Case Name: *Thorpe Hall Leisure Ltd v Secretary of State for Housing, Communities And Local Government & Anor* [2020] EWHC 44 (Admin) (15 January 2020)

Full case: Click Here

Commentary:
The High Court upheld the Inspector's decision to dismiss an appeal against the refusal of planning permission for 200 dwellings on the Essex coast. Mr Justice Ouseley concluded that the Inspector had erred in certain minor respects but refused to quash the decision on the basis that it would ultimately have been the same if the errors had not occurred.

The Claimant submitted that the Inspector had erred in law in finding that she could not conclude that there would be no adverse effect on the Hamford Special Protection Area (the "SPA") or on the Hamford Water Special Area of Conservation (the "SAC"), approximately 2.4km north of the appeal site. The Inspector reached this conclusion, relying on an erroneous interpretation of Natural England's interim advice, which was to be applied to any residential planning applications coming forward ahead of the Essex Coast Recreational disturbance Avoidance and Mitigation Strategy ("RAMS") being adopted, about how the risk to harm to a range of European designated areas should be mitigated by off-site measures. Mr Justice Ouseley found that the Inspector had misinterpreted Natural England's advice, which only required a contribution to "off-site" measures and did not actually require the identification of specific visitor management measures before the RAMS was adopted. Despite finding that the Inspector had erred in her finding that harm to the European designated sites could not be excluded, Mr Justice Ouseley was satisfied that the Inspector's decision would ultimately have been the same had she not erred in her interpretation of Natural England's interim advice because the proposed development conflicted with important policies in the development plan so the tilted balance in favour of the development would still have been disapplied.

A secondary issue put forward by the Claimant was that the Inspector was wrong to conclude that the possible adverse effects on the SPA and SAC could not be overcome at least in part by a condition, which she could and should have imposed. Mr Justice Ouseley accepted that a condition might have been a solution but that its drafting would not have been simple. Mr Justice Ouseley recognised that Inspectors may sometimes impose a condition to solve a simple problem but he concluded that in this case that it was not for the Inspector to devise a condition to meet her concerns in this case and more generally, "The authorities do not support any obligation on an Inspector to think of solutions or devise wording for conditions."
The second ground of challenge was that the Inspector erred in law reducing the weight she gave to the affordable housing element of the proposal without alerting the Claimant to the criticism that she was going to make. The Inspector identified that the proposed development would facilitate the delivery of a number of new affordable homes, in an area where delivery had been low and well below demand, which would make a "significant contribution" to the local housing need. However, the Inspector concluded that there were other considerations, including viability concerns and the fact that the tenure split was

unknown, that made it impossible to conclude the degree to which the type of affordable housing supported by the scheme would be available to meet local housing needs. Mr Justice Ouseley found that the Inspector had erred in her judgment that the lack of information about the anticipated tenure split was material and should reduce the weight given to the affordable housing provision, and he recognised that the Inspector not giving the Claimant any chance to deal with her concern was unfair when it could be taken that the tenure split was agreed between the parties. However, applying the judgment in Simplex (GE) Holdings v Secretary of State for the Environment [1988] 3 PLR 25, Mr Justice Ouseley was again satisfied that the Inspector's decision would inevitably be the same if she had not erred because she had already given significant weight to the fact that the development complied with affordable housing targets and the proposed scheme did not accord with the development plan in other regards. Therefore, this ground of challenge was dismissed.
The third ground of challenge was that the Inspector misinterpreted paragraph 80 of the NPPF, giving less weight than she ought to have done to the advantage that the proposed development would have in extending the commercial life of the Lifehouse Hotel through a financial cross-subsidy, to the advantage of the local economy. Mr Justice Ouseley recognised that the that the Inspector had identified the important economic role of the Hotel but that the application was not for business or employment development within paragraph 80 and there was no planning mechanism linking the propose housing development to some investment in the Hotel. Mr Justice Ouseley concluded that the Inspector had not misconstrued paragraph 80 and that even if the Inspector had been wrong to exclude the planning implications of the financial relationship from her consideration of paragraph 80, the questions surrounding the financial stability of the Hotel that led to her giving little weight to the argument meant that she would have come to the same conclusion. Mr Justice Ouseley, therefore, also dismissed this final ground.

Case summary prepared by Nikita Sellers