Neutral Citation Number: [2012] EWHC 1419 (QB)

Case No: CO/13120/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/05/2012

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

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Between:

Sea & Land Power & Energy Ltd	**Claimant**
- and -	
1) Secretary of State for Communities and Local Government	**Defendants**
2) Great Yarmouth Borough Council	

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Mr R. Wald (instructed by **Bond Pearce**) for the **Claimant**
Mr D. Forsdick (instructed by **the Treasury Solicitor**) for the **Defendant**
The Second Defendant did not appear

Hearing date: 15 May 2012

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Judgment

Mrs Justice Lang:

1. The Claimant applies under section 288(1)(b) and 5(b) of the Town and Country Planning Act 1990 ("TCPA 1990") for an order quashing the decision of D. L. Burrows, an Inspector appointed by the First Defendant, dated 23 November 2010, to dismiss the Claimant's appeal against the refusal of planning permission for a wind farm on land to the east and west of Ormesby Road, Hemsby, Great Yarmouth, Norfolk.

History

2. On 8 September 2009, the Claimant applied to the Second Defendant for planning permission for the construction and operation of a wind farm consisting of four wind turbine generators, switch house, access tracks, hard standings and underground cabling. The application was accompanied by an Environmental Statement, a Design and Access Statement, a Non-Technical Summary and a Planning Appraisal.

3. Following public consultation, a report to the Development Control Committee recommended that planning permission should be refused on the grounds that it was contrary to policy NNV2, 3 and 7 of the Great Yarmouth Borough Wide Local Plan 2001 and because it could not be concluded it would not have a significant adverse effect on a European site, applying regulation 48(1), The Conservation (Natural Habitats etc) Regulations 1994 as amended. The Royal Society for the Protection of Birds had expressed concern about the potential adverse effect on pink footed geese and marsh harrier in the Broadlands Protection Area.

4. Curiously, the Grounds of Claim, and Mr Wald's skeleton argument to this Court, both asserted that the report only recommended refusal on the grounds of ecology and uncertainty in relation to the European site, not on the grounds of landscape and visual impact. This was incorrect, as acknowledged by Mr Wald at the hearing.

5. On 23 December 2009, the Second Defendant's Development Control Committee refused the application on the following grounds:

> "1. The application site is located in an area identified in the Great Yarmouth Borough Wide Local Plan 2001 as 'Landscape Important to the Broadland Scene' (Policy NNV2), 'Landscape Important to the Coastal Scene' (Policy NNV3) and 'Landscape Important to the Setting of Settlements' (Policy NNV5) and the open countryside (Policy NNV7) where development is only permitted if it will not;
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> 1) have a significant adverse impact upon the landscape character and traditional built form of the area,
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> 2) destroy or damage features of landscape importance which contribute to the character of the area, will not significantly detract from the open character of the area and is in keeping with the rural character of the area;

> The wind turbines because of their scale and height, character and appearance are considered to be contrary to the aims of these policies and would have a detrimental visual impact upon the nearby nationally designated Broads area which has been confirmed by Government as having the highest status of protection in relation to landscape and the rural nature of the area and the setting of the nearby villages.
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> 2. The application site lies within the local landscape character area G3: Ormesby and Filby Settled Farmland (Great Yarmouth Landscape Character Assessment April 2008) which is considered by the local planning authority to be an area which has a high sensitivity and is in close proximity to Broads (National Park); the local planning authority in assessing the application and supporting information in the context of Planning Policy 22 and its companion guide along with its own commissioned landscape character assessment, considers that the key characteristics of the landscape are fragile and would be adversely affected by wind turbine development and one which would have an adverse impact upon landscape settings of views in the siting of the wind turbines adjacent to and very near to designated landscapes.
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> 3. The application site lies within close proximity to Broadland Special Conservation Area/ Ramsar Site and the local planning authority, having due regard to its obligations under Regulation 48(1) of the Conservation (Natural Habitats etc) Regulations as amended (The Habitats Regulations), cannot conclude on the basis of the information submitted that the integrity of the site would not be compromised – with particular regard to the impact on pink footed geese and marsh harrier qualifying features of the Special Conservation Area – and that the proposal would not have a significant adverse effect on the sire as required by the regulations and Planning Policy Statement 9 and Planning Policy Statement 22 nor can it be concluded that there are no alternative solutions of imperative reasons of overriding public interest including those of a social or economic nature for doing so."

6. On 18 June 2010, the Claimant appealed against the Second Defendant's decision. It submitted that the Development Plan comprised the Regional Spatial Strategy (East of England Plan) ("the RSS"), the Norfolk Structure Plan and the Great Yarmouth Borough-Wide Local Plan. The renewable energy policies in the RSS – ENG1 and 2 – required local authorities to support and encourage the supply of energy from decentralised renewable and low carbon sources and stated that a minimum of 17% of the region's energy should be from renewable sources by 2020.

7. It contended that the proposed development was not contrary to local policies NNV2, NNV3 and NNV7, since the landscape and visual impacts were only significant in the immediate vicinity of the site, and so it was not in breach of the Development Plan.

8. In the alternative, it submitted that other material considerations strongly supported the grant of planning permission, referring in particular to PPS22 on renewable energy and the supplement to PPS1, which advises planning authorities on how to promote and encourage renewable energy generation.

9. The Claimant submitted that the development would contribute to regional and national renewable energy targets, reducing the regional deficit.

10. The Second Defendant, in its Statement and Comments on the grounds of appeal, indicated that the Royal Society for the Protection of Birds no longer objected to the development, and therefore it did not seek to uphold the third ground for refusal. In respect of the first two grounds, it set out the relevant national, regional and local policies, and referred to Government targets and regional targets for renewable energy generation. It made detailed submissions on the potential significant adverse impacts on the local landscape, including The Broads, and relied upon the Landscape and Visual Impact Assessment obtained from Land Use Consultants ("LUC").

11. The Claimant made detailed representations in reply, as well as commenting on the LUC's assessment.

12. The Inspector conducted a site visit on 27 October 2010, and dismissed the appeal in a decision letter dated 23 November 2010.

Law

13. In considering the grounds of appeal, I have applied the following principles of law.

14. The exercise of planning judgment and the weighing of the various issues are entirely matters for that decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28 and *Tesco v Secretary of State for the Environment* [1995] 1 W1.R 759, at 780. In the latter case Lord Hoffmann said "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State".

15. In *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 (a case concerning a challenge to a planning inspector's decision) Sullivan J. Said at [6] – [8]:

> "An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is *Wednesbury* perverse is, in principle, within the scape of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.
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> In any case, where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not

> simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ..."

16. In *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed) said, at [17]:

> "It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 2319, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18Aof the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with whom the other members of the House expressed their agreement. At p.44, 1459, his lordship observed:
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> > "In the practical application of sec. 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is

relevant to the application or fails properly to interpret it."

17. Lord Reed rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. He said, at [18], that development plans should be "interpreted objectively in accordance with the language used, read in its proper context". They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.

18. Lord Reed re-affirmed well-established principles on the requirement for the planning authority to make an exercise of judgment, particularly where planning policies are in conflict, saying at [19]:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)."

19. The Claimant also relied upon general public law principles, applicable in this context. A decision-maker must ask himself the right question and take reasonable steps to acquaint himself with the relevant information to answer it correctly: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, per Lord Diplock at 1065B. The decision-maker ought to take into account a matter which might cause him to reach a different conclusion – the use of the word "might" means that there must be a real possibility that he would reach a different conclusion if he did take that consideration into account: *Bolton MBC v Secretary of State for the Environment* (1990) 61 P & CR 343, per Glidewell LJ at 352-252.

20. I accept the First Defendant's submissions on the correct approach to reading Inspector's decision letters. A decision letter must be read (1) fairly and in good faith, and as a whole without an unduly legalistic or critical approach; (2) in a down-to-earth manner, and not as if it were a legal instrument; (3) as if by a well informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

21. Two citations from the authorities listed above are of particular relevance to the disputed issues in this case.

a) *South Somerset District Council*, per Lord Hoffmann at 84:

> "...as Forbes J. said in City of Westminster v Haymarket Publishing Ltd:
>
> > "It is no part of the court's duty to subject the decision maker to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph"
>
> The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy."

b) *Clarke Homes*, per Sir Thomas Bingham MR at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter withiout excessive legalism or exegetical sophistication."

22. The relevant principles in relation to the adequacy of reasons were summarised by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953:

> "35 It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in die planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

> 36 The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Grounds of appeal

Ground 1

23. The Claimant's first ground of appeal was that the Inspector had erred in law by failing to have due regard to the RSS for the East of England in making her decision, particularly in relation to renewable energy targets. Alternatively she had failed to provide proper reasons for her conclusions in respect of the RSS.

24. The Claimant submitted that there was no reference at all to the RSS and regional renewable energy targets in the decision letter; alternatively that there was no reference to the crucial question of the extent to which the development would meet the regional deficit. It invited the Court to conclude that the Inspector had mistakenly overlooked or misunderstood the effect of the decision in *R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government & Anor* [2010] EWHC 2866 (Admin)., which quashed the revocation of the RSS.

25. The background to this submission was that, on 27 May 2010, the First Defendant wrote to local planning authorities and the Planning Inspectorate outlining his intention to revoke RSSs. On 6 July 2010, the revocation was announced with immediate effect.

26. On 3 September 2010, the Claimant sent its "Final Comments" to the Inspector stating:

> "The Council quotes from the East of England Plan. On 6 July 2010 Regional Strategies were revoked with immediate effect. The Landscape Conservation Provisions within the East of England Plan are therefore not material in the determination of the appeal.
>
> Although policies within the Plan are no longer material planning considerations the regional renewable energy studies used to define targets within the Plan are capable of being material considerations and the Appellant believes that they are material considerations. Further, such studies have also informed the UK's National Renewable Energy Action Plan submission to the European Commission in July 2010."

27. On or about 3 November 2010, the Inspector wrote to the Claimant saying:

> "You will be aware that the East of England Plan was revoked by the Secretary of State on the 6th July 2010. Both the Council's consideration of the above application and the appellant's representations make reference to the provision of that plan as do further appeal submissions. Your comments are therefore sought as to how, if at all, you consider the revocation has affected the case you have put forward in support against the appeal proposal. If you wish to make any representations in this regard please do so within 7 days of the date of this email. A similar letter has been sent to the local planning authority."

28. The Claimant replied by email on 9 November 2010, stating, inter alia:

a) the decision of the Secretary of State to revoke the RSS had been quashed by the High Court;

b) the East of England RSS was therefore part of the Development Plan for the purposes of the appeal.

29. On 10 November 2010, the Chief Planning Officer emailed advice to all Inspectors on the effect of the *Cala Homes* decision, together with a copy of the judgment. The advice was also posted on the planning inspectorate's website on the same day. Annex A provided:

> "APPEALS, CALL-INS, RS – HOUSING SUPPLY AND OTHER AFFECTED POLICY AREAS
>
> 1. Following the Cala Homes decision, Inspectors will need to consider the RS as part of the development plan in all cases where it contains relevant policy, noting that the Secretary of State has made clear that his letter of 27 May 2010 foreshadowing the intended abolition of the RS still stands and should be taken into account as a material consideration. The key questions for an Inspector considering the potential relevance of intended RS abolition

to a piece of casework will be to identify whether the case turns on or refers to RS policy, and if it does, to identify what action to take in the interests of fairness to the parties.

2. In appeals submitted after the RS revocation announcement on 6 July 2010, the relevance of RS to the case may not be evident from the file as RS is unlikely to have been addressed by the parties. PINS casework staff are screening and identifying those where parties views need to be sought. In some cases applications will have been subject to appeal on the basis of the RS not being in place. Casework staff and Inspectors will find it difficult to judge whether there is an RS element in such cases. Para 9 of the PINS note makes clear that the parties should be asked to draw the Inspector's attention to the relevant policies that need to be considered in such cases.

3. There will inevitably already be cases with RS relevance already with Inspectors, and we particularly ask for your vigilance in identifying and considering those cases where RS policies may be relevant and whether to refer the question of relevance back to the parties if this has not already occurred.

4. The following approach has been developed to assist in determining which cases may merit reopening, which may be dealt with by a reference back to parties for comment and which cases may not need any additional action:

    (a) where RS policy has no material relevance because the decision is of limited (local only) scale and impact and the decision-maker can rely on local statutory development plan policy alone as would have been the case before 6 July 2010, no further action is required;

    (b) where it appears to an Inspector that RS policy may be material as a consequence of the significant (greater than local) scale or impact of the proposal, but the cases put by the parties make no reference to RS, the Inspector must refer to the parties, seeking as view as to the materiality and weight of RS policies. Chart should be informed.

    (c) where a decision relied on both local policy and RS policy on the same issue, it is possible that the local statutory development plan policy can be relied upon if by applying less weight to the RS policy the outcome does not change;

> (d) where both local policy and RS policy are relied upon on the same issue, but the RS is relied on to a greater extent and if as a result of applying reduced weight to the RS outcome is less certain or could change, then the parties' views should be canvassed (Chart should then be advised); and
>
> (e) where the parties' cases rely primarily on the RS, then the parties should be canvassed. (Chart should then be advised.)"

30. It was common ground before me that there was no requirement for this Inspector to seek further submissions from the parties before making her decision, as the RSS had already been addressed by them.

31. The Inspector issued her decision letter on 23 November 2011, which was 13 days after she had received the email from the Chief Inspector informing her of the *Cala Homes* decision and that any RSS should be treated as part of the Development Plan once more. This advice was confirmed by the letter dated 9 November emailed by the Claimants. Both counsel agreed that the *Cala Homes* decision had caused a stir in planning circles and had been widely reported at the time.

32. The Claimant conceded that it had been wrong to assert, in paragraph 3(c) of its Grounds of Claim, that the Inspector had taken her decision before the judgment in *Cala Homes*.

33. In the light of this evidence, I consider it is inconceivable that the Inspector mistakenly thought that the revocation of the RSS was still effective, and therefore disregarded it when making her decision.

34. Despite my finding that she must have known that the RSS was now to be treated as part of the Development Plan, did she nonetheless fail to take it into consideration? On my reading of the decision letter, she did take it into account. Although she did not refer to it by name, she expressly referred to the "regional" policy on the benefits of energy renewal, in paragraph 26 of her decision letter, which in my view, can only have been a reference to the RSS East of England Plan:

> "26. At national, regional and local levels there is a commitment to producing energy from renewable sources. The turbines would have an annual generating capacity of up to 2.5 MW each. Based on 30% generation this could supply 5500 homes which equates to about 14% of the needs in the Council's area. Over their estimate 25 year lifetime the turbines would also reduce the CO2, sulphur dioxide and nitrogen oxides emissions. The scheme would therefore play an important part locally in meeting the Government's targets for a renewable energy supply." (emphasis added)

35. The Claimant submits that the Inspector failed to take into account the material issues raised by the RSS because she did not refer to the regional targets. Nor did she refer

to the regional deficit in meeting the targets for renewable energy, and the extent to which this development would help to reduce the deficit.

36. In my judgment, paragraph 26 of the decision letter shows that she did take these issues into account. She identified the contribution which this development would make to the energy needs of the area (5500 homes/14% of the needs in the Council's area) and she accepted that it "would play an important part locally" in meeting "the Government's targets for a renewable energy supply". The phrase "the Government's targets" includes the specific targets in the RSS, as well as the more general national targets.

37. On the facts, this decision can be distinguished from the decision which was under consideration in *Resource Recovery Solutions (Derbyshire) Ltd v Secretary of State for Communities & Local Government & Anor* [2011] EWHC 1726 (Admin). Here the Inspector did refer to the RSS in her decision, and properly took it into account.

38. The Claimant submits that the Inspector's reasons were inadequate without a more detailed reference to the deficit and the contribution this development would have made to its reduction. It was argued that this was the central issue on the appeal, and the Claimant did not know why it had lost on this point. Applying the well-established principles set out in paragraphs 20 to 22 above. I consider that the reasons in the decision letter were adequate. I accept that they were not as legalistic or comprehensive as the reasons given in the other examples of decision letters shown to me, but nonetheless they met the minimum standard required by law.

39. In my judgment, the principal issue in the appeal was whether, despite the benefits which it would provide, planning permission for the development should be refused. It would be perfectly clear to an informed reader of the decision letter that the reason why planning permission should not be granted was because of the "material harm" it would cause "to the character and appearance of the area" (paragraph 28). As the Inspector correctly observed in paragraph 4, "the main issue is the effect of the proposals on the character and appearance of the locality".

Ground 2

40. The Claimant submitted that the Inspector failed to apply the correct test for assessing landscape harm contained in the Second Defendant's landscape policies, namely, local plan policies NNV2, NNV3, NNV5 and NNV7.

41. The landscape policies impose certain limitations on development in specified landscape areas. These are: landscape important to the Broadland scene (NNV2); landscape important to the coastal scene (NNV3) and landscape important to the setting of settlements (NNV5). The Claimant submitted that, in respect of each of the landscape policies, development will only be permitted where proposed development would not have a significant adverse impact on the valued features of the landscape in question.

42. The Claimant submitted that the Inspector had applied a lower test, namely, "adverse impact", because she stated, in paragraph 10 of her decision letter:

> "The combination of the above factors means that the development because of the character of the area and diverse appearance, size and speeds of existing turbines would have an adverse impact on the appearance of the locality. The Proposal would therefore be contrary to the objectives of policies NNV2, NNV3, NNV5 and NNV7 of the Great Yarmouth Borough Wide Local Plan." (emphasis added)

The Claimant submitted that she reached her conclusion at this stage, as shown by the final sentence, and therefore the correct formulation of the test in paragraph 28 could not save the decision.

43. The First Defendant agreed that NNV2 and NNV5 refer to "significant adverse impact" while NNV3 only permits development that would not "significantly" detract from the open character of the area. However, NNV7 which was also referred to by the Inspector does not require significant adverse impact; it only permits developments that are "in keeping with the rural character of the area".

44. The First Defendant submitted that, when the decision letter was read as a whole, as the case law confirmed that it should be, there could be no doubt that the Inspector regarded the visual and landscape harm as significant. I agree with the Defendant's submission.

45. In her conclusions, in paragraph 28, the Inspector concluded that "the adverse impact on and harm to the character and appearance of the area surrounding the appeal site is so significant that even when taking account of the acknowledged benefits of the proposal, the need for renewable energy and the lack of substantial objection on other grounds, is sufficient to warrant refusal of the proposal" (emphasis added).

46. Furthermore, the Inspector made specific findings which made it clear that she viewed the visual and landscape harm as significant:

a) "in this case the more confined nature of the surroundings, particularly from close and intermediate views would emphasise the discordant scale, height and appearance of the 4 turbines." (paragraph 8);

b) "At present there are 3 different turbine sites within 5 km of each other....The 4 new turbines would also fall within this 5 km area and introduce a fourth wind farm development. The landscape evaluation accepts that there would be some cumulative impacts from both static viewpoints and in sequence when travelling. The tourist nature of the area means that it is not just from the major roads that these impacts would be experienced but also from the minor lines linking the villages and local attractions by road and by boat from people on the plentiful waterways. There would be cumulative impacts from The Broads which would be likely to impair people's enjoyment of the undeveloped nature of the national park." (paragraph 9);

c) "in this particular locality the proximity of so many [turbines] together with their varying inter-visibiliy would unacceptably change the delicate balance that exists between the turbines and their natural surroundings. It would compromise the visual amenity of residents, workers and travellers in the

locality." (paragraph 10).

47. On a reading of the decision as a whole, the Claimant's submission that the Inspector failed to apply the correct test is unarguable. Applying the guidance given in *Clarke Homes*, per Sir Thomas Bingham MR at 271-2, on "a straightforward down-to-earth reading of [her] decision letter without excessive legalism or exegetical sophistication", there was no room for "genuine as opposed to forensic doubt" that the Inspector had concluded that the development would result in significant adverse impact within the meaning of the landscape policies.

Ground 3

48. The Claimant's third ground of appeal was that the Inspector failed to give "primacy" to national policy, in circumstances where there was a conflict between local plan policies and national policy.

49. The PPS1 Supplement provides:

> "11. ....in considering planning applications before Regional Spatial Strategies (RSSs) and Development Plan Documents (DPDs) can be updated to reflect this PPS, planning authorities should have regard to this PPS as a material consideration which may supersede the policies in the development plan.
> …
> 20. ...Planning Authorities should…ensure any local approach to protecting landscape and townscape is consistent with PPS22 and does not preclude the supply of any type of renewable energy other than in the most exceptional circumstances."

50. PPS1 states, at paragraph 22, that Development Plan policies should "seek to promote and encourage, rather than restrict, the use of renewable resources (for example, by the development of renewable energy)". PPS22 (at Key Principle (ii)) repeats this requirement and at Key Principles (i) and (v)) adopts a generally permissive stance towards renewable energy development.

51. The Claimant submitted that the local landscape policies are inconsistent with PPS1, paragraph 22, because they restrict development. In particular, NNV7 prohibits development in the countryside unless it is in keeping with the rural character of the area. A wind turbine development by its nature is unlikely to be in keeping with the rural character of the area so that if NNV7 were to be applied without the necessary regard to the provisions of PPS22 and the Supplement to PPS1 it would effectively create a bar to wind farm development in rural areas.

52. In my judgment, the Claimant's analysis was misconceived, for the reasons given by the First Defendant.

53. First, the landscape policies are part of the Great Yarmouth Borough-Wide Local Plan. This is part of the statutory development plan as defined by s. 38(3) of the Planning and Compulsory Purchase Act 2004 read with the transitional provisions

contained in that Act S. 38 (6) of that Act provides that "[i]f regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise". This provision gives effect to what is called the plan- led system. There is thus a statutory presumption in favour of the statutory development plan, here that includes the local plan and its policies on landscape. In contrast, national planning policies (including PPS22 and the PPS1 supplement) are merely other material considerations.

54. The position was summarised by Lindblom J. in *Cala Homes (South) Ltd v Secretary of State for Communities and Local Government and Winchester City Council* [2011] 1 P. & C.R. 22 at paras. 27 - 28, 32 and 48:

> "27. In England (as elsewhere in the United Kingdom) the planning system is still "plan-led". In statutory—as opposed to policy—terms, the priority to be given to the development plan in development control decision-making is encapsulated in s. 38 (6) of the 2004 Act, which provides:
>
> > "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."
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> 28. Section 38(6) must be read together with s.7G(2) of the 1990 Act. The effect of those two provisions is that the determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. The provision then equivalent to s.38{6) in the Scottish legislation (S.18A of the Town and Country Planning (Scotland) Act 1972 , the counterpart of s.54A of the 1990 Act) was examined and explained by the House of Lords in *Edinburgh City Council* v *Secretary of State for Scotland [1997] 1* W1.R. 1447. In his speech in that case Lord Hope said this (at pp. 1449H-1450G):
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> > "Section 18A of the Act of 1972 ... creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972 [the provision in the Scottish legislation equivalent to section 70(2) of the 1990 Art]. Under the previous law, prior to the introduction of section I8A into that Act, the presumption was in favour of development ... it is not in doubt that the purpose of the amendment introduced by section I8A was to enhance the status, in this exercise of judgment, of the development plan. It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not,

> even with the benefit of section 18A, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in Simpson v. Edinburgh Corporation 1960 S.C. 313 , 318, 'slavishly to adhere to' it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.
>
> The presumption which section 18A lays down is a statutory requirement It has the force of law behind it But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility lies with the decision-taker. The function of the court is, as before, a limited one. All the court can do is to review die decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision-taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which be was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control".

...

32. ...a statement of national planning policy, however made, is capable of being a material consideration in the determination of a planning application. This was recognised by Lord Hope in the passage of his speech in *City of Edinburgh* which I have set out above (see, for example, the decision of Carnwath J., as he then was, in *R. v Bolton MBC Ex p. Kirkman* [1998] Env. L.R. 560 (at p.567); (1998) 76 P.&C.R. 548)

...

48. Four features of the plan-led system are salient in the decision of the House of Lords in *City of Edinburgh:* first, that both the relevant provisions of the development plan and other

> material considerations must be taken into account by the decision-maker (see what was said by Lord Clyde in his speech at p.457F-H, citing Lord Guest's distinction between having regard to the plan and slavish adherence to it in *Simpson* v *Edinburgh Carp* 1960 S.C. 313, at pp.318-319); secondly, that the development plan has "priority" in the determination of planning applications (see what was said by Lord Clyde at p.l458B); thirdly, that this ''priority" is not to be equated to a "mere mechanical preference", for there remains "a valuable element of flexibility" and if there are considerations indicating the plan should not be followed a decision contrary to its provisions can properly be made (see what was said by Lord Clyde at p,1458F); and fourthly, that s.38(6) leaves to the decision-maker the assessment of the facts and the weighing of the considerations material to the decision (see what Lord Clyde said at p,1458G-H). This exercise is a practical one. It entails for the maker of the decision the question "whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it" (see Lord Clyde's speech at P.1459D-H). As was acknowledged by Lord Hope (at p,1450D) it may be, for example, that some of the provisions of the development plan "become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant". When this happens, the balance between the provisions of the plan and the considerations pulling against it is for the decision-maker to strike (ibid.)."

55. Thus the legal position is that the statutory presumption lies in favour of the statutory development plan unless material considerations indicate otherwise. National planning policy is a material consideration. Where national policies change, this can amount to a material consideration of sufficient weight to reach a decision other than in accordance with the statutory development plan but this is not mandatory; rather it involves a balancing exercise for the decision-maker, in this case the Inspector.

56. Second, the Claimant has misinterpreted the PPS1 supplement. It does not "require" the Inspector to give "primacy" to national policy over local policy. It provides that national policies are a material consideration which "may" supersede the policies in the development plan" (paragraph 11). They will not necessarily do so. This recognises that what is involved is a balancing exercise between different policies.

57. The submissions from the Claimant and the Second Defendant set out the relevant national, regional and local policies in detail and made it abundantly clear to the Inspector that there were competing policy considerations.

58. The Inspector had regard to the national policies, referring to PPS22 by its title in paragraph 25, and to the national policies generally in paragraphs 26 to 28. It was not necessary to make express reference to the PPS1 supplement in circumstances where she had full regard to PPS22. Moreover, it is trite law that express reference need not be made to every relevant national planning policy in an appeal decision: see *Hatfield Construction Ltd* v. *Secretary of State for the Environment* [1983] JPL 605; *Boulevard Land*

Ltd v. *Secretary of State for the Environment* [1998] JPL 983. Nor is it necessary to rehearse every argument relating to each matter because the decision letter is addressed to parties who are well aware of the issues: *South Somerset District Council*, per Lord Hoffmann at 84.

59. In my judgment, the Inspector must have been well aware that her task was to weigh up the benefits of a proposal to create renewable energy, reflecting national and regional policies, against the visual harm it would cause, in an area where development was restricted by local policies designed to protect the character of the area and the coastal and Broadland scene. On my reading of the Inspector's decision letter, she had regard to all the relevant policies, and carried out the requisite balancing exercise. She concluded, in the exercise of her judgment, that:

> "the adverse impact on and harm to the character and appearance of the area surrounding the appeal site is so significant that even when taking account of the acknowledged benefits of the proposal, the need for renewable energy and the lack of substantial objection on other grounds, is sufficient to warrant refusal of the proposal." (paragraph 28)

60. Thirdly, I do not accept the Claimant's submission that the Inspector ought to have disregarded the local landscape policies in the light of the national policies in PPS1, paragraph 22 and the PPS1 supplement, paragraph 20. It is clear from the wording of the local landscape policies that they do not "preclude the supply of any type of renewable energy" (PPS1 Supplement, paragraph 20). This is demonstrated by the fact that three wind farm developments have been permitted within a 5 km radius of the proposed development site. The Inspector gave careful consideration, in paragraph 24, to the inspector's decision on one of these sites (Somerton). In paragraph 8, she acknowledged that "in general terms the landscape is one which can and has accommodated large structures such as the turbines to the north" but she distinguished the appeal site because "the more confined nature of the surroundings, particularly from close and intermediate views, would emphasise the discordant scale, height and appearance of the 4 turbines".

61. As I have already explained, as a matter of law it is not correct to assert that the national policy promoting the use of renewable resources in PPS1 paragraph 22 negates the local landscape policies or must be given "primacy" over them. As the First Defendant submits, this is simply a case of policies pulling in different directions: harm to landscape and the benefits of renewable energy. The Inspector was required to have regard to both sets of policies and to undertake a balancing exercise.

62. The First Defendant also rightly refers to other passages in PPS22 and "Planning for Renewable Energy: A Companion Guide to PPS22" which recognise that renewable energy development near National Parks and Areas of Outstanding Natural Beauty may have an unacceptable impact upon them, and may be a material consideration to take into account (although the policy cautions against creating a 'buffer zone' where development is not permitted). The Broads is one of the nationally designated areas which enjoy "the highest status of protection in relation to landscape and scenic beauty": PPS7, paragraph 21. The National Park was directly to the west and north of the appeal site, whilst the Norfolk Coast Area of Outstanding Natural Beauty lies about 3 km to the north (Decision letter, paragraph 7).

63. In conclusion, I do not consider that the Claimant has succeeded in identifying any error of law in the Inspector's decision-making process under its third ground of appeal. This was a legitimate exercise of planning judgment by the Inspector with which the Claimant disagrees. That is not a basis for a successful challenge.

64. For the reasons set out above, the claim is dismissed.