identifies three ingredients of a "*sustainable development*". It provides as follows:

> "7. There are three dimensions to sustainable development: economic, social and environmental. These dimensions give rise to the need for the planning system to perform a number of roles:
>
> ● an economic role – contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;
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> ● a social role – supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community's needs and support its health, social and cultural well-being; and
>
> ● an environmental role – contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and adapt to climate change including moving to a low carbon economy."

10. Paragraphs [11] – [16] NPPF describe and then explain the "*Presumption in favour of sustainable development*".

11. Pursuant to section 38(6) PCPA 2004 and section 70(2) TCPA 1990 planning law stipulates that applications for planning permission should be determined in accordance with the Development Plan unless material considerations indicate otherwise. Paragraph [12] NPPF makes clear that the Framework does not change the statutory status of the Development Plan as the starting point of decision making. Importantly it also states that proposed developments consistent with an up-to-date Local Plan should be approved but proposed developments that conflict should be refused unless "*other*" material considerations indicate otherwise. The use of the word "*should*" presupposes a presumption of refusal which is rebuttable by other material considerations. Paragraph [13] NPPF states that the Framework constitutes guidance

for local planning authorities and decision makers both in drawing up plans and as a material consideration in determining applications.

12. Paragraph [14] NPPF, which is at the core of this case, describes, in substance, a formula or test for determining when the presumption in favour of sustainable development applies and it creates as the pivot of the analysis the context and substance of an up-to-date Local Plan. It has three components: (i) a statement of principle ("*the golden thread*"); (ii) application of the principle in the context of plan-making; and (iii), application of the principle in the context of decision-making. Paragraph [14] is in the following terms:

> "14. 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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> For plan-making this means that:
>
> ● Local planning authorities should positively seek opportunities to meet the development needs of their area;
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> ● Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
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> — 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.
>
> For decision-taking this means:
>
> ● 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."

13. Paragraph [15] NPPF recognises that the concept of "*sustainable development*" is intrinsic to Local Plans so that application of the principles set out in a Local Plan will create a predictable and transparent means of securing sustainable developments:

> "15. Policies in Local Plans should follow the approach of the presumption in favour of sustainable development so that it is clear that development which is sustainable can be approved without delay. All plans should be based upon and reflect the presumption in favour of sustainable development, with clear policies that will guide how the presumption should be applied locally."

D. Inspector's Decision

(i) Introduction

14. The Inspector's Decision is dated the 29th April 2016 ("the Decision"). In paragraph [6] the Inspector explained that at the culmination of written comments and submissions the Inspector was referred to the judgment of the High Court in *Wychavon*:

> "6. After receipt of the appellants' final comments the Council submitted further comments. Before they could be returned the appellants responded referring to the presumption in favour of sustainable development and a recent High Court judgement1. As this judgement was issued in mid March 2016 it was not possible for it to be referred to in the appellants' appeal statement. As a result, I have taken this decision, and the comments received from the Council in relation to it, into account in the appeal."

15. In broad terms there are three main parts of the Decision which are of relevance to the analysis in the present case. First, there is the Inspector's analysis of paragraph [14] NPPF. Second, there are the considerations which the Inspector took into account in concluding that, notwithstanding paragraph [14], the development was "*sustainable*" and the appeal should be allowed and permission granted for the Proposed Development. Third, there is the approach adopted by the Inspector to the balancing of his acceptance that the Proposed Development collided with the Local Plan (on the one hand) with the countervailing considerations which led him to conclude that the Proposed Development was consistent with sustainable development and should be approved (on the other hand). I take each in turn.

(ii) Analysis of paragraph [14] NPPF by the Inspector

16. First, with regard to the analysis of paragraph [14], in paragraphs [11] – [12] of the Decision the Inspector stated as follows:

> "11. The National Planning Policy Framework ('the Framework') is an important material consideration. Paragraph 14 advises that a presumption in favour of sustainable development lies at the heart of the Framework and paragraph 49 advises that housing applications should be considered in this context. In practice this means that proposals which accord with the development plan should be approved without delay.

> By virtue of the conflict with Strategic Policies 2, 4 and 8 that advice does not apply here.
>
> 12. A recently adopted Local Plan with policies regarding the location of housing and the protection of the countryside exists. As a result, the development plan is not absent or silent in relation to the proposed development. Furthermore, because it is common ground that a 5 year housing land supply exists the policies of the Local Plan relevant to the supply of housing are not out of date. As a consequence, the planning balance contained within the final bullet point of paragraph 14 of the Framework does not apply to this appeal. Nevertheless, as the recent High Court judgement mentioned in the procedural matters to this decision reiterates, the presumption in favour of sustainable development is a golden thread that runs throughout the Framework. As a result, where a proposal is contrary to the development plan this presumption is a material consideration that should be taken into account."

Of central relevance is the Inspector's conclusions (a) that because of the conflict of the Proposed Development with SP 2, 4 and 8 the presumption of approval did not apply; (b) but that the judgment in *Wychavon* reiterated that the presumption could still apply to such a development.

(iii) The reasons why the Inspector found that the Proposed Development was "*sustainable*"

17. Second, with regard to the considerations considered to be relevant and persuasive by the Inspector in coming to the conclusion that the proposal amounted to sustainable development, these were described in paragraphs [13] – [36] of the Decision. The principal points may be summarised as follows. The appeal Site is open, undeveloped countryside but the landscape value and sensitivity of the Site is low (Decision paragraph [14]). The proposed development would soon be enclosed by built development on three of its four sides (Decision paragraph [15]). The Site is largely screened from public view from nearby roads owing to the presence of intervening houses, Queen's Hospital and trees and the adverse visual effects seen from a local right of way and in long distance views towards the Site would largely be mitigated (Decision paragraph [16]). The proposal would appear as a natural infill development (Decision paragraph [18]). The overall impact upon the landscape would thus be minor and, upon completion taking into account undertakings and conditions, beneficial and the overall residual visual impact upon completion would be limited (Decision paragraph [19]). There is a shortage of affordable housing in the Borough and the proposed scheme would make some provision for such housing (Decision paragraph [21]). There will be no adverse effect upon education given that the proposed development would generate the need for additional places which would be satisfied by a financial contribution (Decision paragraph [21]). Contributions will be necessary to mitigate the effects of the development on matters such as surface water run off and any concomitant increase in the risk of flooding (Decision paragraph [23]). Difficulties in relation to accessibility and parking would be overcome and, indeed, the proposed scheme would help address problems with on-road parking in the area to the benefit of highway safety and the free flow of traffic (Decision

paragraphs [28] – [30]). The proposed development would enhance biodiversity (Decision paragraph [31]). The construction and fitting out of the dwellings would create employment and generate demand for material and the increase in the population would boost the spending in the local economy (Decision paragraph [32]). The scheme would increase the supply of open market dwellings (Decision paragraph [33]).

(iv) The balancing of pros and cons

18. Third, with regard to the overall balancing exercise between inconsistency with the Local Plan and the *contra* considerations that I have referred to above, the Inspector's analysis is set out in paragraphs [37] – [41] of the Decision. The sum total of the Inspector's reasons for dismissing the presumption in paragraphs [12] and [14] NPPF that the development "*should*" be refused permission are in paragraphs [38], [40] and [41]. In essence, the Inspector labels the "*cons*" as "*limited*" and in accordance with "*localism*" the views of local residents had to be balanced against other considerations. It is worth recording this part of the analysis in full:

> "37. The proposal would be contrary to Strategic Policies 2, 4 and 8 of the Local Plan. Schemes that conflict with the development plan should be refused unless material considerations indicate otherwise. As I have earlier noted the Framework is an important material consideration and the appeal scheme needs to be considered in the context of its presumption in favour of sustainable development. The policies of the Framework as a whole constitute the Government's view of what such development means in practice. There are three dimensions to sustainable development: environmental, economic and social.
>
> 38. In terms of the environment, the harm that would be caused to the character and appearance of the area through the loss of countryside would be limited, well designed development could be delivered and there would be ecological enhancements. Whilst the improvement of parking and public open space provision would occur primarily in order to mitigate the effects of the development, there would still be some wider public benefits of these improvements.
>
> 39. Socially, new housing, including affordable housing would be provided. Given the significant annual shortfall in affordable housing that exists, and the fact that levels of housing provision in recent years have been below annual targets, I attach significant weight to this benefit of the proposal. In terms of the provision of land for a primary school, for the reasons I have given earlier I attached limited weight to this as a benefit of the scheme. Economically, the boost to employment and the local economy would be beneficial.
>
> 40. The social and economic benefits, together with the environmental benefits described are significant and of

> sufficient weight to clearly outweigh the limited harm that would be caused. As a result, the proposal would represent sustainable development as defined in the Framework. Consequently, the material considerations in this appeal are such that permission should be granted for development that is not in accordance with the development plan.
>
> 41. There is no doubt that there is strong local feeling about this proposal, as reflected by the objections received at application and appeal stage. I recognise that this decision will be disappointing for local residents and am mindful, in this regard, of the Government's 'localism' agenda. However, even under 'localism', the views of local residents and Parish Councils, very important though they are, must be balanced against other considerations. In coming to my conclusions on the issues that have been raised, I have taken full and careful account of all the representations that have been made, which I have balanced against the provisions of the development plan and the Framework. For the reasons set out above, that balance of the various considerations leads me to conclude that the appeal should be allowed."

E. The competing submissions in a nutshell

19. The Claimant and the Secretary of State argue that the Inspector's Decision reveals material errors of law in that he misdirected himself as to the nature of the discretion that he possessed under section 38(6). First, the Inspector should have drawn the inference from the common ground fact that the proposal was in conflict with the Local Plan that (a) the presumption that the proposal was sustainable development was rebutted; (b) that there was therefore no room for the operation of any further presumption in favour of approval; and (c), pursuant to paragraphs [12] and [14] NPPF the development should *prima facie* have been refused permission. Each of these considerations needed to be fully factored into the discretion under section 38(6), but they were not. Second, the Claimant and the Secretary of State also argue that, in any event, in exercising his discretion under section 38(6) the Inspector should have taken fully and clearly into account all of the particular facts and matters which led the local planning authority to find, and record in the Local Plan (in particular in SP 2, 4 and 8), that development on the Site did not amount to sustainable development: it is said that it is apparent from the Decision that the Inspector ignored these considerations and, thereby, misdirected himself as to material factual and evidential considerations. Third, it is argued that a conclusion that a proposal is to be refused permission under paragraph [14] NPPF is tantamount to a conclusion that the proposal is not a sustainable development and the Inspector therefore erred in concluding that the development was "sustainable".

20. The Second Defendant, arguing to uphold the Inspector's reasoning, contends that it is apparent from paragraphs [6] – [14] NPPF *read as a whole*, and in the context of the remainder of the NPPF, that there is, indeed, a "*golden thread*" running through planning decision-making generally which favours the approval of "*sustainable developments*" and that paragraph [14] NPPF whilst obviously important is not the only route to an approval. Indeed paragraph [6] NPPF provides that the concept of

sustainable development runs through the whole of the NPPF and is not therefore confined to paragraph [14]. Further, the Inspector's specific findings of fact as to sustainability are impeccable, within the scope of his legitimate discretion and judgment, and are not challenged. Accordingly, it was open to the Inspector to approve the development upon the basis that: (a) it was sustainable; (b) it was presumed approvable; and (c) there were no countervailing considerations of note. Finally, the Second Defendant argues that the Claimant and the Secretary of State have adopted an excessively narrow and formalistic approach to paragraph [14] NPPF and the alternative and broader approach adopted by Coulson J in *Wychavon* is clearly correct.

F. Analysis

(i) The existence of a discretion outside of paragraph [14] NPPF

21. The first point to address is whether paragraph [14] NPPF is an exhaustive and comprehensive test for the operation of section 38(6). Section 38(6) PCPA 2004 makes clear that, *prima facie*, it is the Local Plan that governs and prevails. As paragraph [12] NPPF makes clear (consistently with section 38(6)): (a) a proposal that is inconsistent with a Local Plan "*should be refused*", unless "*other material considerations indicate otherwise*"; and (b), the Framework does not alter the statutory status of the Local Plan as the *fons et origo* of decision making. In itself the Local Plan is therefore a strong indication of where the answer lies in a given case. The NPPF is "*guidance*" which is relevant in both the drawing up of the Plan "*... and as a material consideration in determining applications*" (cf paragraph [13] NPPF).

22. In the present case the point of departure, applying section 38(6), is that the proposal was in conflict with the Local Plan and therefore should be rejected absent "*other*" countervailing and overriding material considerations. Paragraph [14] NPPF is capable in principle of amounting to such a material consideration but on the facts of this case, as the Inspector recognised, its application led to refusal of the application. The limb of paragraph [14] NPPF dealing with "*decision-taking*" indicates that where a proposal is consistent with relevant up-to-date plans it should be approved. It is silent as to what happens in the converse situation, namely where it is inconsistent. However, in such a case where the proposal is inconsistent with relevant policies it must be implicit in paragraph [14] (*a fortiori*) that it should not be approved and this accords with paragraph [12] NPPF which indicates that a proposed development which is inconsistent with paragraph [14] should be refused approval. This is not an abrogation of the presumption in favour of sustainable development because that concept is thoroughly embedded in, and permeates throughout, the entire Local Plan in accordance with the "*golden thread*" which runs through both plan-making and decision-taking. If a proposed development is inconsistent with paragraph [14] it is not therefore a "*sustainable development*" at least as that term is understood in paragraph [14] NPPF. A decision that a proposal should not be approved because it is inconsistent with the Plan is a conclusion which, necessarily, therefore accords with the principles governing the existence and approval of sustainable developments in the NPPF.

23. But there is an important caveat to this conclusion. Whilst the NPPF and, in this case, paragraph [14] thereof, is normally the preponderant or major part of the material considerations exception in section 38(6), it cannot altogether occupy the field of

"*material*" considerations. In principle there must be *some* scope for a discretion to approve a proposed development which is inconsistent with the Local Plan. All the parties in this case including the Secretary of State, accept, in principle, this proposition. The dispute at base therefore is not as to the existence of a discretion so much as to the scope of this residual power.

24. There are three reasons why in principle there must be some residual scope for the exercise of discretion. First, as a matter of elementary principles of public law this is the natural consequence of section 38(6) which cannot be construed as permitting policy guidance (i.e. the NPPF) to fetter the statutory discretion conferred thereby: See in this respect, *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 at paragraph [19]. Secondly, this is acknowledged in footnote 10 to the NPPF which operates as a rider to the expression "*for decision-taking this means…*" in the body of paragraph [14]. When one combines that text with the footnote one gets: "*for decision-taking this means, unless material considerations indicate otherwise…*". This therefore supports the conclusion that the test in paragraph [14] is not all-embracing. It acknowledges that the proviso to the section 38(6) may in principle cover a territory somewhat broader than paragraph [14]. Third, there is section 19(2)(a) PCPA 2004 which states, in relation to plan-making, that the local planning authority must have regard to national policies and advice contained in guidance issued by the Secretary of State. And of course the NPPF is the paradigm example of such national policies and advice. However section 19(2)(a) makes clear that local planning authorities are only required to "*have regard to*" such national policies and advice. They are not straight-jacketed by such policies and advice. This also suggests that, at least to some degree, there is a residual discretion operating outside of paragraph [14].

25. The above conclusion is consistent with the ruling in *Cheshire* (*ibid*) where Jay J explained how paragraph [14] was, for a variety of reasons, designed to be largely dispositive of the analysis but that, notwithstanding, there remained at the end of the day an "*element of flexibility*" outside paragraph [14]: see the citation from *Cheshire* paragraph [28] in the text below. The Secretary of State and ESBC endorse the reasoning in this judgment so it is worth at this juncture setting out the logic and reasoning which led to this conclusion. In paragraphs [20] – [23] the Judge explained how the presumption operated. He stated:

> "20. In the absence of paragraph 14, decision makers would be unable to decide how tensions between the competing desiderata should be reconciled. If, for example, the economic and social merits only slightly outweighed the environmental, what then? The answer is not to be found in paragraphs 6-8. The framers of the NPPF rightly thought that guidance in this regard was necessary. The guidance they have provided in the form of paragraph 14 is to say that the proposal should be approved as sustainable development unless the adverse impacts clearly and significantly outweighed the benefits.
>
> 21. On this approach, the effect of paragraph 14 is that proposals which would otherwise have been refused because their planning merits were finely balanced should be approved – subject to the first indent of the second bullet point being

> made out. Another way of putting the matter is that the scales, or the balance, is weighted, loaded or tilted in favour of the proposal. This is what the presumption in favour of sustainable development means: it is a rebuttable presumption, although will only yield in the face of significant and demonstrable adverse impacts.
>
> 22. In practice, there will be questions of fact and degree. If, for example, the planning advantages are assessed to be non-existent, the presumption is likely to be easily displaced. The stronger the planning benefits are assessed to be, the more tenaciously the presumption will operate and the harder it will be to displace it.
>
> 23. In my judgment, this is not, and cannot be, a question of assessing whether the proposal amounts to sustainable development before applying the presumption within paragraph 14. This is not what paragraph 14 says, and in my view would be unworkable. Rather, paragraph 14 teaches decision makers how to decide whether the proposal, if approved, would constitute sustainable development."

26. In paragraph [25] the Judge used the apt analogy of an algorithm to describe the process laid down in paragraph [14] whereby a conclusion was arrived at as to whether a development was sustainable or not. He stated:

> "25. Nor do I believe that it is necessarily helpful to say that paragraph 14 does not apply to development which is not sustainable. If, having applied the paragraph 14 algorithm, that is the conclusion which is reached, I have no difficulty with this formulation. However, a decision maker will only know if a proposal is sustainable or not by obeying the processes mandated by the paragraph. An integral part of the process is a positive weighting in favour of sustainable development in the sense that the proposal will be assessed as such unless the planning harm clearly and significantly outweighs the planning gain."

27. And in paragraph [26] the Judge identified the conceptual difficulty with recognising that there was an undefined and "*freewheeling*" exercise of discretion outside of paragraph [14]:

> "26. In short, paragraph 14 is about process, not outcome. There is no circularity in the foregoing analysis, because if the adverse impacts do significantly and demonstrably outweigh the benefits (when assessed against the rest of the NPPF), then the proposal will not amount to sustainable development, and will be refused. Indeed, Mr Hunter's argument seems to me to place an almost insurmountable hurdle against development being sustainable, because he fails to explain how the concept should be applied outside the scope of paragraph 14. It is a

> freewheeling exercise of discretion without parameters. Moreover, I agree with Mr Honey that it is difficult to understand on what basis paragraph 14 would have any practical utility if it only applied to cases where the development had already been found to be sustainable, and to my mind Mr Hunter's "enhanced presumption" is a completely incoherent and unworkable concept, also one being nowhere to be found in the policy wording."

28. However, and importantly, in paragraph [28] the Judge acknowledged that paragraph [14] did not lay down a hermetically sealed analysis which eschewed flexibility in all respects. Mr Justice Jay put the proposition in the following way:

> "28. Mr Honey made the good point that the meaning of sustainable development is not rigidly to be determined solely by reference to the indented methodology. As I have pointed out, it is always subject to material considerations indicating otherwise, thereby introducing an element of flexibility both ways. If, taking just one example, the impact or harm is substantial but not such as significantly and demonstrably to outweigh the benefits, then the decision-taker has sufficient flexibility to refuse permission, provided of course that the other material considerations, if any, are carefully defined and assessed."

29. It is relevant to note that Coulson J in *Wychavon* also accepted that there was scope for the exercise of discretion outside of paragraph [14]. The critical dispute, as I have observed above, is as to the *scope* of this discretion.

(ii) The scope of the discretion outside of paragraph [14] NPPF

30. The crux of the dispute thus focuses upon whether the Inspector correctly delineated the ambit of his permissible discretion. In my judgment it follows from the principles of interpretation which govern the scope and effect of paragraph [14] set out above that its application in a given case will cover the preponderant or major part of the exercise of discretion inherent in the concept of "*material considerations*". Paragraph [14] is essentially about process not outcome (cf *Cheshire* (*ibid*) paragraph [26]). There is no reason why it should not sensibly suffice to cover the generality of cases which arise. The "*algorithm*" (the term used by Mr Justice Jay in paragraph [14] of *Cheshire*) describes the sequence of steps to be worked or followed through in order to arrive at a result. Usually algorithms lay down mathematical steps to be applied in sequence. But the concept applies more broadly to any sequence of mandated steps leading to an outcome. The outcome inherent in paragraph [14] contemplates a two stage process with "*plan-making*" preceding "*decision-taking*"; and then, in the case of the latter, a bifurcated approach contingent upon the existence (or otherwise) of an adequate Local Plan. In both cases guidance is given as to the circumstances when the presumption in favour of sustainable development is to apply, but critically for the present case, it also indicates where it is <u>not</u> to apply or even is to be reversed (when read in the light of paragraph [12] NPPF). The test or algorithm uses as the pivot for a decision the Local Plan. There is in relation to decision making little scope in logic or

substance for departing from the algorithm in paragraph [14] unless there is some reason to reject a Local Plan.

31. Insofar therefore as paragraph [14] permits of a residual discretion it must be recognised that the outcome arrived at by the operation of paragraph [14] should carry considerable gravitational pull. It should yield only as an exception to the norm where there exists objective and substantial reasons which can be readily demonstrated to a high degree of probative value and which takes into account the particular reasons why a development has been found to collide with the Local Plan. I should add however (see paragraph [54] below) that I express no concluded view on exactly how exceptional "exceptional" actually is; this being an issue better explored in a case where that issue truly arises.

32. When a decision is being considered in a case where the proposed development conflicts with the Local Plan (and is thereby *prima facie* to be refused under paragraphs [12] and [14] NPPF) it follows from all of the above that the starting point for analysis should not be that there is a presumption in favour of the development. This is because the outcome of the operation of the paragraph [14] algorithm is that the presumption has been rebutted. This was the conclusion of Jay J in *Cheshire* at paragraph [24] (cf the words "*or not*"). In such a case, therefore, the decision maker's starting point should be that the proposal conflicts with paragraph [14] and is not therefore consistent with the presumption of sustainable development. Applying paragraph [12] the development "*should be refused*". The question which follows is whether, nonetheless, there are substantial and demonstrable objective benefits which outweigh this adverse starting point. My analysis leads me to favour a relatively narrow construction of the residual discretion outside of paragraph [14].

33. The Inspector relied upon the analysis of the High Court in *Wychavon*, which concluded that there was a freestanding presumption in favour of approval of any proposal which amounted to a sustainable development even if it was inconsistent with a Local Plan. With respect I do not agree with the conclusion contained in that case. The Court, there, did not have the significant benefit of the considered position of the Secretary of State which I have had in this case. I have had the advantage of detailed and refined analysis from all sides, including the Secretary of State, and this has been of great assistance to me. I have also had the advantage of the analysis in *Cheshire* which reflects the other side of the analytical coin to *Wychavon* and the existence of these two conflicting judgments gave counsel the opportunity to perform a detailed compare and contrast analysis.

(iii) Considerations supporting the (relatively) narrower construction of paragraph [14] NPPF

34. There are a number of supplementary reasons which reinforce me in the conclusion that I have arrived at above. These may be summarised as follows.

35. First, my conclusion is consistent with the core planning principle that planning decisions be made with a high degree of predictability and efficiency. The first of the twelve core principles articulated in paragraph [17] NPPF is that planning decisions should:

> "be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency."

36. The paragraph [14] algorithm enables decision makers to take decisions by reference to the Local Plan and paragraph [15] NPPF (set out at paragraph [13] above) explains that by this route decisions on "*sustainable development*" will be taken. This means that decisions will be taken transparently and on the basis of transparent, and objectively determined, criteria. The desirability of clarity and transparency is not to be underestimated in an area of economic activity where predictability is critical to forward-looking business planning. The alternative analysis, whereby a broad discretion arises outside of paragraph [14] NPPF and notwithstanding a Local Plan, leads to uncertainty. The test expounded in *Wychavon* is undefined. It does not recognise the existence of limits or curbs. It is "*freewheeling*" and unconstrained. In my view a construction which furthers predictability and transparency based on adherence to the Local Plan is one which is to be preferred over one that leads to uncertainty.

37. Second, paragraph [14] reiterates the powerful nexus between the Local Plan and "*sustainable development*" with the latter being defined by reference to the former. This is explicit in the "*plan-making*" component of paragraph [14]. But the primacy of the Local Plan is a theme which runs throughout the NPPF generally. For example, paragraphs [150] – [151] makes clear that Local Plans "*... are the key to delivering sustainable development that reflects the vision and aspirations of local communities*" (paragraph [150] NPPF). Local Plans must be prepared with the objective of contributing to the achievement of sustainable development and they should be consistent with the presumption in favour of sustainable development (paragraph [151] NPPF). Paragraph [182] NPPF makes clear that a Local Plan should be examined by an independent inspector whose role is to assess whether the Plan has been prepared in accordance with, *inter alia*, legal and procedural requirements, and whether it is "*sound*". A local planning authority should submit a plan for examination which it considers to be "*sound*" because it is positively prepared, justified, effective, and: "*consistent with national policy – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework*". Paragraphs [183] and [198] emphasise that Neighbourhood Plans are intended to deliver sustainable development and that where a planning application conflicts with the Neighbourhood Plan that has been brought into force permission should not normally be granted. The upshot of this is that a concept of "sustainable development" is, and indeed must be, a driving principle behind every Local Plan as the predominant means of securing sustainable development. When this is taken into account as a guide to interpretation of paragraph [14] it underscores the considerable importance of planning decisions being taken consistently with the Local Plan. It does not permit of an interpretation which assumes that planning proposals which are inconsistent with the Local Plan remain subject to, and the beneficiary of, some extraneous presumption in favour of developments that an Inspector concludes is

"*sustainable*" in disagreement with a Local Plan. Underpinning the primacy of the Local Plan in the NPPF is a recognition of the political importance of "*localism*". The Local Plan is a document widely consulted over which reflects the balancing of a multiplicity of different, often competing, considerations. As such there is a very democratic reason why it must be accorded great weight. I return later in this judgment to the question whether the Inspector, in paragraph [41] of the Decision (set out at paragraph [18] above) adequately respected this consideration.

38. This conclusion, namely that the concept of "*sustainable development*" is predominantly implemented *via* the Local Plan, is also reflected in the Impact Assessment (July 2012) which accompanied the NPPF. On page 10 it is stated that: "*The presumption in favour of sustainable development sits at the heart of the new Framework, and sends a strong signal to all involved in the planning process to plan positively for sustainable development* ***through their Local Plan***" (emphasis added). Further, throughout the Impact Assessment great emphasis is placed upon the idea that: "*A Plan-led system brings many benefits*". The Assessment cites, in this regard, the conclusions of the Barker Review of Land Use Planning ("*Barker Review of the Land Use Planning Final Report*") at page [7]:

> "The Plan-led system brings with it many benefits. It provides business with a greater degree of certainty about likely development than would otherwise be the case and enables communities to engage in developing a vision of the future of their area. It also supports the coordination of investment and the realisation of positive spillovers. To maximise these benefits, it is important that Development Plan documents are up-to-date and provide clear policy, and that applications in accordance with the Plan are approved unless material considerations indicate otherwise."

39. The centrality of up-to-date Local Plans was also perceived as desirable to avoid the uncertainty which flowed from a set of rules which encouraged decisions to be made through systematic use of the appeals procedure: "*Out of date plans can lead to 'planning by appeal'. This means less development (because of costs to applicants associated with delays and uncertainty); or development which occurs later and which is potentially sub-optimal from the community's perspective*". The Impact Assessment (*ibid* page [18]) identified the substantial estimated transaction costs associated with major residential developments. The Assessment concluded that: "*... unnecessary delays and uncertainty potentially contribute a significant share of the total and small improvements can generate large savings in absolute terms*". The Impact Assessment also recognised the nexus between Local Plans and sustainable development: "*If there is less sustainable development, this carries costs and benefits. The intention of the Framework is to support sustainable development, which means balancing economic, environmental and social considerations and seeking to achieve positive improvements overall. Through its support for Local Plans, the Framework seeks to ensure more efficient delivery of sustainable development*". The Impact Assessment is thus consistent with the policy contained in the NPPF and supports the conclusion that it is through the Local Plan that sustainable development will be implemented and introduced. This is a consideration which lends support for the conclusion I have arrived at which is that the scope for the approval of developments

which are inconsistent with a Local Plan is limited. It seems to me that, although my judgment does not turn upon it, the contents of the Impact Assessment are admissible as one source of guidance to an interpretation of the NPPF (by analogy with the principles governing the admissibility of pre-statutory material as a guide to construction of the subsequent measure: see e.g. *Solar Century Energy Holdings et ors v SSECC* [2013] EWHC 3677 (Admin); affirmed on appeal [2016] EWCA Civ 117).

40. Third, emphasis has been attached by both parties albeit in different ways to the phrases "*golden thread*" and "*means*" in paragraph [14]. The argument with regard to "*means*" (advanced by ESBC and the Secretary of State) is that it is to be treated as "*equates to*" or "*must lead to*" or some other proxy phrase indicating that the operation of the paragraph [14] test will inexorably lead to the correct result. In my view there is some force in this but, because I have accepted that there is scope for an element of discretion outside of paragraph [14], the phrase cannot lead to the conclusion that the operation of paragraph [14] leads to an unassailable and irrebuttable result in every case. It is nonetheless an indication that the test in paragraph [14] is intended to cover the overwhelming majority of cases. In *Wychavon* the Court rejected the contention that "*means*" offered a true definition of anything and was no more than "*... an explanation of the effect of the presumption*". The Judge in *Wychavon* in paragraph [43] accepted an argument advanced by counsel for the developer that: "*... the presumption in favour of sustainable development would only apply if the development plan was silent or absent, or if the relevant policies were out of date (the requirements that trigger the last part of para 14). That cannot possibly be right; that would be such an important limitation on the 'golden thread' that, if such was the intention of the NPPF, it would say so in the clearest terms*". With respect, I disagree. The reference to the "*golden thread*" in paragraph [14] (advanced by the Developer) is merely a metaphor; but, in any event, it is described in terms as doing no more than "*... running through both plan-making and decision-taking*" i.e. through the 2 staged processes described in paragraph [14]. In context, the "*golden thread*" is applicable within the confines of paragraph [14] and it cannot be used to support a conclusion that the presumption has a broader "*at large*" operation. It follows that with respect I do not agree with the Judge's conclusion in *Wychavon* based upon this phrase (set out in paragraph [44]) that: "*Where there is a conflict between a proposal and a development plan, the policies within the NPPF, including the oft-repeated presumption in favour of sustainable development, are important material considerations to be weighed against the statutory priority of the development plan*".

F. Analysis of Inspector's Decision

41. I turn now to apply the above principles to the facts. In my judgment the Inspector was in error in three respects.

(i) Incorrect resurrection of the presumption

42. First, the Inspector applies the presumption in favour of grant of approval having acknowledged and accepted that the proposed development was inconsistent with the Local Plan. However paragraph [14] NPPF is the embodiment of the presumption and once that paragraph has been worked through and a conclusion has been arrived at that the proposal is inconsistent with the Local Plan, then there is no presumption

remaining which can be relied upon in favour of grant (see paragraphs [30] – [33] above). At this stage the presumption has been rebutted. This is because, as *per* paragraph [12] NPPF, it is inconsistent with the Local Plan and the proposal should be refused. Paragraph [12] creates a reverse presumption – "*it should be refused*". This does not mean that there is no discretion outside of paragraph [14] but it does mean that the discretion does not incorporate a presumption in favour of approval and, moreover, the starting point is not neutral but is adverse to the grant of permission.

43. In paragraph [12] of the Decision in the present case (set out at paragraph [16] above) the Inspector held that the presumption applied outwith paragraph [14]. The only sensible way therefore to read the operative paragraph [40] of the Decision (set out at paragraph [18] above) is that having concluded that the proposal was a sustainable development the Inspector applied the presumption of approval to it leading therefore to the actual approval. This follows from the structure of the Inspector's reasons as a whole and also the specific language that he used in paragraph [40] and in particular the word "*consequently*", in the last sentence of that paragraph. For these reasons in my judgment the Inspector materially misdirected himself as to the test to be applied to the evidence.

(ii) The omission of any balancing exercise taking into account the reasons why the Proposed Development was inconsistent with the Local Plan

44. The second material error in the Inspector's reasoning is that he considered that there was no need in his analysis to conduct any sort of a balancing exercise, where on the one side of the scales the Inspector placed the facts that he found led to approval of the proposal (the "*pros*"); and on the other of the scales were placed all those facts and matters which led the local authority to reject development on the Site in dispute as inconsistent with the Local Plan (the "*cons*"). Mr Choongh, for the Claimant, argued that the Inspector had, as set out in paragraph [41] of the Decision (see paragraph [18] above), performed this balancing exercise. But he also argued (recognising perhaps the difficulty of that argument as a matter of analysis of the relevant paragraph which is really about rejecting localism) that if both parties agree, in a given case, that a proposal is in breach of a Local Plan then there is no need for an inspector to undertake any assessment of the actual reasons why it was inconsistent with the policy in question.

45. In my judgment if a decision maker is to approve a proposal which is inconsistent with the Local Plan then the reasons for that (which include addressing the weight of the reasons why the development was inconsistent with the Local Plan) must be set out in the decision. In *Bloor Homes East Midlands Ltd v Secretary of State for Local Communities and Government* [2014] EWHC 754 ("*Bloor*") Lindblom J (as he then was), in paragraph [19(2)], stated that reasons for an appeal must be intelligible and adequate and such as to enable a person to understand why the appeal was decided as it was and as to the conclusions that were reached on the principal, important controversial issues. An Inspector's reasoning would be defective if it gave rise to a substantial doubt as to whether the Inspector went wrong in law, for example by misunderstanding relevant policy or by failing to reach a rational decision on the relevant grounds. The Judge, in accordance with well established principle, reiterated that the reasons need refer only to the main issues in dispute and not to every material consideration.

46. In the present case the Inspector stated, quite explicitly, that the proposal "*... would not comply with any of the exceptions set out in*" SP8. He also accepted that the Site was not a strategic allocation in the Local Plan and would, for that reason as well, be contrary to SP2, 4 and 8. Paragraph [41] of the Decision in the present case is not in my judgment an adequate, or indeed any, articulation of relevant reasons. It is formulaic. There is no evidence in the Decision itself that the Inspector addressed his mind to the details of SP 2, 4 and/or 8. The mere recitation by the Inspector that the "Development Plan" has been taken into account and "*balanced*" is not enough.

47. To understand in practical terms the implications of the Inspector's acknowledgement that the proposal was inconsistent with SP's it is necessary to look at the policies themselves.

48. SP8 states that developments outside settlement boundaries will not be permitted unless they fall within one of the nine exceptions listed in the Policy. These exceptions identify possible benefits of an otherwise inconsistent development. The Inspector accepted that the proposal did not fit into any of these listed exceptions. It is therefore possible, by identifying the benefits set out in the exceptions in the SP, to understand what the Inspector was concluding that the Proposed Development would not generate by way of benefits. The logic of the Decision thus means that the proposal: (a) was not essential to the support and viability of an existing lawful business or the creation of a new business appropriate in the countryside in terms of type of operation, size and impact and nor was it supported by relevant justification for a rural location; (b) did not provide facilities for the use of the general public or local community close to an existing settlement which was reasonably accessible on foot, bicycle or by public transport; (c) was not a development contemplated under the Rural Exception Sites Policy; (d) was not an appropriate re-use of rural buildings; (e) was not an infrastructure development where there was an overriding and demonstrable need for the development to be located in the countryside; (f) was not a development which was necessary to secure a significant improvement of the landscape or the conservation of a feature of acknowledged importance; (g) was not a provision for renewable energy generation of a scale and design appropriate to its location; and (h) was not otherwise appropriate. Nowhere in the Decision does the Inspector explain how or why the failure of the Proposed Development to bring about any of the recognised benefits is to be ignored or overridden. Without any explanation of what, *prima facie*, are weighty considerations the observation, in paragraph [38] that the harm to the character and appearance of the area would be "*limited*" and the assertion in paragraph [41] that he has "*balanced*" the provisions of the Development Plan are unconvincing.

49. Moreover, even where a proposed development falls within one of the exceptions SP8 makes clear that it *still* needs to be judged against a series of additional criteria which could, upon their application, lead to the proposal being refused. Again there is no recognition or analysis of this.

50. The same applies to SP2 which lays down a "*Settlement Hierarchy*". Pursuant to SP2 development is directed towards the most sustainable locations in accordance with the "*Settlement Hierarchy*" set out within the Policy. New development should be concentrated within the settlement boundaries of the main towns, strategic villages, local service villages, and rural industrial estates as depicted on the Policies Maps. Counsel for the local authority pointed to a number of prior planning decisions in

which Inspectors had attributed substantial probative weight to the fact that a proposed development was to occur in a location which was not contemplated by the "*Settlement Hierarchy*". In *Bloor* (*ibid*) at paragraph [19(7)] Lindblom J extolled the virtue of consistency in decision making as important both to developers and local planning authorities. In other judgments Courts have recognised as relevant and admissible the practice of other Inspectors. By way of illustration only in this case counsel for the Claimant drew my attention to the decision of an Inspector (3rd December 2014 in relation to: "Land between Ashflats Lane and A449 Mosspit Stafford ST189BP") where the Inspector, in analysing the "*Planning Balance*", attached great weight to the fact that the proposed development was inconsistent with the allocation of sites set out in the Local Plan. The Inspector found this to be dispositive even though he recognised that the proposed development significantly benefited the supply of housing and, otherwise, generated benefits socially and economically. He also recognised that such benefits were "*... by no means insignificant*" (*ibid* paragraph [116]). And yet further the Inspector concluded that the proposed development had attributes which reflected sustainability. Nonetheless given the substantial weight which had to be accorded to the fact that the proposal was on a green field site which was not contemplated as being an allocated site for future development, the proposal was refused.

51. Where does all this lead to? In my view, as I have already stated, the inconsistency between the proposal and the Local Plan amounted to potentially weighty and substantial matters militating in favour of refusal of the proposal. Yet nowhere in the Decision, or in the description of the balancing exercise, is there any assessment of how or why the net "*pros*" that the Inspector found justified approval outweighed the "*cons*" in the Local Plan which led to a presumption of refusal. Nothing in paragraph [41] of the Decision addresses/performs this task. The Inspector therefore erred in failing to address relevant considerations and/or in giving reasons for his conclusions.

52. Counsel for the developer argued that in cases where inconsistency occurred it was normal practice for Inspectors simply to record the fact of such inconsistency and there was no track record of Inspectors going on to consider the details of that inconsistency in the balancing exercise that I have described. This is not, in my view, reflected in the Inspectors' decisions that I have seen upon this issue. In any event, first principles relating to the adequacy of reasons indicate that it simply cannot be correct (see paragraph [45] above). I am not suggesting that the Inspector was required to write a thesis on the issue of SP 2, 4 and 8. But he needed to address the "*cons*" inherent in his acceptance that the Proposed Development collided with these policies and did not generate exceptional benefits, in some appropriate and reasoned manner. As to the level of detail required this will be case specific and will take into account the arguments advanced. One indication of the level of detail required would be whether the Inspector has addressed the "*cons*" in a level of detail which is commensurate or proportionate with that with which he has addressed the "*pros*".

(iii) The concept of "*sustainable development*"

53. The third material error in the Inspector's Decision is that he found that the proposal was a "*sustainable development*" as that term is defined in the NPPF. I do consider this to be an error essentially for the reasons set out above in relation to the second error: The Inspector has not explained why the Proposed Development is "*sustainable*" when it *prima facie* is inconsistent with significant policies in the Local

Plan. There is one aspect of the argument that has caused me some hesitation. The Inspector says that the proposal was a "*sustainable development*". This is expressly set out in the second sentence of paragraph [40] of his Decision (see paragraph [18] above). I agree with Mr Justice Jay in *Cheshire* at paragraph [24] where he states that the point of paragraph [14] is to lead decision makers "*... along a tightly defined and constrained path, at the end of which the decision must be: is this sustainable development or not?*". The reference to "*or not*" is a reference to the binary outcome of the paragraph [14] process. But that conclusion is not decisive because (as was also recognised by Mr Justice Jay) it is accepted that there is a discretion outside of paragraph [14]. It is therefore, in principle, open to a decision maker to approve a proposal which is not, technically speaking, "*sustainable development*" within the meaning of paragraph [14]. In all probability *if* a development was approved outside the scope of paragraph [14] it would have to be "*sustainable*" else it is hard to see how or why it could or would have been properly approved. Mr Choongh for the Developer gave an illustration of a site that might he argued theoretically fall outside of a Local Plan but would nonetheless be "*sustainable*". He hypothesised a scenario whereby ten sites were initially submitted to the authority as possible sites for development. Each of these sites was eminently sustainable in a physical sense. However the authority chose only 8 of the 10 sites upon the basis that only 8 sites were needed when set against the present economic and policy based assessment of housing need. It was argued that this would not, without more, indicate that sites 9 and 10 were "*unsustainable*". They would have been rejected for reasons other than their intrinsic "*sustainability*". As such, he argued that paragraph [14] could not lead, inexorably, to a conclusion that any proposal inconsistent with the Local Plan was for a site which was necessarily unsustainable. However, counsel for both the Local Authority and Secretary of State declined to pin their forensic colours to an endorsement of this proposition. Both considered that it would be highly unlikely that a development on an unplanned site would be acceptable or "*sustainable*" and they pointed out that under paragraph [7] NPPF a site might well be defined as unsustainable for a variety of micro or macro-economic, social or environmental reasons such that Mr Choongh's example they considered begged more questions than it answered. I see some force in this argument but it does not wholly explain how one categorises a development which is inconsistent with a Local Plan yet is still, quite properly, to be approved: would such a development not, *ex hypothesi*, be sustainable? At the end of the day my conclusions in this case rest essentially on the first two grounds that I have identified.

(iv) Postscript: How exceptional is exceptional?

54. There is one note of caution that I wish to make (flowing out of paragraph [31] above). I have recognised the existence of a discretion outside of paragraph [14] NPPF. I have suggested that it is likely to be the exception rather than the norm that it will be exercised in favour of approval. However it has not been necessary, in order to decide this case, to determine quite how exceptional, "exceptional" has to be. The parties in argument variously referred to it as "narrow" or "wide". The parameters are for another case to measure. My conclusions turns upon a finding that in applying his discretion there have been misdirections in principle by the Inspector. My conclusion does not thus turn upon the appraisal of the precise width and depth of the residual discretion and whether had he not misdirected himself nonetheless the Inspector still stepped outside the scope of the otherwise legitimate exercise of judgment. It may

therefore be for other cases to explore the issue of the precise scope of the exception in greater detail when a case properly turns upon the point.

G. Conclusion

55. It follows from the above reasons that I have concluded that the Inspector erred in law and misdirected himself as to the test to be applied and as to the approach he adopted to the assessment of the evidence. I therefore allow the application. I quash the Inspector's Decision.