

Appendix 5:



Neutral Citation Number: [2015] EWHC 1663 (Admin)

Case No: CO/5738/2014

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

Bristol Civil Justice Centre,
2 Redcliff Street, Bristol, BS1 6GR

Date: 12/06/15

Before :

MR JUSTICE HICKINBOTTOM

Between :

EXETER CITY COUNCIL

- and -

Claimant

**(1) SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL GOVERNMENT
(2) WADDETON PARK LIMITED
(3) THE R B NELDER TRUST**

Defendants

Stephen Whale (instructed by **Exeter City Council Legal Services**) for the **Claimant**
Sasha Blackmore (instructed by the **Government Legal Department**)
for the **First Defendant**
Charles Banner (instructed by **Stephens Scown LLP**) for the **Second and Third Defendants**

Hearing date: 8 June 2015

Approved Judgment

Mr Justice Hickinbottom :

Introduction

1. This claim concerns the proposed construction of dwellings on Land at Home Farm, Church Hill, Pinhoe, Exeter, Devon (“the Site”). An application for planning permission by the Second and Third Defendants (“the Developers”) was refused by the Claimant planning authority (“the Council”); but, on appeal, after a three-day inquiry, on 29 October 2014 an inspector appointed by the Secretary of State, Ms Lesley Coffey BA Hons, BTP, MRTPI (“the Inspector”), allowed the appeal and granted planning permission for 120 residential dwellings, and associated infrastructure and open space.
2. In this application under Section 288 of the Town and Country Planning Act 1990 (“the 1990 Act”), the Council seeks to quash that decision.
3. Before me, Stephen Whale appeared for the Council, Miss Sasha Blackmore for the Secretary of State and Charles Banner for the Developers. At the outset, I thank them all for their helpful contributions.

The Legal Background

4. The relevant legal background is largely uncontroversial. In relation to planning determinations generally, whether made by a local planning authority or by an Inspector on behalf of the Secretary of State on appeal, the following propositions, relevant to this claim, are well-established.
 - i) Section 70(2) of the 1990 Act provides that, in dealing with an application for planning permission, a decision-maker (i.e. a local planning authority, or an inspector who conducts an appeal on behalf of the Secretary of State) must have regard to the provisions of “the development plan”, as well as “any other material considerations”.
 - ii) Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that:

“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.”

That requires the proposed development to be in accordance with the development plan looked at as a whole, rather than with every policy in the plan, which may well pull in different directions and some of which may be more relevant to a particular application than others (R v Rochdale Metropolitan Borough Council (2001) 81 P&CR 27 at [44]-[50] per Sullivan J (as he then was), and R (Hampton Bishop Parish Council) v Herefordshire Council [2014] EWCA Civ 878 at [33] per Richards LJ). Section 38(6) thus raises a presumption that planning decisions will be taken in accordance with

the development plan, looked at as a whole; but that presumption is rebuttable by other material considerations.

- iii) “Material considerations” in this context include statements of central government policy which, since 27 March 2012, has been largely set out in the National Planning Policy Framework (“the NPPF”). On 6 March 2014, the Secretary of State launched a web-based Planning Practice Guidance (“the PPG”), which replaced a plethora of earlier guidance documents and which is regularly updated. That too is a material consideration.
- iv) Whilst he must take into account all material considerations, the weight to be given to such considerations is exclusively a matter of planning judgment for the decision-maker, who is entitled to give a material consideration whatever weight, if any, he considers appropriate, subject only to his decision not being irrational in the sense of Wednesbury unreasonable (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780F-G). The courts have consequently left such decisions to be taken by the appointed decision-maker on the basis of guidance promulgated by the Secretary of State (see, e.g., R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 at [60] per Lord Nolan, [129] per Lord Hoffman and [159] per Lord Clyde).
- v) A decision-maker must interpret policy properly. The true interpretation of such policy, including the NPPF, is a matter of law for the court (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13, and Europa Oil & Gas Limited v Secretary of State for Communities and Local Government [2014] EWCA Civ 825 at [13] per Richards LJ). Where a decision-maker has misunderstood or misapplied a plan or other policy, that may found a challenge to his decision, if it is material, i.e. if his decision would or might have been different if he had properly understood and applied the policy. If it is immaterial – because the decision would inevitably have been the same absent the identified error(s), then the court has a discretion not to quash the decision (Simplex GE (Holdings Limited) v Secretary of State for the Environment (1989) P&CR 306 at pages 324-7 per Purchas LJ). Whether the interpretation of the PPG is the subject of the same objective assessment by the court is moot before this court: Mr Banner for the Developers contends that the guidance is akin to the supporting text of a development plan, which falls short of policy so that it is not to be the subject of objective interpretation by the court and its application can only be challenged on grounds of rationality (R (Cherkley Campaign Limited) v Mole Valley District Council [2014] EWCA Civ 567 at [16] per Richards LJ). Mr Whale for the Council and Miss Blackmore for the Secretary of State submit that the PPG is subject to the Tesco v Dundee principles, and it is for this court to construe it as a matter of law. I deal with that issue below (see paragraph 43).
- vi) An inspector’s decision letter cannot be subjected to the same exegesis that might be appropriate for a statute or a deed. It must be read as a whole, and in a practical, flexible and common sense way, in the knowledge that it is addressed to the parties who will be well aware of the issues and the arguments deployed at the inspector’s inquiry, so that it is not necessary to rehearse every argument but only the principal controversial issues (see

Seddon Properties v Secretary of State for the Environment (1981) 42 P&CR 26 at page 28 per Forbes J; South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80 at pages 82H, 83F-G per Hoffman LJ; and South Bucks District Council v Porter (No 2) [2004] UKHL 33 at [36] per Lord Brown).

- vii) Although an application under section 288 is by way of statutory appeal, it is determined on traditional judicial review grounds.
- viii) It is only in limited circumstances in which it can be contended that a decision-maker has erred in law by reference to a point not raised before him: an argument that an inspector failed to take into account a consideration not raised at the inquiry will only be allowed if the interests of justice require it (South Oxfordshire District Council v Secretary of State for the Environment, Transport and the Regions [2000] 2 All ER 667 at pages 677g-678d per George Bartlett QC sitting as a Deputy High Court Judge, and Humphris v Secretary of State for Communities and Local Government [2012] EWHC 1237 (Admin) at [23] per Ouseley J).
- ix) Because the exercise of discretion involves a series of planning judgments, in respect of which an inspector or other planning decision-maker has particular experience and expertise, “The court must be astute to ensure that such challenges are not used for what is, in truth, a rerun of the arguments on the planning merits”: anyone who challenges a planning decision on Wednesbury grounds faces “a particularly daunting task” (Newsmith v Secretary of State for the Environment, Transport and the Regions [2001] EWHC 75 (Admin) at [6]-[8] per Sullivan J, as he then was).

The Issues before the Inspector

- 5. In paragraph 5 of her decision letter, the Inspector identified four main issues for her determination, as follows.
 - i) The effect of the proposal on the landscape setting of Exeter. She considered this issue in paragraphs 12-29 of her decision letter. The Site falls within an area designated as a Landscape Setting Area within Policy LS1 of the Exeter Local Plan First Review (2005) and Policy CP16 of the Exeter City Council Core Strategy (2012). The Inspector found that the proposed development (a) was not in accordance with Policy LS1 (a blanket policy that effectively limits development to existing urban areas), but that that policy was not a criteria-based policy in terms of the NPPF and was out-of-date, so that it could be accorded little weight (paragraph 13); and (b) would not in fact harm the landscape setting of Exeter and would comply with Policy CP16 of the current Core Strategy (paragraph 29). Those findings are not challenged by the Council.
 - ii) The effect of the proposal on highway safety and traffic. The Inspector concluded that the proposal would not have an adverse impact on highway safety and traffic (paragraph 36).

- iii) Whether in the light of the development plan, national guidance and other material considerations, the proposal would be a sustainable form of development. Within that issue, there were the following two sub-issues: (a) whether the Council could demonstrate a five year supply of deliverable housing land (which turned exclusively upon how new student accommodation was taken into account), and (b) irrespective of whether the Council could demonstrate a five year supply of housing, whether, in the light of the relevant policies – and benefits and harm of the proposal, as the Inspector found them to be – planning permission should be granted. The Claimant’s grounds of challenge now focus on these issues. Briefly, the Inspector found that (a) on the evidence before her, student accommodation should not be included as part of the housing supply (paragraph 50), and the Council had not demonstrated a five year supply of housing; and (b) the proposal would be socially, environmentally and economically sustainable (paragraph 76).
- iv) Whether the proposal would set a precedent for other development which could harm the character of Exeter City. The Inspector found that the proposal would not conflict with any national or local policy (except the out-of-date Policy LS1 which was of little weight), and was sustainable (paragraph 77). She concluded that the proposal should be approved “in accordance with the guidance at paragraph 14 of the NPPF”; and would not set an undesirable precedent for other development that did conflict with relevant policies (also paragraph 77).

The Grounds of Challenge

- 6. Mr Whale seeks to challenge the Inspector’s decision to grant planning permission, on two grounds.
- 7. First, he submits that the Inspector erred in three, related respects in relation to housing requirement/supply, which Mr Whale rolls up in Ground 1:
 - i) The Inspector proceeded on the basis that paragraph 47 of the NPPF “requires local plans to meet the full, objectively assessed needs and affordable housing in the housing market area”. It does not. It requires those needs to be met only “as far as is consistent with the policies set out in the [NPPF]...”.
 - ii) Whilst it was common ground that the housing requirement in the Core Strategy – of “at least 12,000” – did not include the need to provide housing for students, the Inspector failed to take into account the fact that the adopted housing requirement did include “an element of growth in relation to those students resident within general market housing in 2006” (paragraph 27(b) of the Claimant’s Statement of Facts and Grounds).
 - iii) The Inspector erred in not taking into account student accommodation as part of the housing *supply*. Whether or not student accommodation needs form part of the housing *requirement*, “new” student accommodation can be included as part of the housing *supply* in satisfaction of the identified requirement. Nothing in either the NPPF or the PPG requires or even suggests otherwise.

8. Second, as Ground 2, Mr Whale submits that the Inspector erred in adopting tests for inclusion of student accommodation in the housing supply assessed as fulfilling the identified requirement – not satisfied in this case – namely such accommodation can be included if (i) the student population is stable, and (ii) the number of general market dwellings occupied by students declines as a consequence of the provision of student accommodation. There are no such tests in paragraph 3.38 of the PPG or elsewhere.
9. The Secretary of State and Developers deny that there is any merit in any of these grounds and sub-grounds – but, even if the grounds were to be made good, the errors by the Inspector would be immaterial, in the sense that her decision would inevitably have been the same even if she had acted as the Council contend she ought to have done. In those circumstances, they submit that, even if I am persuaded that the Inspector acted unlawfully, I should exercise my discretion and not quash her decision.

Housing Requirements

10. Before I turn to the grounds of challenge, it might assist to refer briefly to different concepts that each plays a part in consideration of housing requirements. I recently considered three concepts – household projections, policy off objective assessment of need for housing, and policy on housing requirement – in R (Gallagher Homes Limited and Lioncourt Homes Limited) v Solihull Metropolitan Borough Council [2014] EWHC 1283 (Admin) at [37]:

“(i) Household projections: These are demographic, trend-based projections indicating the likely number and type of future households if the underlying trends and demographic assumptions are realised. They provide useful long-term trajectories, in terms of growth averages throughout the projection period. However, they are not reliable as household growth estimates for particular years: they are subject to the uncertainties inherent in demographic behaviour, and sensitive to factors (such as changing economic and social circumstances) that may affect that behaviour. Those limitations on household projections are made clear in the projections published by the Department of Communities and Local Government from time-to-time (notably, in the section headed ‘Accuracy’).

(ii) Full Objective Assessment of Need for Housing: This is the objectively assessed need for housing in an area, leaving aside policy considerations. It is therefore closely linked to the relevant household projection; but is not necessarily the same. An objective assessment of housing need may result in a different figure from that based on purely demographics if, e.g., the assessor considers that the household projection fails properly to take into account the effects of a major downturn (or upturn) in the economy that will affect future housing needs in an area. Nevertheless, where there are no such factors,

objective assessment of need may be – and sometimes is – taken as being the same as the relevant household projection.

(iii) Housing Requirement: This is the figure which reflects, not only the assessed need for housing, but also any policy considerations that might require that figure to be manipulated to determine the actual housing target for an area. For example, built development in an area might be constrained by the extent of land which is the subject of policy protection, such as Green Belt or Areas of Outstanding Natural Beauty. Or it might be decided, as a matter of policy, to encourage or discourage particular migration reflected in demographic trends. Once these policy considerations have been applied to the figure for full objectively assessed need for housing in an area, the result is a ‘policy on’ figure for housing requirement. Subject to it being determined by a proper process, the housing requirement figure will be the target against which housing supply will normally be measured.”

Ground 1: The Housing Requirement Ground

11. “Sustainable development” is at the heart of the NPPF. There is no specific definition of “sustainable development”, but it is to be defined in terms of development which meets the needs of the present without compromising the ability of future generations to meet their own needs. That is reflected in the first words of the Ministerial Foreword to the NPPF, which state:

“The purpose of planning is sustainable growth.

Sustainable means ensuring that better lives for ourselves don’t mean worse lives for future generations.

Development means growth. We must accommodate the new ways in which we will earn our living in a competitive world. We must house a rising population...”.

12. It is said in paragraph 6 of the NPPF that the policies set out in paragraphs 18-219, taken as a whole, constitute the Government’s view of what sustainable development means in practice for the planning system. “Sustainability” therefore inherently requires a balance to be made of the factors that favour any proposed development, and those that favour refusing it, in accordance with the relevant national and local policies. However, the NPPF provides for a number of presumptions as to where the balance might lie.

13. Paragraph 14 provides:

“At the heart of the [NPPF] is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.

For **decision-taking** this means [unless material considerations indicate otherwise]:

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless
 - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
 - specific policies in this Framework indicate development should be restricted...”.

14. Part 6 of the NPPF deals with, “Delivering a wide choice of high quality homes”. The identification of sites for future housing provision is dealt with in paragraphs 47-50 of the NPPF, which provide as follows:

“47. To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
- identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
- identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;
- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
- set out their own approach to housing density to reflect local circumstances.”

48. Local planning authorities may make allowance for windfall sites in the five-year supply
49. Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.
50. To deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable, inclusive and mixed communities, local planning authorities should:
 - plan for a mix of housing based on current and future demographic trends, Markey trends and the needs of different groups in the community (such as, but not limited to, families with children, older people, people with disabilities, serviced families and people wishing to build their own homes;
 - identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand...”
15. This guidance informs the relevant housing requirement to be used for both the strategic plan-making function of a local planning authority when (e.g.) preparing a Local Plan Review, and the function of decision-making in respect of a particular planning application when it informs the approach of the decision-maker. In the latter case, it is particularly relevant in the absence of a demonstration of a particular level of supply of deliverable housing sites. If the authority cannot demonstrate a five year plus buffer supply of housing land at the time of a planning application for housing development, then that weighs in favour of a grant of permission. In particular, in those circumstances, (i) relevant housing policies are to be regarded as out-of-date, and hence of potentially restricted weight; and (ii) there is a presumption of granting permission unless the adverse impacts of granting permission “significantly and demonstrably” outweigh the benefits, or other NPPF policies indicate that development should be restricted in any event, sometimes referred to as a “tilted balance”. However, that presumption is, again, not irrebuttable: it may be rebutted by other material considerations.
16. Turning to local policy (the development plan), Core Strategy Policy CP1 requires delivery of at least 12,000 dwellings in the plan period 2006-26. As a housing requirement, that figure was not in issue before the Inspector.
17. Exeter is a thriving university city, with a planned substantial increase in numbers of students (over 19,300 in 2013-14, compared with just over 13,300 in 2006-07). Students, of course, require accommodation, either communal (usually halls of residence restricted to student occupation) or private non-communal (usually in the form of self-contained flats with a cluster of bedrooms which, if not used as student accommodation, could and would be used as general private housing stock). Students are of generally narrow age range and, in accommodation terms, have a rapid and self-replacing turnover. However, the Council has always recognised that, in the light of the expansionist plans of the university, despite university plans for additional communal accommodation, the number of students living in private housing would

increase so that the Council need to approve and increase the stock of houses of multiple occupation (see, e.g., paragraph 3.5 of the Council Planning Member Working Group Minutes 9 February 2010).

18. Before the Inspector, it was uncontroversial as to how student accommodation had been treated in arriving at the housing requirement figure of at least 12,000. As recorded by the Inspector (in paragraph 38 of her decision letter), the parties agreed that the housing requirement figure “did not include provision for student accommodation needs arising from the growing number of university students within Exeter”. That is made clear from the Council’s Urban Capacity Study 2006-26 (September 2006), which said that the Regional Spatial Strategy target (from which the 12,000 figure was derived) “does not take into account the need to provide housing for students”. The fact that future demand for student housing was not taken into account in that figure was expressly referred to in paragraph 20 of the Report on the Examination of the Council’s Core Strategy Development Plan Document (November 2011) (“the CS Inspector’s Report”), prepared of course by a different inspector appointed by the Secretary of State.
19. Nevertheless, the housing requirement figure was informed by demographic trends, in the form of (South West) regional household formation rate projections for the relevant period. Although pan-regional, an element of the increase as a result of these projections is attributable to increased student population, at least so far as non-communal accommodation is concerned (communal accommodation not featuring in the projections). This too was properly recorded by the Inspector in paragraph 39 of her decision letter:

“... The Council explained that although the housing requirement did not include specific provision for student housing, it projected the future housing needs of those students within market housing based on the household formation rate for their age demographic. Due to the majority of students falling within the 18-22 age group there would be relatively high household formation rate throughout the plan period. As such, the adopted housing requirement includes an element of growth in relation to those students resident within general market housing in 2006.”
20. However:
 - i) The household formation projected rate is a background rate, which does not reflect any particular increase in student population in a university city such as Exeter; and, especially, does not reflect the increase in student population in such a city as a result of known expansionist plans of the university. The objective assessment of need for housing (and thus the housing requirement) in this case did not therefore take into account the fact that, for Exeter, the unmodified housing projection figure would be inappropriate as it would not reflect the peculiar circumstances of the student population in Exeter.
 - ii) Before the Inspector, the Council did not attempt to calculate how that demographic trend was reflected in the housing requirement figure in quantitative terms, i.e. it did not rely upon a specific proportion of the housing

requirement being attributable to student accommodation because of the demographic input.

21. Before the Inspector, the parties' respective positions with regard to the inclusion of student accommodation units within the housing supply figure (as contributing towards satisfaction of the housing requirement figure of at least 12,000) were as follows.
22. The Council submitted that all non-communal student accommodation schemes for the relevant period should be included: it accepted that communal accommodation ought not to be included both on principle and because (as I understand it) there was in fact no new communal student accommodation in the period. This was a change in approach by the Council, which had not included any student accommodation in the supply figures prior to 2012-13, with the result that the 2013 Strategic Housing Land Availability Assessment ("SHLAA") showed a shortfall of supply against requirements of 749 dwellings. By retrospectively including 914 historic completions of private student accommodation units, the 2014 Draft SHLAA before the Inspector showed a surplus of 169 dwellings.
23. It made this accounting change because it considered the inclusion of student accommodation in this manner was in line with the PPG, which had been first published in March 2014. Paragraph 3.38 of the PPG, alongside the side note "Related policy [NPPF] Paragraph 47", and under the heading "How should local planning authorities deal with student housing?", provides:

"All student accommodation, whether it consists of communal halls of residence or self-contained dwellings, and whether or not it is on campus, can be included towards the housing requirement, based on the amount of accommodation it releases in the housing market. Notwithstanding, local authorities should take steps to avoid double counting."
24. The Council also relied upon the CS Inspector's Report which, having expressed support for the requirement figure of at least 12,000, said (at paragraph 21):

"... It is debateable whether or not the new privately developed student units should be counted towards Exeter's 5 year housing land supply. Clusters of self-contained accommodation, perhaps with individual studio units and a shared kitchen, should be counted in the housing supply, whereas communal accommodation (e.g. traditional halls of residence) should not. More certainly, growing student numbers add to arguments for the plan to provide sufficient new land for housing for the 5 years and secure the maximum housebuilding for the full plan period."
25. Thus, the Council submitted that all non-communal student accommodation should be included in the supply figure.
26. On the contrary, the Developers submitted that none should, or indeed, could be included, because there was no specific provision for student accommodation in the

housing requirement figure – and to include any such accommodation in the supply figure would undermine the whole purpose of the requirement of the NPPF that housing needs are generally met, and would mask the need for general housing in Exeter. It would be irrational to exclude student housing for requirement purposes, but to include it in the figures used for housing supply in satisfaction of that requirement.

27. The Inspector dealt with this issue in paragraphs 37-50 of her decision letter. She did not agree fully with the contentions of either party.
28. She clearly understood that the adopted housing requirement reflected an element of growth in relation to student accommodation because of the demographic projections used, as explained above – she expressly makes that point at paragraph 39 of her decision letter – but it was agreed that student accommodation requirements did not form part of the objectively assessed need for housing; and, in the absence of any evidence as to the proportion of the adopted requirement that reflected student accommodation simply because of the demographic trends that had been taken into account, the Inspector was not satisfied that the provision of student accommodation in itself contributed to any specific extent to meeting the identified housing requirement (paragraph 49).
29. However, nor was she convinced by the Developers’ submission that that was the end of the matter.
30. Consistent with paragraph 3.38 of the PPG, she went on to consider whether, on the evidence in this particular case, it was appropriate to count any part of the supplied student accommodation as housing supply against the adopted housing requirement, because the provision of student accommodation had (e.g.) released housing that had been used by students into the general housing market. She found that there was no evidence of such release; and, indeed, since the commencement of the plan period, 700 additional general market dwellings were now occupied by students (paragraph 46 and 47). There appeared to be no other justification for the inclusion of any of the student accommodation. She therefore considered the inclusion of student accommodation as part of housing supply in this case would not be consistent with paragraph 3.38 of the PPG.
31. Furthermore, she was not persuaded by reliance on the CS Inspector’s Report, because (i) the basis for that inspector’s view in relation to the inclusion of student accommodation was unclear, although that inspector had understood that the university intended to meet most of its future student housing needs in communal accommodation on university-owned land; and (ii) it pre-dated the NPPF (paragraph 47 of which, she said, “required local plans to meet the full, objectively assessed need...”) and the PPG (paragraphs 48-49).
32. For those reasons, the Inspector concluded that “student accommodation should not be included as part of housing land supply” (paragraph 50).
33. As I have indicated, Mr Whale submits that the Inspector erred in three respects.
34. First, he says that the Inspector erred in proceeding on the basis that paragraph 47 of the NPPF “requires local plans to meet the full, objectively assessed needs and

affordable housing in the housing market area” (paragraph 49 of her decision letter, referred to in paragraph 31 above), whereas paragraph 47 requires a plan to meet those full, objectively assessed needs for market only “as far as is consistent with the policies set out in this Framework...”.

35. There is nothing in this complaint. Paragraph 47 reflects two different concepts, namely the “policy off” objectively assessed housing need and the “policy on” housing requirement, which I have explained above (see paragraph 10). It is clear that the policy off need and policy on requirement will be the same if there are no policies that impact upon the policy off figure. In this case, none was suggested. The words in paragraph 47 omitted by the Inspector – about which Mr Whale makes complaint – therefore had no relevance in this case. The Inspector did not arguably err by omitting (and/or not taking into account the import of) words in the NPPF that were immaterial to the issues before her.
36. Second, Mr Whale complains that, whilst it was common ground that the housing requirement in the Core Strategy – of “at least 12,000” – did not include the need to provide housing for students, the Inspector erred in failing to take into account the fact that the adopted housing requirement did include “an element of growth in relation to those students resident within general market housing in 2006”.
37. However, as I have described, it is clear that the Inspector was well-aware that, by taking account of the projection inherent in the regional demographic trend, the adopted housing requirement figure did reflect, to an extent, an increase in student accommodation during the plan period: she expressly set out that point at paragraph 39 of her decision letter (see paragraph 19 above). But, there was no evidence as to the extent that it did so: and, indeed, the Council did not rely upon any specific extent that it did so. It simply relied upon paragraph 3.38 of the PPG in support of its proposition that, irrespective of the extent (if any) that student accommodation was included in the housing requirement figure adopted, all non-communal student accommodation was properly included in the housing supply figure. In the circumstances, the Inspector was entitled to proceed on the basis that she was not satisfied that any specific proportion of the adopted housing requirement figure could be properly attributable to student accommodation.
38. Before me, the Council seek to repair this evidential deficit before the Inspector, by requesting permission to rely upon a further statement of Richard Short (a Planning Officer with the Council) dated 19 February 2015 in which he seeks to identify the proportion of the Council’s identified housing requirement of at least 12,000 attributable to student population by using more recent projections for the period 2013-33. He accepts that the proportion cannot be identified from the earlier projections.
39. However:
 - i) The new evidence of Mr Short is controversial. If it is admitted, the Developers seek to rely upon further evidence of David Seaton (a planning consultant instructed in their behalf), in the form of a statement dated 19 May 2015.

- ii) In any event, it is much too late for this evidence to be deployed. Before the Inspector, as I have described, the Council did not rely upon a particular proportion of the housing requirement being attributable to student accommodation, and there was no evidence before the Inspector from which she could have assessed that attribution. It cannot be said that she erred in law in not making the attribution; and it is not arguably in the interests of justice to allow the Council to take this new point now.
 - iii) In any event, even if the Council were able to show that a specific proportion of the adopted housing requirement figure was attributable to student accommodation, for the reasons given below, that would not be determinative of this application.
40. For those reasons, I formally refuse the Council's application of 6 May 2015 to admit this further evidence, and also the Developers' application of 21 May 2015 to adduce evidence in response.
41. That leads to Mr Whale's third and final subground. He submits that, whether or not student accommodation needs form part of the housing requirement, the Inspector erred in not taking into account student accommodation as part of the housing supply. Paragraph 3.38 of the PPG requires (or, at least, permits) it to be counted.
42. That argument appears to be counterintuitive, particularly in the light of the principles set out in the NPPF. It would mean, for example, that if the adopted housing requirement excluded student accommodation altogether, despite the terms of paragraph 50 of the NPPF, that requirement could be satisfied by student accommodation alone. I accept Mr Banner's submission that it would be irrational to include student accommodation in housing supply as meeting an adopted housing requirement, where such accommodation does not feature in that requirement.
43. But the foundation of the argument is in any event false. Paragraph 3.38 does not allow – let alone require – all new student accommodation simply to be included towards the housing requirement, as Mr Whale suggests: rather, it allows an authority to reflect the release of accommodation units onto the general housing market as a result of new student accommodation (although, of course, in the unlikely event that the provision of student accommodation releases unit for unit to the general market, then the whole of the accommodation may effectively go to satisfy the requirement). That is clear from the words used; but also from the reference to communal student accommodation, which is not included in the housing requirement figure and (Mr Whale accepts) was in this case properly not included within the housing supply figure either. The moot point as to the proper approach to interpretation of the PPG (see paragraph 4(v) above) does not arise, because the words of paragraph 3.38 are unambiguously clear and the Secretary of State does not suggest otherwise. Leaving aside the argument on discretion below (paragraphs 50-53), whatever approach to construction is adopted, the result is consequently the same.
44. Far from the Inspector's approach to student accommodation and housing supply in this case being wrong in law, in my view it was eminently correct. She was correct not to accede to the Council's submission that all student accommodation supplied should or could be set off against the housing requirement. She was correct not to be persuaded by the Developers' contention that she could not under any circumstances

take into account student accommodation. She was correct to look at the facts of this case and determine whether, on the evidence before her, there was any basis for taking any of the new student accommodation into account. Given the evidence that a substantial number of additional general market dwellings had been occupied by students, she was clearly entitled to find that there was not. She properly accepted (in paragraph 47) that, although there was currently no evidence to show that the provision of student accommodation has released housing into the general market in Exeter, the situation may in the future change if (e.g.) the delivery of student accommodation significantly exceeded the increase in student population.

45. For those reasons, none of the separate strands of Ground 1 succeeds.

Ground 2: The Unlawful Adoption of Tests for Inclusion of Student Accommodation in the Housing Supply

46. Having said that student accommodation could be taken into account in the supply figure to the extent that that accommodation released housing to the general market (paragraph 44 of her decision letter), in paragraph 47 of her decision letter, the Inspector continued:

“Where student population is relatively stable, and the number of general market dwellings occupied by students declines as a consequence of the provision of student accommodation, I consider the inclusion of such accommodation as part of the housing supply would be consistent with the guidance within the PPG. However, within Exeter, due to the considerable increase in the number of students relative to the provision of purpose-built student accommodation, there has not been a reduction in the number of general market dwellings occupied by students. On the contrary, there has been a significant increase...”.

47. Mr Whale submits that the Inspector proceeded on the basis that the inclusion of student accommodation as part of the housing supply would be consistent with paragraph 3.38 of the PPG if (and only if) (i) the student population is relatively stable and (ii) the number of general market dwellings occupied by students declines as a consequence of the provision of student accommodation. He submits that the Inspector erred in law in positing these tests, which are not posited in paragraph 3.38 of the PPG or elsewhere.
48. I consider this ground misconceived. If the Inspector’s decision letter is read fairly and as whole – as it must be – paragraph 47 does not set out tests which must be satisfied if student accommodation is to be included with the supply figure; rather, the Inspector is considering how it might be appropriate to include student accommodation in the supply figure. The passage relied upon does not seek to establish a “test”, but rather exemplifies ways in which it might be established that student accommodation releases dwellings into the general housing market and thus, in line with paragraph 3.38 of the PPG, might properly be included in the housing supply figure. However, that possible example was not this case. The Inspector found that, however one might consider the evidence, there was no way of appropriately including any of the student accommodation in housing supply in this

case. That finding is unimpeachable; and, on the evidence, I would have thought all but inevitable.

49. In his skeleton argument, for the first time Mr Whale seeks to rely upon paragraph 27 of the Secretary of State's Consultation Paper, "Section 106 Planning Obligations – Speeding up Negotiations: Student accommodation and affordable housing contributions" (February 2015). Paragraphs 27 and 28 read as follows:

"27. Many of our university towns and cities purpose built accommodation provides affordable housing for students. Local authorities are rewarded through the New Homes Bonus for the provision of such accommodation, and planning guidance already allows them to count the provision of all student accommodation towards meeting their local housing requirement.

28. Student housing provided by individual private landlords is a low-cost form of housing. Therefore encouraging more dedicated student accommodation will help free up low-cost properties in the private rented sector and help address problems associated with the cheaper end of the private housing market and with homes in multiple occupation...".

Mr Whale submits that paragraph 27 supports his view that paragraph 3.38 of the PPG permits all student accommodation to be counted as against an adopted housing requirement.

50. However:
- i) The Consultation document was not before the Inspector: indeed, it post-dates her decision.
 - ii) It also post-dates the NPPF and PPG, and so cannot be used in interpreting those documents, in particular paragraph 3.38 of the PPG.
 - iii) But in any event the passage relied upon is consistent with the interpretation of paragraph 3.38 I prefer: paragraph 3.38 does allow authorities to include student accommodation towards meeting their housing requirement, e.g. by releasing accommodation into the private sector, where that is justified on the evidence. Indeed paragraph 28 of the consultation document strongly suggests that that is what is being referred to in paragraph 27.

51. Ground 2 therefore also fails.

Discretion

52. Therefore, both grounds fail on their merits, and I must dismiss this application.
53. However, although now not determinative, it is only right that I refer to another ground of opposition relied upon by Miss Blackmore and Mr Banner. They each submitted that, even if I were to find that the Inspector had acted unlawfully as Mr Whale contended, I ought to exercise my discretion and not quash the decision

because the errors were immaterial, i.e. even if the Inspector had not erred as suggested, she would inevitably have come to the same conclusion and allowed the appeal.

54. That submission is based on the following propositions:

- i) The proposed development undoubtedly had planning benefits: as the Inspector said (at paragraph 75 of her decision latter), whatever the position with regard to land supply, it created “much needed” housing including 35% social housing and supported growth generally; it benefited the local community by providing pedestrian links through the site, a linear park, a playground and a surface water mitigation scheme; and it provided the short-term economic benefits of construction.
- ii) The Inspector found that the proposal was in accordance with all relevant policies, except Policy LS1. Furthermore, it caused no landscape setting, highway safety and traffic, or other harm. The only planning detriment was therefore the breach of Policy LS1. However, that policy was out-of-date, and not criteria-based; and could therefore only be given little weight. The policy concerned landscape setting, and the Inspector expressly found that (a) the proposal would in fact cause no harm to landscape setting, and (b) the proposal complied with the current Core Strategy Policy CS16 on landscape setting (paragraph 29).
- iii) The Inspector found that there was no five year supply of housing, and thus the relevant policies for supply were deemed out-of-date by paragraph 49 of the NPPF, with the result that the presumption in favour of development in the second bullet point in paragraph 14 of the NPPF applied.
- iv) However, if she had not found an absence of five year supply, she would nevertheless have had to have balanced the benefits of the proposal against the harm. The only harm was the breach of Policy LS1, but
 - a) Policy LS1 was out-of-date, thus arguably triggering the presumption in the second bullet point of paragraph 14 in any event.
 - b) If she had considered the issue, she could only have concluded that that breach of Policy LS1 did not mean that there had not been compliance with the development plan as a whole. She would therefore have been required by the first bullet point of paragraph 14 to have approved the proposal.
 - c) In any event, even if neither a) nor b) applied, the Inspector found the proposed development to be sustainable, so that there would be a presumption in favour of development. On the basis of her uncontested findings, the Inspector could not have concluded that the harm (of the technical breach of Policy LS1) outweighed the benefits of the development. Indeed, those benefits patently outweighed that “harm” by a very considerable margin.

- v) Therefore, even if the Inspector did err in law as the Claimant contends, it was immaterial: had she have not have so erred, she would in any event have been bound to have come to the same conclusion, and granted the appeal by granting the planning permission sought.
55. In my judgment, whilst my conclusions in favour of the Defendants on Grounds 1 and 2 are very firm, this argument on discretion would be overwhelming. Given the Inspector's findings on harm (which the Council does not, and could not, dispute), whichever way the Inspector had proceeded, she would inevitably have come to the conclusion to which she did in fact come, i.e. that planning permission should be granted.

Conclusion

56. However, in my judgment, the Council does not get as far as that. For the reasons I have given, I do not find any ground pursued made good; and I dismiss this application.