Neutral Citation Number: [2013] EWHC 4091 (Admin)

Case No: CO/5790/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2013

Before :

HIS HONOUR JUDGE BIRTLES
(Sitting as a Deputy High Court Judge)

- -

Between :

R (on the application of) Trevone Objectors Group	**Claimant**
- and -	
(1) The Cornwall Council	**Defendant**
(2) First Step Home Limited	**Interested Party**

- -
- -

Mr Charles Banner (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Mr Sancho Brett (instructed by **Cornwall Council Legal Services**) for the **Defendant**

Hearing dates: 25 November 2013

- -

Approved Judgment

Judgment Approved by the court for handing down.

HHJ Birtles:

Introduction

1. This is a claim by Trevone Objectors Group seeking to challenge the grant of full planning permission by The Cornwall Council to First Step Homes Ltd for the development of 15 affordable dwellings (13 discounted open market dwellings and 2 social rented dwellings) and associated works on land at Trevone Farm, Trevone Road, Trevone, Padstow, Cornwall, in a decision notice dated 26th March 2012 pursuant to an application for planning permission dated 26th October 2009 with a reference number of E1/2009/01489. The Claimant is a group of 9 individuals living in Trevone who own properties close to the development. First Step Homes is a developer of affordable housing in the South West of England. The Defendant is a unitary authority and the relevant planning authority in Cornwall. The site for the development adjoins the boundary of Trevone village and lies within an Area of Outstanding Natural Beauty ("AONB").

2. The Claimant originally sought to challenge the Council's decision to grant permission on three grounds. By his order dated 31st August 2012, Mr Justice Bean gave the Claimant permission to claim judicial review limited to its Ground 3 on the basis that it is was arguable. That ground alleges that the Council unlawfully failed to subject the planning application to an environmental impact assessment pursuant to EU Directive 2011/92/EUS transposed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, prior to granting permission.

3. In fact the correct EU Directive is EEC/85/337 which has been incorporated into UK domestic law by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("the 1999 Regulations"). Nothing turns on that in this case.

4. The Claimant is represented by Mr Charles Banner of Counsel the Defendant is represented by Mr Sancho Brett who is in-house Counsel for the Defendant.

5. I heard the judicial review on 25th November 2013. At the conclusion of the hearing I reserved judgment.

The Factual Background

6. The Site is within the Cornwall AONB

7. An AONB designation represents "the highest status of protection in relation to landscape and scenic beauty" in the UK: see paragraph 21 of PPS7 Sustainable Development in the Countryside, which was the applicable planning policy at the time of the Permission. Its importance as a consideration in planning decisions is enshrined in statute under s.85(1) of the Countryside Rights of Way Act 2000 ("the 2000 Act"), which provides:

> "In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of

conserving and enhancing the natural beauty of the area of outstanding natural beauty."

8. Paragraph 5.31 of the Council's Local Plan (the North Cornwall Local Plan 1999) notes that "the primary purpose of AONB designation is to conserve natural beauty". Paragraph 5.32 goes on to state that "the boundaries of the AONB are drawn to incorporate only the very best landscapes", and even outside the boundaries "often there will be peripheral areas of considerable quality where badly sited development could have an impact on the AONB".

9. Paragraph 5.31 of the Local Plan states that "all major development proposals in an AONB should be accompanied by an environmental assessment" Mr Banner asks me to note that:

    a. "Major development" is defined in Article 2(1) of the Town and Country Planning (Development Management Procedure) Order 2010 ("the DMPO") – a statutory instrument which sets out procedural rules for all planning applications submitted to local authorities – as "the provision of dwelling houses where (i) the number of dwelling houses to be provided is 10 or more", a definition which includes the Development in the present case. The same definition was included in the DMPO's predecessor, the Town and Country Planning (General Development Procedure) Order 1995 ("the GDPO"), which was in force when the Local Plan was adopted, at Article 8(7); and

    b. The term "environmental assessment" in paragraph 5.31 was a reference to EIA. See the definitions section on page 21 of the Local Plan, which uses precisely the same language as Reg. 2(1) of the EIA Regulations in stating that "An EA is required if a particular development is likely to have a significant environmental effect by virtue of its nature, size or location."

10. Notwithstanding the above, in a screening opinion dated 17th May 2011 ("**the Screening Opinion**") the Council expressed the view that the Development was not EIA Development. The reasoning for this was set out in an accompanying checklist. In particular:

    a. At paragraph 3(d)-(e) that there would be a "high" probability of "permanent" harm to the landscape and the agricultural land of the AONB in respect of which the "possibility of reversibility…is low".

    b. At paragraph 3(a), however, the Council stated that such harm would be "localised" i.e."constrained to an area that is small in relation to the overall AONB designation" and "will not be excessive to the wider character of the area". At paragraph 3(c) "the limited area of the site in relation to the overall AONB designation" was said to increase the absorption capacity of the AONB in this location.

11. The officer's report dated 14th January 2010 concluded that the Development would have an "adverse landscape impact to an AONB" (p.65) and would be "highly visible from most nearby public vantage points, including the adjoining roads and public footpaths" (p.60), but that the alleged significant affordable housing need in the area "would outweigh the anticipated level of harm to the surrounding area – albeit on fine balance" (p.65).

12. Subsequently, on 9th November 2011 the Council formally advertised the application as being a departure from Policy ENV1 of the Local Plan. The Council's summary reasons for granting planning permission in its Decision Notice thereafter expressed the conclusion that the Development is in breach of Policy ENV1. Policy ENV1 provides that development within or near to AONBs "will not be permitted where they adversely affect the character and amenity of these areas unless the development is required in the proven national interest and no alternative sites are available." It therefore follows that the Council concluded that the Development would "adversely affect the character and amenity" of the AONB.

The Legislative Framework

13. The purpose of the EIA Directive is to require a structured assessment, which is subject to public participation, of the environmental effects of "projects which are likely to have significant effects on the environment": see Art.1(1).

14. Article 4 of the Directive draws a distinction between (a) types of development which are deemed in all circumstances to be likely to have significant effects on the environment and must therefore always be subject to EIA and (b) types of development which may be likely to have significant effects and which must be subject to 'screening' to assess whether they would (in which case EIA is required). The former are contained in Annex I of the Directive and the latter in Annex II.

15. This distinction is carried across in to the EIA Regulations by Reg. 2(1), which defines "EIA development" as:

> "…development which is either –
>
> a. Schedule 1 development; or
>
> b. Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

16. Schedule 1 transposes Annex I of the Directive and Schedule 2 transposes Annex II.

17. Schedule 2 is a table which is in two columns. Column 1 lists certain types of development. Column 2 sets out size thresholds. The definition of "Schedule 2 development" in Reg.2(1) refers to these columns:

> ""Schedule 2 development" means development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where –
>
> (a) any part of that development is to be carried out in a sensitive area; or

(b) Any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development."

18. The size thresholds are therefore disapplied where the development would be in a "sensitive area". That term is also defined in Reg. 2(1). For present purposes it is sufficient to note that the definition includes Areas of Outstanding Natural ("AONB").

19. It is common ground that the Development in the present case was Schedule 2 development and was in an AONB

20. Part 2 of the EIA Regulations enables a local planning authority to issue a screening opinion indicating its view as to whether a proposed development falling within schedule 2 is EIA Development within the meaning of Reg. 2(1), and therefore requires EIA, on the basis that it is "likely to have significant effect on the environment by virtue of factors such as its nature, size or location".

21. The screening criteria for considering whether a development is likely to have significant effects on the environment within the meaning of Reg. 2(1) are set out in Schedule 3 of the EIA Regulations. Paragraph 2 of Schedule 3 provides, in relevant part:

"2. Location of development

The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular, to –

(a) the existing land use;

…

(c) the absorption capacity of the natural environment, paying particular attention to the following areas –

…

(viii) landscapes of historical, cultural or archaeological significance."

22. In undertaking this exercise, local planning authorities must apply the precautionary principle, which is a general principle of EU environmental law.

23. Where EIA is required, Reg. 3(2) of the EIA Regulations provides:

"The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission … unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."

24. The "environmental information" for these purposes is defined by Reg. 2(1) as:

> "…the environmental statement, including any further information and any other information, any representations made by anybody required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development"

25. Reg. 2(1) also defines the concept of an "environmental statement" as:

> "… a statement –
>
> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4."

26. Parts III-V of the EIA Regulations contains detailed provisions for the submission and publicity of, and consultation upon, environmental statements. The responses from members of the public and statutory consultees must be taken into account before permission is granted: see Reg. 3(2), above.

The grounds of challenge

27. Before turning to the submissions I should refer to the fact that Mr Gavin Smith, who is employed by the Defendant as a Principal Development Officer within the Planning Regeneration Service has provided a witness statement dated 4th October 2012. Mr Smith was the officer who wrote the screening opinion. While his evidence is important I bear in mind it was written some 16 months after the date of the screening opinion (17th May 2011). It is clear from later correspondence that Mr Smith wrote his witness statement based on his memory and the screening opinion itself. He has no contemporaneous notes. Unfortunately some of his witness statement is in the form of argument rather than fact. I did not find it particularly helpful given those two factors.

28. There are four grounds of challenge. I take each in turn.

29. Ground 1: failure to have regard to and/or apply its policy in paragraph 5.31 of the Local Plan.

30. Mr Banner submits that the Council's policy in paragraph 5.31 of the Local Plan that "all major development proposals in an AONB should be accompanied by an environmental assessment" is to be interpreted as covering this planning permission because I should give the words "major development proposal" the definition given to it by what he calls its "ordinary meaning in planning law" set out at the time in the

local plan's adoption in Article 8(7) of the GDPO. This development falls within that meaning.

31. In summary Mr Banner submits that if that is correct then that gives rise to three alternative scenarios: (a) a legitimate expectation that the Defendant will follow its own local plan (b) the setting by the State of a threshold or criterion for the purposes of Article 4(2)(b) of the Directive above which Annex II development in Cornwall would be made subject to EIA, the Council being an emanation of the State in accordance with established principles of EU law: Fratelli Costanzo SPA v. Comune di Milano (ECJ 22nd June 1989) (c) paragraph 5.31 is a relevant consideration which must be taken into account by the Defendant and it was not done so on the evidence before me.

32. It seems to me that the correct way to approach this issue is to decide whether Mr Banner's primary submission is correct. It is only if it is correct that one can move on to his submissions on the three alternative consequences.

33. The Claimant's argument is based on paragraph 5.31 of the Local Plan. Paragraph 5.31 is not a statement of policy but part of the narrative or 'reasoned justification' to Policy ENV1. The statement of Policy ENV1 is as follows:

> Protecting the Countryside and
>
> Landscape Character
>
> POLICY ENV1:
>
> 1. In the Areas of Outstanding Natural Beauty and the Heritage Coast, the main priority will be the conservation of the natural beauty of the landscape. Development proposals within, or near to, the Areas of Outstanding Natural Beauty or the Heritage Coast will not be permitted where they adversely affect the character and amenity of these areas unless the development is required in the proven national interest and no alternative sites are available.
>
> 2. Development proposals in the countryside elsewhere will only be permitted where they are allowed under other policies in the Plan and they do not have a significant adverse affect on the amenity or landscape character of the area. Protection of landscape character will be particularly important in the Areas of Great Landscape Value which are defined on the Proposals Map.

34. Paragraph 5.31 of the narrative to the policy says:

> 5.31 As the primary purpose of AONB designation is to conserve natural beauty, major development will only be permitted in exceptional circumstances where there is proven national need and no alternative sites are available elsewhere. All major development proposals in an AONB should be accompanied by an environmental assessment. [emphasis added].

35. In the absence of an express definition of 'major development proposals' in the Local Plan, I agree with Mr Brett that whether a proposal is a major development is a matter of planning judgement to be exercised by the relevant decision maker on a case by

case basis. If the Council intended to use a numerical rule for assessing whether developments were 'major developments' under the policy, it would have included one (or subsequently added one to the policy). Such a rule would prevent the Council from using its judgement having regard to all relevant circumstances including the characteristics of the surrounding area. For example, a proposal for 30 properties may be 'major' in a very small village but not major in a city.

36. In my judgment it would be wrong in law to import the meaning of 'major development' as defined by the Town and Country Planning (Development Management Procedure) Order 2010 ('the DMPO') for the following reasons:

    (a) First, the Council could have included a definition of 'major development' in the policy but decided not to. The Council could have confirmed that the meaning of the term as set out in the DMPO would apply in the context of the policy but it decided not to. The Council was entitled to leave the issue to be determined on a case by case basis and should not be bound by a meaning afforded other legislation merely because it uses the same words.

    (b) Second, the meaning given in the DMPO is not the ordinary meaning in planning law. The definition in Article 2(1) starts 'In this Order, unless the context otherwise requires—' and the provisions of the Order are clearly distinct from the provisions of the EIA Regulations. The definition in the DMPO (and previously the Town and Country Planning (General Development Procedure) Order 1995 ('the GDPO') is the subject matter of that order and does not thus extend to any other policy on legislation.

    (c) Third, when read in the context of the whole policy, I do not consider that 'major development' clearly does not mean 'more than 10 dwellings'. For example, Policy DVS6 of the Plan provides that 'cycle parking will be required in all major developments.' Logically this is not intended to apply to a development of 10 dwellings. Further, the glossary of the Local Plan defines EA as: 'Information about the likely environmental effects of certain major projects which is assessed and taken into account in determining planning applications. An E.A. is required if a particular development is likely to have a significant environmental effect by virtue of its nature, size or location.' [Emphasis added]

        Paragraph 5.8 of the Plan provides:

        'Since 1988, an environmental assessment has been required in association with planning applications for certain major projects so that the effects on the environment can be taken into account in a systematic way during the planning process. It is the responsibility of the developer to produce an environmental statement to the satisfaction of the Council which describes in detail the effects of the proposal on the environment. For some major projects an environmental assessment is required in every case whereas in others the Council must determine whether it is required, taking into account the advice in Circular 2/99. The scale and type of

> development proposals requiring an environmental assessment are seldom put forward in North Cornwall, the main exceptions to date being wind farm proposals.' [emphasis added]
>
> Interpreted objectively and in this context, the Council were entitled to find that 15 dwellings did not amount to a major development.

37. Furthermore section 38(6) of the Planning and Compulsory Purchase Act 2004 provides: "If regard is to be had to the development plan for purposes 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." [emphasis added]

38. The impact of the development on the environment was carefully considered and weighed up against other considerations by the Council. Policy ENV1 was referred to throughout the reports and determinations. The decision notice makes it very clear that the development 'failed to comply with saved Policy ENV1 of the North Cornwall District Plan 1999 but has been approved as material considerations outweigh the identified departure from the development plan and there are no other overriding material considerations which justify refusing planning permission'. This was a matter of planning judgement for the Council and a decision the Council was entitled to make.

39. It cannot therefore be said that the Council failed to have regard to Policy ENV1 when granting permission or that it failed to give reasons for a departing from it.

40. To the extent that the Screening Opinion is criticised for not mentioning Policy ENV1 my conclusions are these:

> (a) This criticism is not relevant and does not work considering the points made above. The Council had careful regard to policy ENV1 before granting permission in the knowledge that no EIA had been conducted.
>
> (b) Because the Screening Opinion found that the development was not an EIA development did not need to refer to ENV1. The test for determining whether a development is EIA development is meant to be one which is intended to be used quickly by officers and there is no requirement under the 1999 Regulations for a screening decision which concludes that a proposed development does not constitute EIA development to include reasons: Mellor v Secretary of State for Communities and Local Government C-75/08, 30 April 2009. It was enough for the screening opinion to contain all relevant information on which the officer made the decision in accordance with the statutory guidance, which it did.
>
> (c) Reference to ENV1 in the opinion was academic because the policy went no further than the requirements of the 1999 Regulations.

41. It follows that I do not accept Mr Banner's submission and it is not necessary for me to consider his three alternative scenarios.

Ground 2: Failure to have regard to and/or apply the pre-cautionary principle

42. Mr Banner submits that the precautionary principle in EU environmental law derived from Article 191(2) of the Consolidated Version of the Treaty on the Functioning European Union and he refers me to the relevant European case law in paragraphs 32 – 33 of his skeleton argument.

43. Mr Banner also referred me to R (on the application of) Loader v. Secretary of State for Communities and Local Government and others [2012] EWCA Civ 869 at paragraph 29 per Pill LJ and Evans v. Secretary of State for Communities and Local Government [2013] EWCA Civ 115 at paragraph 31 per Beatson LJ.

44. Mr Banner submits that the Council did not have regard to or apply the precautionary principle. In particular: (a) this is evident from the substance of the Screening Opinion itself, which despite identifying permanent and the reversible harm to the AONB (a conclusion reiterated in the Officer's Report), discounted the need for an environmental impact assessment on the sole or primary basis that the area of the site was a small proportion of the AONB without having regard, for example, to the potential risk for environmental effects if this approach was taken in other cases with permission for housing development if sought in the AONB (b) it has also been confirmed by Mr Smith in his witness statement paragraphs 5-6 that he did not adopt a risk based approach to assessing whether the development was likely to have significant environmental effects, insisting wrongly that he was not required to do so.

45. In R (on the application) of Loader v. Secretary of State for Communities and Local Government and others [2002] EWCA Civ 869, Pill LJ said this:

> "43. What emerges is that the test to be applied is:
>
> "Is this project likely to have significant effects on the environment?"
>
> That is clear from European and National authority, including the Commission Guidance at B3.4.1. The criteria to be applied was set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (Commission v. UK).
>
> The decision maker must have regard to the precautionary principle and to the degree of uncertainty as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals to ameliorative or remedial measures may be taken into account by the decision maker.

> 44. The criteria to the annexes to the Regulations justify the approach to the question proposed in Circular 02/99, paragraphs 33, 34 and annex A (cited at paragraph 17 and 18 above) it is stated, at paragraph 34 that the number of cases of schedule 2 developments which are EIA developments will be "a very small proportion of the total number of schedule 2 developments".
>
> …
>
> The proposed test does not accord with the overall tenor of the procedure initiated by the Directive. The formal and substantial procedure is compensated, potentially involving considerable time and resources. It is contemplated for a limited range of schedule 2 projects, those which are likely to have significant effect on the environment. To require it to be followed in all cases where the effect would influence the development consent decision would devalue the entire concept. It is not contemplated for example, that if the Secretary of State took the view that a proposed house extension might affect the amenity of a neighbour on environmental grounds and do so decisively, it will for that reason necessarily be an EIA development. "

46. In R (on the application of) Evans v. Secretary of State for Communities and Local Government and others [2013] EWCA Civ 114 at paragraphs 21-22 Beatson LJ said this:

> "21. The authorities considered by this court in Loader's show that an approach which considers whether there is a real risk as opposed to a probability of an impact embodies a precautionary approach. They are set out by Pill LJ, who gave the only substantive judgment: see [2012] EWCA Civ 869 at [26] – [30]. Toulson and Sullivan LJ agreed with Pill LJ. For the reasons in the following paragraphs of this judgment I have concluded that it is unarguable that the Secretary of State's approach in this case failed to embody a precautionary approach.
>
> 22. The assessment of the significance of the impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of "likelihood" and "significance": see Bowen-West v. Secretary of State [2012] EWCA Civ at [40] per Laws LJ, and Jones v. Mansfield [2003] EWCA Civ 1408 at [17] and [61] per Dyson and Carnworth LJ. Carnworth LJ stated that, because the word "significant" does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the court's are ill-equipped. See also the well-known statement of Lord Hoffman in Tesco

> Stores v. Secretary of State [1995] 1 WLR 759 at [57] that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State's. This is particularly so where the issue is the visual impact of the development on a site, unlike the court, has visited the site and uses expertise in assessing it."

47. Mr Banner submits that an EIA was required in this case because the officer and the Council's reports identified permanent and irreversible harm to the AONB. I accept Mr Brett's submissions on this point. First, the fact that the officer referred to this demonstrates that he had considered these in the context of whether an EIA was required. Second, the Screening Opinion refers to "Duration of landscape and loss of agricultural land impact is likely to be permanent and possibility of reversibility is low." Third, in light of the guidance in the Loader and Evans cases the fact of permanent and irreversible harm alone does not automatically require an EIA. That issue is something to be considered by a decision maker in deciding whether the development is likely to have "significant effect on the environment by virtue of factors such as its nature, size or location". The extent of which the harm was significant is a matter of judgment for the officers. The officer here clearly did not consider that there was a real possibility of a significant impact by reason of the development. He went further than that. For example, in section 3(a) the Screening Opinion says this:

> "(a) Extent of the impact – Localised. …The impact of the development will not be excessive to the wider character of the area."

48. Mr Banner relies on the witness statement of Mr Smith and in particular the paragraphs 4-5. In my judgment they do not contradict the precautionary principle and they are not relevant to this issue because on a fair reading of the Screening Opinion it was considered that the development would not have significant effects so as to require an EIA. I note the Claimant's point that the witness statement was written some 16 months after the Screening Opinion and based on Mr Smith's memory and the Screening Opinion itself. If there is any conflict between them I prefer the Screening Opinion as being the original and closer to the event.

Ground 3: Legal misdirection in treating size as a determinative factor

49. Mr Banner submits that, on a fair reading of the Screening Opinion, the Council treated the size of the site – and in particular its size in proportion to the overall scale of the AONB – as a 'knock-out point' in considering whether the Development was likely to have significant environmental effects so as to require EIA. Both the Screening Opinion and the Officer's Reports acknowledge that there would be harm to the landscape and agricultural land of the AONB. What nonetheless led the Council to screen out EIA was the size of the site.

50. Mr Banner makes these submissions: First, the EIA Regulations make clear that the size of the area over which an adverse impact occurs is not determinative of the significance of that impact for the purposes of screening Schedule 2 development. In particular:

a. The test in Reg. 2(1)(b) is whether the development is "likely to have a significant effect on the environment by virtue of factors such as its nature, size or location" (emphasis added). The use of the word "or" indicates that any one of the factors referred (the development's nature, size or location) could in itself mean that the development is likely to have significant environmental effects and should be subject to EIA. In other words, the large size of a development might of itself mean that it is likely to have significant environmental effects, but the small size of a development cannot of itself mean that it is not likely to have significant environmental effects.

b. As noted above, the definition of "Schedule 2 Development" in Reg. 2(1) disapplies the size thresholds normally applicable in considering whether development falls within Schedule 2 in cases where "any part of that development is to be carried out in a sensitive area". The definition of "sensitive area" includes AONBs. This reinforces the conclusion that the size of the development cannot be a 'knock-out point' against the need for EIA when screening development in AONBs.

51. Second, Mr Banner submits that it would be contrary to common sense to treat the size of a development as a reason in itself for ruling out the potential for significant environmental effects. See e.g. the Landscape Institute's Guidelines for Landscape and Visual Impact Assessment (2nd Edition, 2002) ("the LVIA Guidelines") [B/1/380] at para. 7.39, which observes that there are "two principal criteria determining significance" namely "the scale or magnitude of effect and the environmental sensitivity of the location or receptor". Paragraph 7.39 goes on to state (emphasis added):

> "A higher level of significance is generally attached to large-scale effects and effects on sensitive or high-value receptors; thus small effects on highly sensitive sites can be more important than large effects on less sensitive sites. It is therefore important that a balanced and well-reasoned judgment of these two criteria is achieved. (emphasis added)"

52. In the present case, the area of land on which the proposed Development was located was of nationally significant landscape importance. It is clear from the observation in the Local Plan that AONB boundaries had been drawn to incorporate "only the very best landscapes" that the Development's acknowledged permanent and irreversible harm would be directed at one of "the very best landscapes". Applying the LVIA Guidelines, therefore, even a small effect on such an important landscape was capable of considerable significance. Moreover, the Council accepted that the Development would be "highly visible from most nearby public vantage points, including the adjoining roads and public footpaths" (p.60 of the January 2010 Officers Report). In these circumstances, more was required in order for EIA to be ruled out than simply relying on the small scale of the site as a proportion of the overall AONB.

53. However, as Mr Brett points out there are difficulties with these submissions.

54. The Screening Opinion uses a checklist to ensure that all relevant matters are to be considered. In box 3 of the first page of the checklist, it states: 'Would the development site/proposal be likely to have significant effects on the environment

because of factors such as nature, size and/or location? (refer to Schedule 3 for guidance)' against which it stated 'NO'. Schedule 3 goes on to list the selection criteria against the characteristics, location and potential impact of the development. The officer's commentary against 'Characteristics of Development' addresses the size of the development and it also addresses accumulation with other development, use of natural resources, production of waste, pollution and nuisances and the risk of accidents. In respect of location, the officer addresses the existing land use, the relative abundance, quality and regenerative capacity of natural resources in the area and the absorption capacity of the natural environment. In respect of 'Characteristics of the potential impact' the officer notes the extent, magnitude, probability and duration of the impact of the development (and not the size of the development itself as suggested by the Claimant). Moreover, the matters considered by the officer were those prescribed by Schedule 3 of the legislation. In light of the wording of the Screening Opinion, it cannot be said that the size of the development 'in proportion to the overall scale of the AONB' was treated as a 'knock-out point' I agree.

55. Mr Banner submits that the evidence of Mr Smith (paragraphs 4 and 7 in particular) puts an impermissible and unwarranted 'gloss on the reasons given in the screening opinion'. Thus paragraph 4 merely addresses what the officer meant by the word 'excessive' and paragraph 7 effectively repeats the contents of the officer's checklist in different words. Indeed, the statement adds little in respect of this argument because the contents of the Screening Opinion are clear.

56. I accept the idea that the small size of development may not by itself mean that it is not likely to have significant environmental effects. However, size was not the only factor considered by the officer in respect of his decision that the development was unlikely to have a significant effect on the environment.

57. The issue was one of planning judgment for the officer concerned. Although the size thresholds in Schedule 2 did not apply to the development, this did not mean that size could not be a material factor in the screening opinion. Regulation 2(1) refers to the word 'size' as well as 'nature', and 'location' (for which factors size could also be relevant). It was for the officer to weigh up these different factors and come to a decision. He was entitled to give the size of the development more weight than other factors.

Ground 4: Irrationality

58. For the purpose of these proceedings Mr Banner accepts that I must apply the Wednesbury test, although he reserves the right to argue on appeal that the Aarhus Convention Compliance Committee's findings in the *Port of Tyne* case mean that the compliance of the Wednesbury test with the EIA Directive is no longer *acte clair*. He submits that the decision not to subject the development to EIA on the basis that it would not have any likely effects on the environment was irrational. Mr Banner accepts that this is a high hurdle to overcome. However he points to the following nine factors to support his submission:

> (i) the finding in the Screening Opinion that the Development would cause permanent and irreversible harm to a landscape which had the highest status of designation in the UK, the

boundary of which had been drawn to incorporate "only the very best landscapes";

(ii) the Council's subsequent acceptance that the Development was in breach of Policy ENV1 and therefore by definition caused "adversely affect the character and amenity" of the AONB as an entity;

(iii) the conclusions in the Officers's Report, in accordance with which Permission was granted, that (i) the Development would have an "adverse landscape impact to an aonb"(ii) it would be "highly visible from most nearby public vantage points, including the adjoining roads and public footpaths" and (iii) that the local affordable housing need which the Council treated as a matter of significant weight only outweighed the impact on the AONB "on fine balance" (the clear implication of which is that the impact on the AONB was considered to be of only marginally less significance than the perceived substantial housing benefits of the Development);

(iv) the distinction between the screening stage and EIA itself, the former being a summary decision designed to weed out those developments in relation to which the risk of significant environmental effects can be ruled out and the latter being the stage at which the magnitude of significant environmental effects is determined;

(v) the screening criteria in paragraph 2 of Schedule 3 to the EIA Regulations, which requires particular regard to be had to: "landscapes of historical cultural or archaeological significance";

(vi) the Council's duty under s.85(1) of the Countryside Rights of Way Act 2000 to have regard when exercising its functions to the purpose of conserving and enhancing the AONB;

(vii) paragraph 5.31 of the Local Plan;

(viii) the precautionary principle; and/or

(ix) the LVIA Guidelines.

59. I reject these submissions for the following reasons:

(i) The Screening Opinion did not find that the development would cause permanent and irreversible harm as suggested by the Claimant. It found that the duration of landscape impact and loss of agricultural land impact was 'likely' to be permanent and the 'possibility' of reversibility of such factors was 'low'. This did not prevent the Council from nevertheless determining that the development was unlikely to

have significant effects on the environment. Just as an impact can be temporary and reversible but nevertheless significant, an impact can be permanent and irreversible and yet not be significant. Whether the Council was right or wrong is irrelevant, its decision could not be described as so wrong that it is irrational.

(ii) On the same basis, even if the development would have had an adverse affect on the character and amenity of the area, an adverse landscape impact and was visible from most nearby public vantage points, this did not mean that it was irrational for the Council to find that the development was unlikely to have a significant affect on the environment such that an EIA was not required. As confirmed in Loader case, a full EIA process is not required in all cases where the effect would influence the development consent decision: see the judgment of Pill LJ at paragraph 46.

(iii) The fact that the relevant area has been described as an area including 'only the very best landscapes' does not mean that it is irrational for the Council to determine that a development therein is not an EIA development. The 1999 Regulations allow for the thresholds in Column 2 of Schedule 2 to disapply to the issue of whether a screening opinion is required were a development is within a sensitive area but there is nothing in the Regulations prescribing that all developments in sensitive areas require EIAs. The regulations clearly provide that the test is whether the development would likely have significant effects on the environment because of factors such as nature, size or location. This test clearly applies to 'sensitive areas'. Consequently, the Regulations themselves envisage that a development can not have a significant impact even where it is to be situated in a sensitive area.

(iv) I find no substance in this point.

(v) I find no substance in this point.

(vi) The existence of the Section 85 of the 2000 Act duty is: 'In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.' This duty does not prevent a planning authority from finding that a development within an ANOB is not an EIA development and cannot possibly lead to the conclusion that such a decision is unreasonable or irrational.

(vii) Similarly, the contents of the Local Plan did not prevent the Council from granting the application or from finding that the development was not an EIA development. I have dealt with paragraph 5.31 of the Local Plan earlier in this judgment.

(viii) I have dealt with the precautionary principle earlier in this judgment.

(ix) The advisory guidelines for landscape and visual impact assessment published by the landscape Institute and Institute of Environmental Management and Assessment are more relevant to the manner of conducting EIAs for EIA developments rather than screening opinions. Further, it is not binding law and goes no further than advising balanced and reasoned judgment which, was applied by the Council in this case.

Conclusion

60. For these reasons the claim for Judicial Review is dismissed.