David Lock Associates
Town Planning and Urban Design

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Section 78 of the Town and Country Planning Act 1990
Town and Country Planning (Inquiries Procedure) (England) Rules 2000

Appeal by Gallagher Estates, Charles Brown and Simon Digby

REBUTTAL PROOF OF EVIDENCE

of Mr David Keene MRTPI
of David Lock Associates Limited

12 June 2018

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ENCLOSURES

DAK/APP1: JJ Gallagher Ltd, London and Metropolitan International Developments Ltd, and Norman Trustees v Cherwell District Council and Secretary of State for Communities and Local Government [2016] EWHC 290 (Admin) (18 February 2016)

DAK/APP2: COURT OF APPEAL Dominic Woodfield v JJ Gallagher Ltd and London and Metropolitan International Development Ltd and Norman Trustees [2016] EWCA Civ 1007 (12 October 2016)

PREFACE

David Keene will say:

I hold a Bachelor of Arts in Geography from the University of Durham and a Post Graduate Diploma in Town Planning from Kingston Polytechnic. I am a member of the Royal Town Planning Institute.

I am a Partner and Chairman of David Lock Associates (DLA), chartered town planning and urban design consultants based in Milton Keynes. I have been a practicing town planner for some 42 years with experience in local government with Berkshire County Council and Basingstoke & Deane Borough Council. In addition, I have worked in planning consultancy and previously held senior positions with the Barton Willmore Planning Partnership, Conran Roche/EDAW and the Babtie Group.

DLA advises many national householders and town developers, including Gallagher Estates, on sustainable urban extensions and new settlements across the country. I am personally engaged in major residential and mixed-use development proposals in Rugby, Slough and Fareham.

I have detailed knowledge of the planning and regeneration context in Cherwell District, having been the project director for the Gavray Drive Project since 2003.

1.0 SCOPE OF REBUTTAL EVIDENCE

1.1 I have set out the principal element of my evidence in my Main and Summary Proofs of Evidence date 29 May 2018.

1.2 In this Rebuttal Proof of Evidence, I seek to address issues raised by Pat Clissold on behalf of Save Gavray Meadows in regards to the Environmental Statement Addendum (May 2018). The intention of this Rebuttal Proof of Evidence is to offer clarification.

1.3 In so doing I seek not to address all the points raised in the evidence of Pat Clissold, but focus only on key points raised. Matters in relation to Ecology have been addressed in the Rebuttal Proof of Evidence of Mr Rowlands.

2.0 REBUTTAL EVIDENCE

Introduction

2.1 This rebuttal evidence seeks to focus on a limited number of points raised by Pat Clissold which are identified below:

- Point 2: Page 22, 2.68 of Lock document – Crushed-stone blanket;
- Point 5: Page 20, 2.53 of Lock document; and,
- Point 6: Page 21, 2.62 of Lock document.

I hope that the comments set out herein will clarify the evidence in respect of the matters raised and will assist the efficient conduct of the inquiry.

2.2 In addition, for completeness and ease, we include in appendices the High Court and Court of Appeal judgments from 2016. These have been referred to in evidence and we consider it helpful to provide copies.

Point 2: Page 22, 2.68 of Lock document – Crushed-stone blanket;

2.3 Pat Clissold asks a number of questions regarding to the proposed crushed-stone blanket. In the absence of a fully worked scheme, the Environmental Statement (2015) and the subsequent Addendum (2018) makes a number of assumptions in relation to construction impacts.

2.4 The transport chapter of the 2015 Environmental Statement includes an estimate that total fill material for the site will be 22,700 cubic metres with a 29 week earthworks programme resulting in fourteen 20 tonne tipper trucks visiting the site per day. Other construction is estimated to result in 81 construction vehicle movements per week or approximately 15 movements per day. This is detailed in paragraph 5.5.8 and table 5.8 of the original ES chapter on transport.

2.5 On dust emission, an addendum to the Air Quality chapter is included in Appendix B of the ES Addendum (2018). Mitigation measures during construction of the proposed development are outlined in section 6.6 of the

addendum chapter. These are based on recommendations by the Institute of Air Quality Management (IAQM). It is concluded that with the application of these mitigation measures, the residual significance of potential impacts from all dust generating activities will be "negligible."

2.6 The proposed surface water drainage strategy may reduce flood frequency in the south-eastern corner of the site. This area will lie within the undeveloped green space as defined by the Parameter Plan.

Point 5: Page 20, 2.53 of lock document

2.7 The definition of significance in terms of Environmental Impact Assessment is set out in paragraph 1.3.19 of the Environment Statement (2015). That paragraph states that:

> *"For any effect to be 'significant' it must exceed a specific threshold. Wherever possible, such thresholds are set using national industry norms. Where such norms do not exist, the experience of the assessor has been used to determine the significant threshold. Effects falling below the threshold are termed 'non-significant effects".*

Point 6: Page 21, 2.62 of Lock document

2.8 This paragraph should read:

> *"The design of the Proposed Development will help mitigate any effects from trespass onto adjacent ~~agricultural~~ land".*

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DAK/APP1: JJ Gallagher Ltd, London and Metropolitan International Developments Ltd, and Norman Trustees v Cherwell District Council and Secretary of State for Communities and Local Government [2016] EWHC 290 (Admin) (18 February 2016)

Neutral Citation Number: [2016] EWHC 290 (Admin)

Case No: CO/4622/2015

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

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

Date: Thursday 18th February 2016

Before:

THE HON. MRS JUSTICE PATTERSON DBE

Between:

(1) JJ GALLAGHER LTD **(2) LONDON AND METROPOLITAN INTERNATIONAL DEVELOPMENTS LTD** **(3) NORMAN TRUSTEES**	**Claimants**
- and -	
(1) CHERWELL DISTRICT COUNCIL **(2) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**	**Defendants**

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Official Shorthand Writers to the Court)

Satnam Choongh (instructed by **Pinsent Masons LLP**) for the **Claimants**
Hugh Flanagan (instructed by **Cherwell District Council**) for the **First Defendant**
Richard Kimblin (instructed by the **Government Legal Department**) for the **Second Defendant**

Hearing date: 9 February 2015

Judgment
As Approved by the Court

Mrs Justice Patterson:

Introduction

1. This is an application under section 113(3) of the Planning and Compulsory Purchase Act 2004 ("PCPA") for an Order that "Policy Bicester 13 adopted by the first defendant on 20 July 2015 be treated as not adopted and remitted to the second defendant." Policy Bicester 13 appears in the Cherwell Local Plan ("CLP").

2. The claimants have an interest in land at Gavray Drive, Bicester. That land is allocated in the CLP as Bicester 13.

3. The first defendant is the Cherwell District Council, local planning authority for the area which includes Bicester.

4. An inspector, Nigel Payne BSc (Hons), DipTP, MRTPI, MCMI, was appointed by the second defendant, the Secretary of State for Communities and Local Government to hold an examination into the CLP. He conducted hearings during 2014 and issued a report on 9 June 2015 recommending that the CLP be adopted, subject to modifications necessary to make the CLP sound.

5. On 20 July 2015 the full council of the first defendant resolved to approve the main modifications to the CLP, as recommended by the inspector, together with additional modifications to enable the CLP to proceed to adoption. The CLP was adopted by Order dated the 20 July 2015.

6. The claimant submits that in adopting the CLP the first defendant erred in law because:

    i) Policy Bicester 13 fails to give effect to the inspector's reasons and adopting it as it stands is illogical and irrational;

    ii) Policy Bicester 13 is inconsistent with policy ESD11 of the CLP and so the decision to adopt is illogical and irrational on the basis of its current wording also;

    iii) The inspector failed to provide reasons for recommending adoption of policy Bicester 13 as drafted so that the first defendant's decision to adopt the plan is unlawful.

7. The first defendant agrees that policy Bicester 13 must be quashed on the basis that the inspector's reasoning was inadequate but disagrees with the claimants about the terms of the Order remitting the CLP to the second defendant.

8. The second defendant disagrees with both the claimants and the first defendant. The second defendant contends that the policy Bicester 13 is ambiguous and a judgment of the court is sufficient to resolve any ambiguity. Accordingly, there is no need for policy Bicester 13 to be remitted at all.

9. The relevant parts of CLP policy Bicester 13 read:

    "Development Area: 23 hectares

Development Description: a housing site to the east of Bicester town centre. It is bounded by railway lines to the north and west and the A4421 to the east.

Housing:

- Number of homes – 300 dwellings
- Affordable Housing – 30%.

…

Key site specific design and place shaping principles:

- …
- That part of the site within the Conservation Target Area should be kept free from built development. Development must avoid adversely impacting on the Conservation Target Area and comply with the requirements of Policy ESD11 to secure a net biodiversity gain."

The supporting text to the policy reads:

"C104. The majority of the site is part of the River Ray Conservation Target Area. Part of the site is a Local Wildlife Site and is situated to the east of Bicester town centre. It is bounded by railway lines to the north and west. The site comprises individual trees, tree and hedgerow groups, and scrubland/vegetation. The Langford Brook water course flows through the middle of the site.

C105. The central and eastern section of the site contains lowland meadow, a BAP priority habitat. There are a number of protected species located towards the eastern part of the site. There are several ponds and a small stream, known as the Langford Book, which runs from north to south through the middle of the site. A range of wildlife has been recorded including butterflies, great crested newts and other amphibians, reptiles, bats and birds.

C106. There are risks of flooding on some parts of the site therefore mitigation measures must be considered. There is also a risk of harming the large number of recorded protected species towards the eastern part of the site. Impacts need to be minimised by any proposal. Approximately a quarter of the site is within Flood Zones 2 and 3 therefore any development would need to be directed away from this area.

> C107. Although there are a number of known constraints such as Flood Zone 3, River Ray Conservation Target Area and protected species, this could be addressed with appropriate mitigation measures by any proposal."

10. Policy ESD11, referred to in Bicester 13, is entitled 'Conservation Target Areas'. That reads:

> "Where development is proposed within or adjacent to a Conservation Target Area biodiversity surveys and a report will be required to identify constraints and opportunities for biodiversity enhancement. Development which would prevent the aims of a Conservation Target Area being achieved will not be permitted. Where there is potential for development, the design and layout of the development, planning conditions or obligations will be used to secure biodiversity enhancement to help achieve the aims of the Conservation Target Area."

11. The Gavray Drive site is subject to different designations on the eastern part of the site beyond Langford Brook. The Conservation Target Area ("CTA") and Local Wildlife Site ("LWS") overlap within the site but are not coterminous.

Factual Background

12. The CLP examination commenced on 3 June 2014. The site was not included as an allocation. The examination was immediately suspended by the inspector to allow the first defendant to put forward modifications that would address the need for additional housing sites.

13. The first defendant consulted on and submitted proposed modifications to the CLP. One of the modifications included the allocation of the Gavray Drive site for 300 houses.

14. The claimants responded to the consultation on the proposed modification. They supported the principle of the allocation but argued that, "As drafted the policy can be read as precluding any development within the River Ray Conservation Target Area which we are sure was never the intention". Policy ESD11 Conservation Target Areas does not seek to restrict development within CTAs but instead states, "Where development is proposed within or adjacent to Conservation Target Areas biodiversity surveys and a report will be required to identify constraints and opportunities for biodiversity enhancements." The response continued that, "Development on the part of the CTA outside the Local Wildlife Site would be balanced through securing the long term restoration, management, maintenance and enhancement of part of the local wildlife site within the developer's control." The claimants put forward an amendment to policy Bicester 13 to delete the opening sentence of the relevant bullet point which stated, "That part of the site within the Conservation Target Area should be kept free from built development."

15. Examination into the CLP commenced on 21 October 2014.

16. At the examination before the inspector the first defendant, supported by members of the public, argued that there should be no built development on any part of the allocated site designated as a CTA.

17. The day before the examination commenced the first defendant passed a resolution that sought a modification to the policy that would designate the CTA as "Local Green Space" within the meaning of paragraph 76 of the National Planning Policy Framework ("NPPF").

18. The examination hearings concluded on 23 December 2014.

19. The inspector issued a final report on 9 June 2015.

20. Prior to then the first version of the draft report had been sent to the first defendant on 22 May 2015 for fact checking. The first defendant sent comments to the second defendant on that version including some on Policy Bicester 13. At that time paragraph 139 of the report read:

> "Requests that the developable area shown on the policies map should be reduced to avoid any building in the whole of the River Ray Conservation Target Area, as distinct from the smaller Local Wildlife Site, would significantly undermine this contribution. It would also potentially render the scheme unviable or at the very least unable to deliver a meaningful number of new affordable units, as required under policy BSC 3, when all other necessary contributions are also taken into account. Moreover, it could well materially reduce the potential for the scheme to contribute to enhancement of the Local Wildlife Site's ecological interest as part of the total scheme, thereby effectively achieving the main objective of the Conservation Target Area. Consequently, it would not represent a reasonable, realistic or more sustainable alternative to the proposals set out in the plan, as modified."

21. Version two of the report was received by the first defendant shortly after receipt of the representations and included a change to paragraph 139 as follows:

> "Requests that the developable area shown on the policies map should be reduced to avoid any building in the whole of the River Ray Conservation Target Area would significantly undermine this contribution. It would also potentially render the scheme unviable or at the very least unable to deliver a meaningful number of new affordable units, as required under policy BSC 3, when all other necessary contributions are also taken into account. Moreover, it could well materially reduce the potential for the scheme to contribute to enhancement of the Local Wildlife Site's ecological interest as part of the total scheme, thereby effectively achieving the main objective of the Conservation Target Area. Consequently, it would not represent a reasonable, realistic or more sustainable alternative to the proposals set out in the plan, as modified."

22. That version was followed by a telephone call from the first defendant to the Inspectorate raising further questions, including about policy Bicester 13.

23. The final report was then received as set out.

24. The relevant parts of the inspector's final report read as follows:

> "135. This area of largely flat land, bounded by railway lines to the north and west, the ring road to the east and residential development to the south lies to the east of Bicester town centre in a very sustainable location. Planning permission has previously been granted for new housing but that has now expired. In view of the need for additional sites to help meet OANs it is still considered suitable in principle to accommodate new development. However, the eastern part is now designated as a Local Wildlife Site, with the central/eastern sections containing lowland meadow; a BAP priority habitat.
>
> 136. Additionally, roughly a quarter of the site lies in Flood Zones 2 and 3 adjacent to the Langford Brook that runs north-south through the centre of the site. The majority also lies within the River Ray Conservation Target Area. Nevertheless, even with these constraints, indicative layouts demonstrate that, taking into account appropriate and viable mitigation measures, the site is capable of delivering around 300 homes at a reasonable and realistic density not greatly different from that of the modern housing to the south.
>
> 137. In addition to necessary infrastructure contributions towards education, sports provision off site, open space, community facilities and public transport improvements, a number of other specific requirements are needed under policy Bic 13 for this proposal to be sound, in the light of current information about the site's ecological interests and environmental features. In particular, that part of the allocation within the Local Wildlife Site east of Langford Brook (just under 10 ha) needs to be kept free from built development and downstream SSSIs protected through an Ecological Management Plan prepared and implemented to also ensure the long term conservation of habitats and species within the site. Landscape/visual and heritage impact assessments and archaeological field evaluation are also required.
>
> 138. There must also be no new housing in flood zone 3 and the use of SUDs to address flood risks will be required. Subject to such modifications (MMs 89-91), policy Bic 13 is sound and would enable this site to make a worthwhile contribution to new housing needs in Bicester and the district in a sustainable location. This can be achieved without any material harm to environmental or ecological interests locally as a result of the

> various protection, mitigation and enhancement measures to be included in the overall scheme.
>
> 139. Requests that the developable area shown on the policies map should be reduced to avoid any development in the whole of the River Ray Conservation Target Area would significantly undermine this contribution. It would also potentially render the scheme unviable or at the very least unable to deliver a meaningful number of new affordable units, as required under policy BSC 3, when all other necessary contributions are also taken into account. Moreover, it could well materially reduce the potential for the scheme to contribute to enhancement of the Local Wildlife Site's ecological interest as part of the total scheme, thereby effectively achieving the main objective of the Conservation Target Area. Consequently, it would not represent a reasonable, realistic or more sustainable alternative to the proposals set out in the plan, as modified.
>
> 140. Similarly, despite the historic interest of the parts of the site in terms of their long established field patterns and hedges, this does not amount to a justification for the retention of the whole of the land east of the Langford Brook as public open space, nor for its formal designation as Local Green Space. This is particularly so when the scheme envisaged in the plan should enable the more important LWS to be protected with funding made available for enhancement at a time when the lowland meadow habitat is otherwise likely to deteriorate further without positive action. Such an approach would be capable of ensuring no net loss of biodiversity as a minimum and also compliance with policies ESD 10 and 11 as a result.
>
> 141. All in all the most suitable balance between the need to deliver new housing locally and to protect and enhance environmental assets hereabouts would essentially be achieved through policy Bic 13, as modified, and the land's allocation for 300 new homes on approximately 23 ha in total, given that the requirements of policies ESD 10 and 11, including to achieve a net gain in biodiversity arising from the scheme as a whole, can also be delivered as part of an overall package of development with appropriate mitigation measures."

25. On 20 July 2015 the first defendant resolved to approve the main modifications to the CLP as recommended by the inspector and additional modifications to allow the CLP to proceed to adoption. Its resolution included the following:

> "That the designation of the Conservation Target Area at Gavray Drive (Policy Bicester 13) as a designated Local Green Space through the forthcoming stages of the Cherwell Local Plan Part 2 be positively pursued."

26. The CLP was adopted by order dated 20 July 2015.

27. In light of the inspector's conclusions the claimants asked the first defendant for an explanation of the resolution to pursue a Local Green Space ("LGS") designation. The first defendant responded by email dated 24 July 2015 in the following terms:

> "My understanding is that a proper case was not made for the land being a Local Green Space as part of Part 1. There is thought to be a more robust case available to support it, this time with full public consultation engagement and that the appropriate mechanism for this is Part 2. It is policy officers' view that the adopted site allocation policy prevents any built development in the CTA in any event though this does not preclude appropriate provision of associated public open space etc as part of a development in the CTA. The provision of such open space and facilities is thought to be unlikely to be inconsistent with the Local Green Space designation if this does indeed take place. Therefore proceeding with attempts to designate part of the CTA as a Local Green Space as Part 2 of the Local Plan is not thought to be at odds with achieving the development provided for in the site allocation policy."

<u>Legal and Policy Framework</u>

28. The statutory framework for local plans is found in part 2 of the Planning and Compulsory Purchase Act 2004 (PCPA). In particular:

    i) A local planning authority is to prepare a scheme of development plan documents: section 15(1).

    ii) The development plan documents must set out the authority's policies relating to the development and use of land in their area: section 17(3).

    iii) In preparing a local development plan document the local planning authority must have regard to the matters set out in section 19 such as national policy: section 19(2)(a).

    iv) Each local development plan document must be sent to the Secretary of State for independent examination: section 20(1).

    v) The local development plan document must only be sent for examination if the relevant requirements have been complied with and the plan is thought to be ready: section 20(2).

    vi) Section 20(5) provides that the purpose of an independent examination is to determine whether the development plan documents satisfy the requirements of section 19 and section 24(1) (regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents), whether the plan is sound and whether the local planning authority has complied with its duty to cooperate.

    vii) The purpose of an independent examination is to determine in respect of the development plan document whether it is sound: section 20(5)(b).

viii) If the inspector finds that the plan is sound he must recommend adoption of the plan and give reasons for his recommendation.

29. Both the inspector's recommendations and reasons must be published.

30. There is no statutory definition of what "sound" means. Paragraph 182 of the NPPF states that in order to be sound a plan should be:

> "……examined by an independent inspector whose role is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and whether it is sound. A local planning authority should submit a plan for examination which it considers is "sound" – namely that it is:
>
> - Positively prepared – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;
>
> - Justified – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;
>
> - Effective – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities; and
>
> - Consistent with national policy – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework."

31. With the exception of modifications that do not materially affect the policies of the plan the effect of section 23 of the PCPA is that the plan cannot be adopted otherwise than in accordance with the recommendations of the inspector.

Issue One: Is Policy Bicester 13 Ambiguous?

32. Given the respective stances of the parties the first question that arises is whether policy Bicester 13 is ambiguous or, to be more precise, whether the opening words of the third bullet point of the policy under the key site specific design and place shaping principles, namely, "that part of the site within the Conservation Target Area should be kept free from built development…" are ambiguous or make the policy ambiguous.

33. At the examination both the claimant and first defendant regarded those words as clear. They both contended that the words meant no built development was to take place in that part of the site within the CTA.

34. In its written submissions for the court hearing the second defendant agreed that the bare words were capable of bearing the meaning adopted by the first defendant and the claimants provided that the context is entirely ignored. In argument, the second defendant agreed that the disputed words used were not ambiguous in themselves. The issue arose from the emphasis placed upon them.

35. The second defendant submits that when the contentious words are read in context, the interpretation adopted by the first defendant and claimants is clearly wrong. In itself, their interpretation is irrational because:

    i) It is plainly impossible to give effect to the fundamental purpose of the allocation if the contentious words are interpreted as both the claimants and first defendant contend as 300 dwellings could not be built;

    ii) There is an obvious alternative reading to these contentious words, namely, that some but not all of the CTA may be built upon;

    iii) The supporting text to the policy explains and makes clear that the majority of Gavray Drive is in the CTA but the plan allocates the whole site and further makes clear that the development will assist in funding improvements to CTAs;

    iv) Development within CTAs is fully and expressly anticipated in the plan; see ESD11. The supporting text to ESD11 explains that development may contribute to the objectives of CTAs and fund enhancements;

    v) The inspector's report is crystal clear in its findings on the issue: see paragraphs 139 and 140;

    vi) Both the claimants and first defendant participated fully in the examination and understood the background, the issues and the result.

36. In short, both parties at the examination understood the issue of building on "all or some" of the CTA was an issue which was before the second defendant. Paragraph 136 of the inspector's report, in particular, makes clear that the majority of the site is within the CTA but nevertheless the site is capable of accommodating 300 dwellings.

37. Further, paragraph 141 of the inspector's report deals with the balance between the need to deliver housing and environmental protection. It finds that environmental protection can only be delivered as an overall package of development with appropriate mitigation measures producing a net gain in biodiversity. Policies Bicester 13 and ESD11 when read together give effect to that part of the inspector's findings.

38. The interpretation adopted by the claimant and the first defendant ignores all of the context and the obvious alternative reading of the words in the policy.

39. The policy adopted by the first defendant, is entirely clear when read in full and in its proper context alongside the supporting text, the site allocation and other plans.

40. The claimants submit that there is no difficulty understanding the policy. The words mean what they say: there can be no built development on that part of the site which

sits within the CTA. There is nothing in the policy or the explanatory text that would allow some part of the CTA to be built upon. What was said by the parties pre-adoption becomes irrelevant once the plan is adopted: it is impermissible to rove through the contents of the background documents which would include the inspector's report and what was said at the examination. The first defendant is seeking to import ambiguity by reference to extraneous material to the plan itself.

41. The first defendant submits that at the time of the examination both the claimants and itself were of the view that the words used within the policy precluded built development in the CTA. They did not, as alleged by the second defendant, understand the words to mean that some but not all the CTA could be built upon. The interpretation of the second defendant would mean that the policy would become extremely difficult to apply, that such an interpretation would be contrary to that adopted in the sustainability appraisal, that it would be inconsistent with the similar wording in policy Bicester 12, and would result in a strained interpretation of the language used.

Discussion and Conclusions

42. In interpreting a policy in a development plan the judgment of Lindblom J (as he then was) in **Phides Estates Overseas Limited v Secretary of State for Communities and Local Government** [2015] EWHC 827 (Admin) makes it clear that where a policy is neither obscure nor ambiguous it is not necessary or appropriate to resort to other documents outside the local plan to help with the interpretation of policy. In [56] Lindblom J said:

> "I do not think it is necessary, or appropriate, to resort to other documents to help with the interpretation of Policy SS2. In the first place, the policy is neither obscure nor ambiguous. Secondly, the material on which Mr Edwards seeks to rely is not part of the core strategy. It is all extrinsic – though at least some of the documents constituting the evidence base for the core strategy are mentioned in its policies, text and appendices, and are listed in a table in Appendix 6. Thirdly, as Mr Moules and Mr Brown submit, when the court is faced with having to construe a policy in an adopted plan it cannot be expected to rove through the background documents to the plan's preparation, delving into such of their content as might seem relevant. One would not expect a landowner or a developer or a member of the public to have to do that to gain an understanding of what the local planning authority had had in mind when it framed a particular policy in the way that it did. Unless there is a particular difficulty in construing a provision in the plan, which can only be resolved by going to another document either incorporated into the plan or explicitly referred to in it, I think one must look only to the contents of the plan itself, read fairly as a whole. To do otherwise would be to neglect what Lord Reed said in paragraph 18 of his judgment in Tesco Stores Ltd. v Dundee City Council: that '[the] development plan is a carefully drafted and considered statement of policy, published in order to inform the public of

> the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it', that the plan is 'intended to guide the behaviour of developers and planning authorities', and that 'the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained'. In my view, to enlarge the task of construing a policy by requiring a multitude of other documents to be explored in the pursuit of its meaning would be inimical to the interests of clarity, certainty and consistency in the 'plan-led system'. As Lewison L.J. said in paragraph 14 of his judgment in R. (on the application of TW Logistics Ltd.) v Tendring District Council [2013] EWCA Civ 9, with which Mummery and Aikens L.JJ agreed, 'this kind of forensic archaeology is inappropriate to the interpretation of a document like a local plan …'. The 'public nature' of such a document is, as he said (at paragraph 15), 'of critical importance'. The public are, in principle, entitled to rely on it 'as it stands, without having to investigate its provenance and evolution'."

43. It is, of course, permissible to look to the supporting text to a policy as an aid to interpretation: see **R (Cherkley Campaign Limited) v Mole Valley District Council** [2014] EWCA Civ 567 at [16].

44. The second defendant referred to other decisions dealing with the issue of construction of any document. I do not find them particularly helpful in the circumstances of the instant case. The most helpful is **Cusack v Harrow Borough Council** [2013] UKSC 40 where Lord Neuberger was dealing with the approach to construction and interpretation of any document. He referred to the intention of the drafter being determined by reference to the precise words used, their particular documentary and factual context and, where identifiable, their aim or purpose. That decision does not deal with the issue of interpretation of planning policy, which is the concern in this case, and thus does not take the issue of interpretation significantly further.

45. The other authorities relied upon by the second defendant are considerably less apposite. The first is **Pepper v Hart** [1992] 3 WLR 1032. That is cited as authority for the court having recourse to parliamentary material where there is ambiguity in legislation. There is no legislation to construe here. That decision is dealing with a very different situation to that which is facing the court in the current case. The other case relied upon is **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6 and the judgment of Lord Sumption on the interpretation of a court order remitting an arbitration award. That judgement is not dealing with a document regulating the use of land in the public interest. Nor is it dealing with a document which is available for public inspection and which is to guide development in the public interest over the next few years. The judgment is not dealing with the interpretation of public documents. It is not on the point.

46. The starting point to be taken when interpreting planning policy seems to me to be the wording of the policy itself, assisted, if necessary, with words from the supporting text. If the words of the policy with the supporting text are not clear or are ambiguous

then, but only then, it may be permissible to have regard to documents incorporated within the plan itself. That is consistent with the approach in the case of **Phides**. It would be entirely unrealistic to expect any party reading the development plan, whether a member of the public, developer or land owner to have to resort to an investigation of other background documents. That is particularly so given the public interest in the role of planning. It follows that even if the policy is ambiguous or not clear I do not accept that it is appropriate to have resort to the various versions of the inspector's report to clarify the meaning as the first defendant invites the court to do. The extent to which one can have regard to other documents in determining the meaning of policy is not, in my judgment, at large but is circumscribed by the development plan and what is incorporated within it.

47. Adopting the approach of taking the disputed words of the policy as a starting point I reject the submission that the words used in Bicester 13, in themselves, and in their context, admit some built development within the CTA. The words used are perfectly clear; they do not permit any development within the CTA.

48. The policy is a housing allocation policy for 300 homes of which 30% are to be affordable. That built development is to take place within the allocated site which is edged red on the proposals map. Within the red line there are key site-specific design and place shaping principles which apply. One of those is that the part of the site within the CTA should be kept free from built development. That clearly refers to that part of the allocated site which is within the designation of CTA. It may be that the layout of any development would allow playing fields or public open space within the CTA so as not to adversely impact upon it but residential development or other forms of built development are not permissible under the policy as worded. In themselves, therefore, the words of the policy are clear.

49. Further, the wording makes sense in context. The provision of 300 homes elsewhere within the site can be used to produce funds to assist the targets of the CTA and to secure net biodiversity gains to the LWS. Whether that is what the inspector intended is a matter for the next issue to which I turn. But, in itself, I repeat, the policy is clear and not ambiguous. There is no need to have recourse to any document other than the CLP itself.

50. In considering the supporting text of the development plan the supporting paragraphs are entirely consistent with that interpretation. Paragraph C104 describes the physical location of the site and the degree to which it was affected by other designations. Paragraph C105 recites the wildlife interests. C106 sets out the risks of flooding and the fact that that causes a risk of harm to a large number of recorded protected species. Paragraph C107 notes the number of constraints but states that they can be addressed with appropriate mitigation measures in any proposal. The supporting text is, therefore, consistent with a significant housing allocation of 300 dwellings, the layout of which is to be tailored to take into account the various policy constraints within the allocated site.

51. Although the first defendant disagrees with the second defendant on reasons why the policy was ambiguous and agrees with the claimants that the policy should be remitted it had become a late, if somewhat tentative, convert to the view that policy Bicester 13 may be ambiguous. The first defendant contends that the question under the policy is whether all of the site within the CTA or part of the site within the CTA

should be kept free from built development. In my judgment, that is an entirely artificial approach to the words used. It is not compatible with the plain and ordinary meaning of the words of the policy.

52. There is no need, therefore, to go through the reasons why the first defendant submits that the second defendant is wrong in its interpretation.

53. The first defendant has sought to resolve the alleged ambiguity by reference to material which is extraneous to the plan itself. The transcript of the proceedings, the various versions of the inspector's report and the other documents referred to in Mr Peckford's witness statement are not incorporated into the plan nor specifically referred to in it. Accordingly, they do not fall within the category of documents to which resort may be had in a case of ambiguity which, as I have found, is not the case here.

54. Although policy ESD11 is part of the plan and regard needs to be had to it in interpreting policy Bicester 13 the wording of ESD11 is general in application and insufficient to displace the clear words of the site-specific allocation policy. In its adopted form the plan means that the restrictions upon development within CTAs generally, as set out within policy ESD11, have given way to the site specific conclusion that in the context of Gavray Drive there should be no development within the particular CTA covered by policy Bicester 13.

55. In short, the policy needs to be interpreted without regard to extraneous material; it is clear on its face in prohibiting any built development within that part of the site which falls within the CTA. There is nothing anywhere else within the plan or within the supporting text that would support built development within this particular CTA. The policy is clear and not ambiguous.

Issue Two: Was the Inspector's Report and Consequent Recommendation on Bicester 13 Irrational and/or Inadequately Reasoned?

56. The next question is whether it was a rational decision on the part of the inspector to recommend the adoption of policy Bicester 13 as worded in the light of his findings and conclusions in his report and/or whether he gave any or adequate reasons for recommending adoption of policy Bicester 13 as drafted?

57. The claimants submit that the inspector did not give any reasons as to why there should be no development within the CTA. All the reasons that he gave pointed in the opposite direction, namely, that there should be some development with the CTA area. The first defendant accepts that the reasoning given by the inspector is unsatisfactory.

58. The claimants draw attention to the indicative layout that it submitted to the examination, and which was referred to by the inspector in his report, which showed built development within that part of the allocation site that was within the CTA but outwith the LWS.

59. The second defendant submits that the claimants need to show that the inspector erred in law. Given the role of the inspector he made no error. The duty upon him is to examine the submitted plan for its soundness. His reasoning on whether the plan was

sound is clear. He addressed matters that were raised during the hearing session. It was open to the first defendant to make modifications to the plan which did not materially change it; in short it was open to the first defendant to clarify the policy.

Discussion and Conclusions

60. I have set out the full text of the inspector's report into the Gavray Drive site above. Within that he referred to indicative layouts demonstrating that, taking into account appropriate and viable mitigation measures, the site was capable of delivering around 300 homes at a reasonable, realistic density. The layouts that were before him were those submitted by consultants to the claimants. The revised master plan in the court hearing bundle (which was one of those submitted at examination) clearly shows some built development within that part of the CTA to the east of Langford Brook but no built development in the LWS within the CTA. The revised masterplan is the document that the inspector was referring to in paragraph 136 of his report.

61. In paragraphs 137 and 138 of his report the inspector went through other requirements that were necessary for policy Bicester 13 to be sound. They involved keeping that part of the allocation within the LWS free from built development, the absence of new housing in flood zone 3 and the use of Sustainable Drainage Systems ("SUDS") to address flood risks. Subject to those modifications, the inspector found the policy to be sound and that the site made a worthwhile contribution to new housing needs in Bicester and the district in a sustainable location. In so concluding, it is evident that the inspector took into account the indicative master plan supplied by the claimants as that was the only indicative layout before him. He seems to have relied on that to conclude that the site was capable of delivering some 300 homes.

62. The inspector then turned to suggestions before him by both the first defendant and members of the public that the developable area should be reduced. He discounted those suggestions in paragraph 139. The avoidance of any development in the whole of the River Ray CTA would, he found, significantly undermine the contribution of the site to the housing needs of Bicester. Such a reduced area would also potentially render the scheme unviable or, at the very least, unable to deliver a meaningful number of new affordable units. Further, a reduced area could materially diminish the potential for the scheme to contribute to enhancement of the LWS's ecological interest thereby achieving the main objective of the CTA. As a result, the requested reduction to avoid any development in the whole of the River Ray CTA would not represent a reasonable, realistic or more sustainable alternative to the proposal set out in the plan. In other words, the inspector understood that the policy to deliver around 300 homes was justified and sound when considered against reasonable alternatives, in this instance the alternative of no development within the CTA.

63. The inspector continued in his report to discount the suggestion that the whole of the land east of the Langford Brook should be retained as open space or designated as LGS. That was particularly the case as the proposal would enable the more important LWS to be protected with funding made available from the development (paragraph 140).

64. In paragraph 141 the inspector concluded that the most suitable balance was between the need to deliver new housing locally and protection and enhancement of environmental assets by the allocation of the site for 300 new homes on about 23

hectares. That could achieve a net gain in biodiversity which could be delivered as part of an overall package of development with appropriate mitigation measures. That was a matter for his planning judgment having considered and reached conclusions on all of the issues raised in the examination by the allocation of the site.

65. The inspector's overall reasoning was to retain the allocation as shown on the proposals map of the submitted CLP and to use the development proposed to deliver gains to enhance the LWS and produce a net gain in biodiversity as part of an overall package. That overall package centred on the delivery of around 300 homes. The inspector was satisfied that the indicative layouts showed that that was realistic and appropriate with viable mitigation measures. Notably those indicative layouts showed built form within the CTA.

66. The inspector's reasoning, therefore, is inimical with the first sentence of the key site-specific design and place shaping principles referring to keeping that part of the site within the CTA free from built development. He gave no reason at all to explain or justify the retention of that part of policy Bicester 13 that prevented built development in the CTA. As the claimants submit all his reasoning pointed the other way. Therefore, I find that the inspector failed to give any reasons for, and was irrational, in recommending the adoption of a policy that prevented built development in the CTA.

67. The inspector's findings were clear, both in rejecting the argument that there should be a reduction of the developable area to avoid any development in the whole of the CTA and on the absence of justification for the retention of the whole of the land to the east of the Langford Brook as public open space or its designation of LGS. His reasoning was that the LWS needed to be kept free from built development and protected, together with downstream SSSIs, through an ecological management plan which would ensure the long term conservation of habitats and species within the site.

68. Against that background it is difficult to understand how the inspector recommended that policy Bicester 13 should remain in its current form. Part of his modifications, consistent with his report, should have been to recommend the deletion of the first sentence of the third bullet point within the policy. That would have produced a justified and effective allocation consistent with national policy which was then sound and consistent with his report.

69. For those reasons the inspector erred in law in failing to give reasons for acting as he did, taking into account the duty upon him to examine the plan for soundness. Alternatively, the inspector was irrational in recommending as he did without supplying any reasons.

70. The first defendant had no legal power to make a modification to the plan which would have had the effect of deleting the disputed sentence as that would materially change the contents of the CLP.

71. It follows that some remedy is clearly appropriate. I turn now to consider which of the competing submissions of the claimant and first defendant is preferable.

Remedy

72. The claimants seek an Order that:

i) Policy Bicester 13 adopted by the first defendant on 20 July 2015 be treated as not adopted and remitted to the second defendant;

ii) The second defendant appoint a planning inspector who recommends adoption of policy Bicester 13 subject to a modification that deletes from the policy the words "that part of the site within the Conservation Target Area should be kept free from built development";

iii) The first defendant adopts policy Bicester 13 subject to the modification recommended by the planning inspector appointed by the second defendant.

73. The first defendant submits that the second and third parts of the proposed Order are inappropriate as they ask the court to assume plan making powers and redraft the plan. They would constrain the second defendant and first defendant as decision makers and exclude the public from participation.

74. The first defendant submits that the extent to which policy Bicester 13 should allow housing development on the site or protect the site as an environmental resource is pre-eminently a matter of planning judgment. If the court were to require the policy's adoption in the amended form that would restrike the planning balance and would trespass into a function which is that of the defendants.

75. The evidence before the court suggests that the final drafting of the policy was anything but an oversight. The first defendant had specifically queried the relationship of the disputed words and the conclusions in the inspector's report. The inspector in response made no recommendations about deletion or modification of the disputed words in the policy. It is clear that their inclusion was deliberate.

76. Further, the first defendant submits that the claimants' proposed Order is unsatisfactory in that it excludes the public from making representations on the amended wording of policy Bicester 13. The first defendant refers to the statutory framework requiring consultation during the preparation and revision of local plans.

77. Yet further, the claimants' proposed Order raises issues about the sustainability appraisal which, in the addendum, noted that the policy requires that the part of the site within the CTA should be kept free from built development before concluding that "Overall the site is likely to have … mixed effects, with potential for overriding minor positive effects overall." Modification would, therefore, require consideration of whether a further sustainability appraisal was required.

78. Instead, the first defendant seeks an Order that the second defendant appoints a planning inspector to reconsider the way in which policy Bicester 13 treated the designated CTA, that the planning inspector appointed permit representations by all interested parties on the way in which policy Bicester 13 treated the CTA and how that policy should be drafted, that the planning inspector shall make recommendations in respect of modifications to policy Bicester 13, provide reasons for those recommendations and that the first defendant shall adopt policy Bicester 13 subject to whatever modification is recommended by the appointed planning inspector.

79. The second defendant does not support the Order proposed by the first defendant. That is because the process of examination of a development plan is holistic with all

parts of the plan interconnected. The exercise is resource intensive and here was fully and properly undertaken. The answer is fully contained within the inspector's report which sets out the inspector's planning judgement. There is, therefore, no need to return to a reopened examination.

80. In addition, there are good reasons why a reopened examination is not necessary, namely, the integrity of the plan process and clarity as to the outcome based on the inspector's report.

81. As to sustainability, without the first sentence of the third bullet point of policy Bicester 13, the policy is clear in that it says that the development must not adversely impact upon the CTA. It is difficult to see where a requirement for a further sustainability appraisal, in those circumstances, would come from. There has been no suggestion that the sustainability appraisal was not properly considered. The site itself was addressed in considerable detail by at least two ecologists at the examination hearing.

82. It follows that, if the policy is unambiguous, the claimants' draft Order is preferable and deals with all matters.

Discussion and Conclusions

83. Under section 113(7) of the PCPA the High Court may quash the relevant document and remit the document to a person with a function relating to its preparation, publication, adoption or approval. If the High Court remits the relevant document, under (7B) it may give directions as to the actions to be taken in relation to the document. 113(7B) reads:

> "(7B) Directions under subsection (7A) may in particular—
>
> (a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;
>
> (b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;
>
> (c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);
>
> (d) require action to be taken by one person or body to depend on what action has been taken by another person or body."

84. Those powers are exercisable in relation to the relevant document in whole or in part.

85. On this part of the case I am of the view that the approach of the claimants and the second defendant to the appropriate remedy is correct.

86. The reasons for that view are as follows. An extensive examination process has taken place into the plan as a whole. As part of that process the inspector has exercised and made clear his planning judgment on, amongst other matters, housing across the district. As part of that exercise his decision was to permit policy Bicester 13 to proceed on the basis that it made a valuable contribution of 300 houses to the housing supply in Cherwell District Council. That conclusion was reached having heard representations from the claimants, the first defendant and the public. The representations from the public argued that there should be reduced developable areas on the allocation site and that part of the site was suitable for designation as LGS. The public, therefore, have fully participated in the planning process. The error which I have found occurred was not as a result of the public having any inadequate opportunity to participate in the examination process.

87. There is no statutory requirement when remitting the relevant document to the second defendant to give directions which, in effect, require a rerun of part of the examination process that has already taken place. There may be circumstances where it is appropriate to do so where, for example, there is a flaw in the hearing process but this is not one of those cases. There was a full ventilation of issues as to where development should take place within the Bicester 13 allocation site, the importance of biodiversity and the ecological interests, LGS issues and whether there should be any built development within the CTA. Those are all matters upon which the inspector delivered a clear judgment. The difficulty has arisen because he did not translate that planning judgment into an appropriately sound policy.

88. In those circumstances, and for those reasons, I do not consider it appropriate to accede to the directions sought by the first defendant. If the matter were to be remitted as sought by the first defendant there would be a rerun of the same issues for no good reason, without any suggestion of a material change in circumstance, and at considerable and unnecessary expenditure of time and public money. I reject the contention that a further sustainability appraisal will be required. The residual wording of the policy is such that it secures the objective of any development having a lack of adverse impact upon the CTA.

89. The justice of the case here is met with the Order sought by the claimants and, if the policy has not been found to be ambiguous, which it has not, supported by the second defendant which gives effect to the planning judgment of the inspector.

90. Accordingly this claim succeeds. The Order should be in the terms of paragraphs 1, 2 and 3 of the draft submitted by the claimants. The parties are invited to draw a final agreed Order and should agree costs within seven days of the judgment being handed down, failing which the issue of costs will be determined on paper.

DAK/APP2: COURT OF APPEAL Dominic Woodfield v JJ Gallagher Ltd and London and Metropolitan International Development Ltd and Norman Trustees [2016] EWCA Civ 1007 (12 October 2016)

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Neutral Citation Number: [2016] EWCA Civ 1007

Case No: C1/2016/1148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE PATTERSON DBE
[2016] EWHC 290 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 October 2016

Before:

LORD JUSTICE LAWS
and
LORD JUSTICE LINDBLOM

Between:

Dominic Woodfield	**Appellant**
and	
(1) J.J. Gallagher Ltd. **(2) London and Metropolitan International Developments Ltd.** **(3) Norman Trustees**	**Respondents**
and	
(1) Cherwell District Council **(2) Secretary of State for Communities and Local Government**	**Interested Parties**

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Official Shorthand Writers to the Court)

Mr Richard Turney (instructed by **Leigh Day**) for the **Appellant**
Mr Satnam Choongh (instructed by **Pinsent Masons LLP**) for the **Respondents**
Mr Richard Kimblin Q.C. (instructed by **the Government Legal Department**) for the **Second Interested Party**
The First Interested Party did not appear and was not represented

Hearing date: 6 September 2016

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. In this appeal we must consider whether, in its order granting relief in these proceedings, the court below exceeded the scope of the remedies provided for in section 113 of the Planning and Compulsory Purchase Act 2004 in challenges to the adoption of a local plan.

2. The appellant, Dominic Woodfield, appeals against the order of Patterson J. dated 18 February 2016, by which she granted relief on an application made under section 113 by the respondents in this appeal, J.J. Gallagher Ltd., London and Metropolitan International Developments Ltd. and Norman Trustees ("Gallagher") challenging the adoption by the first interested party, Cherwell District Council, of the Cherwell Local Plan 2011-2031 Part 1, on 20 July 2015. The challenge went to a single policy in the local plan, "Policy Bicester 13: Gavray Drive", in which a site at Gavray Drive, to the east of Bicester town centre, was allocated for housing development – 300 dwellings. An inspector appointed by the second interested party, the Secretary of State for Communities and Local Government, conducted an examination into the local plan. The examination hearings were held between 3 June and 23 December 2014. In his report dated 9 June 2015 the inspector recommended adoption of the local plan, including Policy Bicester 13. Mr Woodfield appeared at the examination as an objector to that policy. He played no part in the proceedings in the court below, but when it became clear that the council was not intending to appeal to this court against the judge's order he launched an appeal of his own. His standing, at one stage contested by Gallagher and the Secretary of State, is now no longer in dispute. I granted permission to appeal on 15 July 2016.

3. Both Gallagher and the Secretary of State have opposed the appeal. The council has played no part in it. On 2 August 2016 it sent a letter to the court, saying its position on the appeal was "neutral". It confirmed that on 18 May 2016 the inspector had produced an addendum report. In that addendum report he recommended the amendment to Policy Bicester 13 required in the judge's order. But the council has awaited the outcome of this appeal before proceeding to adopt the policy in that amended form.

The order of Patterson J.

4. So far as is relevant in the appeal, Patterson J.'s order states:

> "1. Policy Bicester 13 adopted by [the council] on 20th July 2015 be treated as not adopted and remitted to [the Secretary of State];
>
> 2. [The Secretary of State] appoint a planning inspector who recommends adoption of Policy Bicester 13 subject to a modification that deletes from the policy the words "That part of the site within the Conservation Target Area should be kept free from built development";
>
> 3. [The council] adopt Policy Bicester 13 subject to the modification recommended by the planning inspector appointed by [the Secretary of State];

… .”.

The issues in the appeal

5. Mr Woodfield’s appeal attacks only the relief granted by the judge: not the part of her order stating that Policy Bicester 13 was to be “treated as not adopted and remitted to [the Secretary of State]”, but the two paragraphs – paragraphs 2 and 3 – requiring the Secretary of State to appoint an inspector who was to recommend its adoption subject to the specified “modification”, and the council to adopt it subject to that “modification”. It is a striking feature of the appeal that neither the Secretary of State nor the council seeks to upset either of those requirements. Indeed, in opposing the appeal the Secretary of State actively maintains that the judge’s order should be upheld.

6. There are two grounds of appeal, succinctly stated:

> “1. Having found that there was an error of law the judge should have remitted the matter of the wording of Policy Bicester 13 of the Cherwell Local Plan for public re-examination.
>
> 2. In directing that an order be made to revise the policy wording without remitting the matter for re-examination, the judge made an error of principle because she exercised a planning judgement which should have been exercised by [the Secretary of State’s] inspector and by [the council].”

As refined in the skeleton argument of Mr Richard Turney, who appeared for Mr Woodfield, those grounds raise three main issues: first, whether Patterson J.’s order is within the scope of the court’s powers under section 113 of the 2004 Act; second, whether the order she made was, in the circumstances, misconceived; and third, whether the order was at odds with the regime for public participation in plan-making.

The allocation of the site at Gavray Drive

7. Patterson J. provided a narrative of the plan-making process (in paragraphs 12 to 27 of her judgment). I need mention only the salient detail here.

8. In August 2014 the council proposed the allocation of the site at Gavray Drive for 300 dwellings under Policy Bicester 13 in its Schedule of Proposed Main Modifications to the (Submission) Local Plan (Part 1). Much of the site is within the River Ray Conservation Target Area, and part of it is a Local Wildlife Site. Gallagher supported the proposed allocation but objected to the inclusion in Policy Bicester 13 of a sentence which stated:

> “That part of the site within the Conservation Target Area should be kept free from built development.”

9. Policy Bicester 13 was considered in the council’s sustainability appraisal addendum, against 19 sustainability criteria, one of which was “to conserve and enhance and create resources for the district’s biodiversity”. The assessment was on the basis that “[the] policy requires that the part of the site within the Conservation Target Area should be kept free from built development, as well as protection of the Local Wildlife Site and detailed

consideration of ecological impacts, wildlife mitigation and the creation, restoration and enhancement of wildlife corridors to protect and enhance biodiversity". The conclusion was that "[overall], the site is likely to have … mixed effects, with potential for overriding minor positive effects overall".

10. At the examination hearing, on 16 December 2014, several parties each explained their stance on the proposed allocation. We were taken through a transcript of the discussion that took place.

11. The council contended for the retention of the sentence in Policy Bicester 13 which Gallagher sought to have deleted – the provision precluding built development in the Conservation Target Area. Evidently with the support of a large number of local residents, it also suggested that the part of the Conservation Target Area within the site ought to be designated as Local Green Space, to which government policy in paragraphs 76 and 77 of the National Planning Policy Framework ("the NPPF") would apply. Its planning officer, Ms Sharon Whiting, said the reason why it was of the view that "the part of the Conservation Target Area that does not form part of the [Local Wildlife Site] designation needs [to] be kept free from development is … to make sure that there is a gap from the [Local Wildlife Site] …".

12. Gallagher welcomed the council's continued commitment to the allocation of the site for 300 dwellings, and suggested, as an approximate upper limit, 340. On a plan prepared for the examination hearing it indicated housing development spreading well into the Conservation Target Area, but no building in the Local Wildlife Site. Its planning consultant, Mr David Keene of David Lock Associates, said that the level of development proposed by Gallagher on the allocated site "represents an appropriate balance between development and biodiversity objectives and enhancements" and would provide funding for ecological enhancement. Referring to the plan Gallagher had prepared for the hearing, he told the inspector that "the gross area for residential development which is within the Conservation Target Area extends to about 3.43 [hectares]", the total area of the Conservation Area being 14.57 hectares. This 3.43 hectares was part of the 5.64 hectares shown on the plan as the Gavray Drive East Development Area. Gallagher's ecological consultant, Dr Rowlands, said that "[in] the event that development occurs that only precludes the Local Wildlife Site, then this development alone will contribute [about] 40% to delivery of the CTA targets of the River Ray CTA".

13. CPRE Oxfordshire (Bicester Branch) and Langford Village Community Association contended for the Local Green Space designation to be imposed on the land to the east of Langford Brook. Mr Woodfield argued that the policy favoured by the council did not go far enough to protect the ecological interest of the site. The "crucial thing", he said, was that "no built development in the [Conservation Target Area] stipulation is essential if development of this site is to be of an appropriate balance … and crucially whether it is to comply with the NPPF objective of no net loss of biodiversity". He also said that "the wording of Policy Bicester 13 needs amendment to clarify that the CTA, not just the [Local Wildlife Site] within it, cannot be used as a dumping ground for ancillary infrastructure components such as formal recreation, kick about areas, playing areas or allotments". These, he said, "are all uses that would be incompatible with the appropriate management to secure the nature [conservation interest] in the retained areas, and achieve no net loss". In his view, given the various constraints on its development, the site ought not to be allocated for more than 250 dwellings.

14. As the council's Planning Policy Team Leader, David Peckford, explains in his second witness statement, dated 12 November 2015, on 22 May 2015 a draft of the inspector's report was sent to the council for the facts to be checked. The first sentence of paragraph 139 of that draft report stated:

> "139. Requests that the developable area shown on the policies map should be reduced to avoid any building in the whole of the River Ray Conservation Target Area, as distinct from the smaller Local Wildlife Site, would significantly undermine this contribution. … ."

In the Schedule of Main Modifications appended to the draft report the modification recommended as Policy Bicester 13 included the contentious sentence about the exclusion of "built development" from the Conservation Target Area. On 5 June 2015 the council sent the Planning Inspectorate its response to the draft report, suggesting, in the light of paragraph 139 as drafted at that stage, that the inspector should consider "whether consequential modifications are needed to Policy 13 (MM91) to avoid inconsistency between the conclusions of the report and the current policy wording". On 9 June 2015 the Planning Inspectorate sent a further draft of the inspector's report, in which the words "as distinct from the smaller Local Wildlife Site" were omitted from the controversial sentence in paragraph 139. The recommended modification was unchanged. The council's officers were still concerned about the relationship between the draft report and Policy Bicester 13. In an e-mail to the Planning Inspectorate on that day Mr Peckford said:

> "… We understand that the Inspector does not wish to rule out all development in the CTA for the reasons set out and we note that main mod.91 rules out 'built development' … . Could we please ask the Inspector considers again whether the reference to 'building' in the first sentence of para. 139 might be further clarified. On the understanding that the Inspector does not wish to rule out recreation/open space uses etc within the CTA, does the Inspector here mean '<u>development ie over and above built development</u>' and if so, could this clarification be inserted into the report?"

A further draft of the inspector's report was sent to the council on 11 June 2015. In paragraph 139 the words "any building" were now replaced with the words "any development". Again, however, there was no change to the modification itself. The disputed words remained. In paragraph 38 of his second witness statement Mr Peckford said this:

> "38. Officers (myself included) interpreted the change to the Inspector's report to mean that the Inspector's intention was that while the bullet point requirement in Policy Bicester 13 included "built development" in the whole of the Conservation Target Area, other forms of development should not be ruled out in that area. We had in mind development which would facilitate the provision of public open space, playspace, playing fields etc: development comprising engineering operations and material changes of use as distinct from building operations. In addition, it might also be the case that flood attenuation measures could be delivered in that area, but we did not have that in mind at the time. We concluded that the report and the policy were consistent."

15. In the final version of his report – which, as I have said, is dated 9 June 2015 – the inspector's conclusions on Policy Bicester 13 were these:

"135. This area of largely flat land, bounded by railway lines to the north and west, the ring road to the east and residential land to the south lies to the east of Bicester town centre in a very sustainable location. Planning permission has previously been granted for new housing but that has now expired. In view of the need for additional sites to help meet OANs it is still considered suitable in principle to met new development. However, the eastern part is now designated as a Local Wildlife Site, with the central/eastern sections containing lowland meadow; a BAP priority habitat.

136. Additionally, roughly a quarter of the site lies in Flood Zones 2 and 3 adjacent to the Langford Brook that runs north-south through the centre of the site. The majority also lies within the River Ray Conservation Target Area. Nevertheless, even with these constraints, indicative layouts demonstrate that, taking into account appropriate and viable mitigation measures, the site is capable of delivering around 300 homes at a reasonable and realistic density not greatly different from that of the modern housing to the south.

137. In addition to necessary infrastructure contributions towards education, sports provision off site, open space, community facilities and public transport improvements, a number of other specific requirements are needed under policy Bic 13 for this proposal to be sound, in the light of current information about the site's ecological interests and environmental features. In particular, that part of the allocation within the Local Wildlife Site east of Langford Brook (just under 10 ha) needs to be kept free from built development and downstream SSSIs protected through an Ecological Management Plan prepared and implemented to also ensure the long term conservation of habitats and species within the site. Landscape/visual and heritage impact assessments and archaeological field evaluation are also required.

138. There must be no new housing in flood zone 3 and the use of SUDS to address flood risks will be required. Subject to such modifications (MMs 89-91), policy Bic 13 is sound and would enable this site to make a worthwhile contribution to new housing needs in Bicester and the district in a sustainable location. This can be achieved without any material harm to environmental or ecological interests locally as a result of the various protection, mitigation and enhancement measures to be included in the overall scheme.

139. Requests that the developable area shown on the policies map should be reduced to avoid any development in the whole of the River Ray Conservation Target Area would significantly undermine this contribution. It would also potentially render the scheme unviable or at the very least unable to deliver a meaningful number of new affordable units, as required under policy BSC 3, when all other necessary contributions are also taken into account. Moreover, it could well materially reduce the potential for the scheme to contribute to enhancement of the Local Wildlife Site's ecological interest as part of the total scheme, thereby effectively achieving the main objective of the Conservation Target Area. Consequently, it would not represent a reasonable, realistic or more sustainable alternative to the proposals set out in the plan, as modified.

140. Similarly, despite the historic interest of parts of the site in terms of their long established field patterns and hedges, this does not amount to a justification for the retention of the whole of the land east of the Langford Brook as public open space, nor for its formal designation as Local Green Space. This is particularly so when the scheme in the plan should enable the more important LWS to be protected with funding made available for enhancement at a time when the lowland meadow habitat is otherwise likely to deteriorate further without positive action. Such an approach would be capable of ensuring no net loss of biodiversity as a minimum and also compliance with policies ESD 10 and 11 as a result.

141. All in all the most suitable balance between the need to deliver new housing locally and to protect and enhance environmental assets hereabouts would essentially be achieved through policy Bic 13, as modified, and the land's allocation for 300 new homes on approximately 23 ha in total, given that the requirements of policies ESD 10 and 11, including to achieve a net gain in biodiversity arising from the scheme as a whole, can also be delivered as part of an overall package of development with appropriate mitigation measures."

The inspector did not recommend any change to the sentence in Policy Bicester 13 which said that the "part of the site within the Conservation Target Area should be kept free from built development". That sentence remained in the policy when the local plan was adopted.

16. When it resolved to adopt the local plan on 20 July 2015 the council also resolved to pursue, "through the forthcoming stages of the Cherwell Local Plan Part 2 …", the designation as Local Green Space of the part of the Conservation Target Area within the Policy Bicester 13 site. When asked by Gallagher to clarify this resolution, the council's officers said in an e-mail on 24 July 2015 that although Policy Bicester 13 prevented "built development" in the Conservation Target Area, it did "not preclude appropriate provision of associated public open space [etc.] as part of a development in the CTA", and that this was also "thought to be unlikely to be inconsistent with the Local Green Space designation if this does indeed take place".

Policy Bicester 13 and Policy ESD 11

17. In the adopted local plan Policy Bicester 13 states:

"Policy Bicester 13: Gavray Drive

Development Area: 23 hectares

Development Description: a housing site to the east of Bicester town centre. It is bounded by railway lines to the north and west and the A4421 to the east

Housing
- Number of homes – 300 dwellings
- Affordable Housing – 30%

…

Key site specific design and place shaping principles

…

- That part of the site within the Conservation Target Area should be kept free from built development. Development must avoid adversely impacting on the Conservation Target Area and comply with the requirements of Policy ESD11 to secure a net biodiversity gain.
- Protection of the Local Wildlife Site and consideration of its relationship and interface with residential and other built development.

…

- … A central area of open space either side of Langford Brook, incorporating part of the Local Wildlife Site and with access appropriately managed to protect ecological value. No formal recreation within the Local Wildlife Site.

… ".

The supporting text for Policy Bicester 13 acknowledges, in paragraph C.104, that "[the] majority of the site is part of the River Ray Conservation Target Area"; in paragraph C.106, that there is "a risk of harming the large number of recorded protected species towards the eastern part of the site", and "[impacts] need to minimised by any proposal"; and states, in paragraph C.107, that "[although] there are a number of known constraints such as Flood Zone 3, River Ray Conservation Target Area and protected species, this could be addressed with appropriate mitigation measures by any proposal".

18. Policy ESD 11 states:

> "Policy ESD 11: Conservation Target Areas
>
> Where development is proposed within or adjacent to a Conservation Target Area biodiversity surveys and a report will be required to identify constraint and opportunities for biodiversity enhancement. Development which would prevent the aims of a Conservation Target Area being achieved will not be permitted. Where there is potential for development, the design and layout of the development, planning conditions or obligations will be used to secure biodiversity enhancement to help achieve the aims of the Conservation Target Area."

Paragraph B.240 in the supporting text for Policy ESD 11 says that "Conservation Target Areas represent the areas of greatest opportunity for strategic biodiversity improvement in the District and as such development will be expected to contribute to the achievement of the aims of the target areas through avoiding habitat fragmentation and enhancing biodiversity".

Patterson J.'s judgment

19. Patterson J. rejected the suggestion that Policy Bicester 13 was ambiguous. The Secretary of State had argued before her that the contentious words might be read as meaning that some but not all of the Conservation Target Area may be built upon. She concluded (in paragraph 55 of her judgment) that Policy Bicester 13 was "clear on its face in prohibiting any built development within that part of the site which falls within the CTA".

20. Gallagher contended before the judge that, in the light of the inspector's relevant reasoning in his report, his recommendation that the local plan be adopted with the contentious

provision in Policy Bicester 13 was illogical and irrational. Patterson J. referred to the "indicative layouts" before the inspector at the examination hearing. She noted that the "revised master plan" referred to by the inspector in paragraph 136 of his report "clearly shows some built development within that part of the CTA to the east of Langford Brook but no built development in the LWS within the CTA" (paragraph 60 of the judgment). In paragraphs 137 and 138 of the report the inspector had taken into account, and apparently relied on, Gallagher's "indicative master plan … the only indicative layout before him", in concluding that "the site was capable of delivering some 300 homes" (paragraph 61). The judge continued (in paragraph 62):

> "62. The inspector then turned to suggestions before him by both [the council] and members of the public that the developable area should be reduced. He discounted those suggestions in paragraph 139. … [The] inspector understood that the policy to deliver around 300 homes was justified and sound when considered against reasonable alternatives, in this instance the alternative of no development within the CTA."

The inspector's conclusion in paragraph 141 was, she said, "a matter for his planning judgment having considered and reached conclusions on all of the issues in the examination by the allocation of the site" (paragraph 64). His reasoning was "inimical" to the requirement in Policy Bicester 13 to keep the part of the site within the Conservation Target Area free from built development. He had given "no reason at all to explain or justify the retention of that part of [Policy] Bicester 13 that prevented built development in the CTA". What he said all "pointed the other way" (paragraph 66). He had clearly rejected the argument that the developable area should be reduced "to avoid any development in the whole of the CTA …" (paragraph 67). He ought to have recommended the deletion of the controversial provision in Policy Bicester 13 (paragraph 68). In the circumstances "some remedy" was "clearly appropriate" (paragraph 71).

21. Gallagher had sought an order that would require the Secretary of State to appoint an inspector who would recommend the adoption of the local plan with an amendment to Policy Bicester 13 deleting the disputed words, and the council to adopt the local plan in that form (paragraph 72 of the judgment). The Secretary of State supported Gallagher's proposed order (paragraphs 79 to 82). The order sought by the council would have required the Secretary of State to appoint an inspector to reconsider the way in which the Conservation Target Area was treated in Policy Bicester 13; the inspector to permit representations to be made on that issue by all interested parties, to recommend any appropriate "modification", and to provide reasons for that recommendation; and the council to adopt Policy Bicester 13 subject to whatever "modification" the inspector then recommended to it (paragraphs 73 to 78).

22. Patterson J. accepted Gallagher's and the Secretary of State's arguments on remedy. She explained why in paragraphs 86 to 89 of her judgment:

> "86. … An extensive examination process has taken place into the plan as a whole. As part of that process the inspector has exercised and made clear his planning judgment on, amongst other matters, housing across the district. As part of that exercise his decision was to permit policy Bicester 13 to proceed on the basis that it made a valuable contribution of 300 houses to the housing supply in Cherwell District Council. That conclusion was reached having heard representations from [Gallagher, the council] and the public. The

representations from the public argued that there should be reduced developable areas on the allocation site and that part of the site was suitable for designation as LGS. The public, therefore, have fully participated in the planning process. The error which I have found occurred was not as a result of the public having any inadequate opportunity to participate in the examination process.

87. There is no statutory requirement when remitting the relevant document to the second defendant to give directions which, in effect, require a rerun of part of the examination process that has already taken place. There may be circumstances where it is appropriate to do so where, for example, there is a flaw in the hearing process but this is not one of those cases. There was a full ventilation of issues as to where development should take place within the Bicester 13 allocation site, the importance of biodiversity and the ecological interests, LGS issues and whether there should be any built development within the CTA. Those are all matters upon which the inspector delivered a clear judgment. The difficulty has arisen because he did not translate that planning judgment into an appropriately sound policy.

88. In those circumstances, and for those reasons, I do not consider it appropriate to accede to the directions sought by the first defendant. If the matter were to be remitted as sought by the first defendant there would be a rerun of the same issues for no good reason, without any suggestion of a material change in circumstance, and at considerable and unnecessary expenditure of time and public money. I reject the contention that a further sustainability appraisal will be required. The residual wording of the policy is such that it secures the objective of any development having a lack of adverse impact upon the CTA.

89. The justice of the case here is met with the Order sought by the claimants and, if the policy has not been found to be ambiguous, which it has not, supported by the second defendant which gives effect to the planning judgment of the inspector."

The inspector's addendum report

23. In paragraph 2 of his addendum report of 18 May 2015, following the court's order of 19 February 2016, the inspector said he recommended the deletion of the sentence in Policy Bicester 13 precluding "built development" in the Conservation Target Area "in the interests of soundness, clarity and to facilitate implementation of the policy and allocation in the plan". In its letter of 2 August 2016 to the court the council says it "has not yet re-adopted Policy Bicester 13 subject to the modification recommended by the Inspector, pending completion of the current proceedings".

Is Patterson J.'s order within the scope of the court's powers under section 113 of the 2004 Act?

24. The statutory scheme for the preparation and adoption of development plan documents is in Part 2 of the 2004 Act. Under section 20(7B) and (7C), if an inspector appointed by the Secretary of State to carry out an independent examination of a development plan document, having conducted the examination, does not consider that it would be

reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but does consider that it would be reasonable to conclude that the authority has complied with the duty to co-operate in section 33A, he must, if asked to do so by the local planning authority, recommend modifications of the document that would make it one that satisfies the requirements mentioned in subsection (5)(a) and is sound. In those circumstances, under section 23(2A) and (3), the local planning authority "may adopt" the document with the modifications recommended by the inspector under section 20(7A) – the "main modifications" – or with the main modifications and additional modifications that do not materially affect the policies in the document; but, under section 23(4), the authority "must not adopt" the document unless it does so in accordance with section 23(3).

25. Under section 113(7) of the 2004 Act the court may quash the "relevant document" and "remit [it] to a person or body with a function relating to its preparation, publication, adoption or approval". Subsection (7A) provides that if the court remits the "relevant document" under subsection (7)(b) it "may give directions as to the actions to be taken in relation to the document". Section 113(7B) provides:

> "Directions under subsection (7A) may in particular –
> (a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;
> (b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;
> (c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);
> (d) require action to be taken by one person or body to depend on what action has been taken by another person or body."

Subsection (7C)(a) provides that those powers are "exercisable in relation to the relevant document" either "in whole or in part".

26. Subsections (7)(b) and (7A) to (7C) avoid the consequence, when a "relevant document" is quashed, of its preparation having to begin again even if the error of law in its preparation has occurred at a relatively late stage in the process. Before those provisions were introduced (by section 185 of the Planning Act 2008) the court's options as to relief were limited, under section 113(7), to quashing the relevant document "(a) wholly or in part", and "(b) "generally or as it affects the property of the applicant". As H.H.J. Robinson, sitting as a deputy judge of the High Court in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin), said (at paragraph 6 of her judgment):

> "6. Concern was frequently expressed about the lack of flexibility in the provision because … quashing had the effect that the local planning authority had to recommence the plan making process (in respect of the part quashed) from the beginning, see e.g. *South Northamptonshire* [*District Council*] *v Charles Church Developments* [*Ltd.*] [2000] PLCR 46, a decision on the predecessor provision in s.287 of the Town and Country Planning Act 1990. The amendments to s.113 which include the power to remit were made by s.185 of the Planning Act 2008 the Explanatory Notes to which indicate that the

amendments were intended to expand the court's powers by providing an alternative remedy, see paragraph 295."

27. Mr Turney submitted that the judge misused the provisions of section 113(7A), (7B) and (7C). Her order required action to be taken both by an inspector and by the council as local planning authority, which, under the statutory scheme for plan-making, they would only be entitled to take having exercised their own planning judgment. Section 113 does not permit the court to substitute its own view for the authority's on the planning issues in a plan-making process. The court may make directions as to the procedural steps involved in the making and adoption of a plan, but not decisions on the content of the plan's policies and text (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780E-H). Had Parliament intended to give the court the power to do that when remitting a development plan document under section 113, it would have done so expressly. It did not. The scope of the court's power to give "directions" always depends on the context (see the judgment of the Court of Appeal, given by Sir Anthony Clarke M.R., in *R. (on the application of Girling) v Parole Board* [2007] Q.B. 783, at paragraphs 19 to 23; and the judgment of Lloyd L.J. in *Ryanair Holdings Ltd. v Office of Fair Trading* [2012] Bus. L.R. 1903, at paragraph 45). The context here is the statutory scheme for development plan-making in the 2004 Act, which gives the local planning authority the task of preparing and adopting a local plan. Subsection (7A) does not empower the court to mandate a particular outcome, such as the adoption of a local plan in a particular form. That would be "constitutionally improper" (see the judgment of Elias J., as he then was, in *R. (on the application of Hirst) v Secretary of State for the Home Department* [2002] 1 W.L.R. 2929, at paragraph 86). It would be inconsistent with the proper scope of remedies in judicial review under section 31 of the Senior Courts Act 1981 and CPR r.54.19, and under other statutory provisions providing for matters to be remitted to a decision-maker in the planning sphere – for example, sections 288 and 289 of the Town and Country Planning Act 1990 (see the decision of the Court of Appeal in *R. (on the application of Perrett) v Secretary of State for Communities and Local Government* [2010] P.T.S.R. 1280).

28. Mr Satnam Choongh, for Gallagher, and Mr Richard Kimblin Q.C., for the Secretary of State, do not contest the proposition that the court's power to give directions under section 113(7A) does not, and could not, enable the court to intrude upon the statutory role of the local planning authority, or the statutory remit of an inspector, in the preparation of a local plan by exercising a planning judgment of its own. That is not in dispute. Nor could it be.

29. The court's powers to grant appropriate relief under section 113(7), (7A), (7B) and (7C) are widely drawn. They afford the court an ample range of remedies to overcome unlawfulness in the various circumstances in which it may occur in a plan-making process. As was recognized by the judge in *University of Bristol*, the provisions in subsection (7A), (7B) and (7C) were a deliberate expansion of the court's powers to grant relief where a local plan is successfully challenged under section 113. They introduce greater flexibility in the remedies the court may fashion to deal with unlawfulness, having regard to the stage of the process at which it has arisen, and avoiding – when it is possible to do so – uncertainty, expense and delay. They include a broad range of potential requirements in directions given under subsection (7A), all of which go to "the action to be taken in relation to the [relevant] document". The four types of requirement specified in subsection (7B) are stated to be requirements which directions "may in particular" include. None of them, however, would warrant the substitution by the court of its own view as to the issues of substance in a plan-making process, or as to the substantive content of the plan – its

policies and text. They do not allow the court to cross the firm boundary separating its proper function in adjudicating on statutory challenges and claims for judicial review in the planning field from the proper exercise of planning judgment by the decision-maker.

30. The question dividing the parties here is whether the court's power under section 113(7A) to give directions when remitting a local plan – in particular its power under subsection (7B)(c) and (d) to give directions requiring the taking of "action" – broad as that power may be, extends to giving directions such as the judge gave in the particular circumstances of this case. In my view they do.

31. Subsection (7B)(c) is broadly framed. It embraces "action" to be taken by "a person or body with a function relating to the preparation, publication, adoption or approval of the document …". This will include "action" to be taken by an inspector appointed by the Secretary of State to undertake an examination of a local plan, and action to be taken by the local planning authority whose responsibility it is to prepare and adopt the plan. Both the inspector and the authority perform relevant functions. The "action" itself may include action to be taken by the inspector in recommending modifications to the plan under section 20(7C), or by the authority in adopting the plan with such modifications under section 23(3). Both are functions relating to the preparation and adoption of the plan.

32. Mr Turney was prepared to concede that in a case where an inspector's report had left no room for doubt about the outcome he was recommending and allowed no other possible outcome, but he had failed to recommend the inevitable modification to the plan, it might be appropriate for the court to grant relief under section 113(7) and (7A) with a direction requiring him to recommend that modification to the local planning authority. Mr Turney did not accept, however, that this was such a case. Nor did he accept that in those or any other circumstances the court could ever compel an authority to adopt a plan in a particular form. The statutory scheme leaves the authority with the option not to adopt the plan. When granting a remedy under section 113(7) and (7A), Mr Turney submitted, the court may not shut out that option. So if Patterson J. was right to find the inspector's conclusions in paragraphs 135 to 141 of his report unambiguous and the modification required to give effect to them plain, paragraph 2 of her order might be appropriate. But paragraph 3 would not.

33. I do not think Mr Turney's submissions recognize the full extent of the court's power to give directions under section 113(7A). Such directions are, by their nature, a form of mandatory relief. They enable the court to fit the relief it grants precisely to the particular error of law, in the particular circumstances in which that has occurred. In principle, as I see it, they may be used to require the "person or body" in question to correct some obvious mistake or omission made in the course of the plan-making process, perhaps at a very late stage in the process, without upsetting the whole process by requiring its earlier stages to be gone through again. I cannot see why they should not be used, in an appropriate case, to give proper effect to a planning judgment already exercised by the "person or body" concerned – typically in the formulation of policy or text, or in the allocation of a site for development of a particular kind – or to ensure that a decision taken by that "person or body" in consequence of such an exercise of planning judgment is properly reflected in the outcome of the process. Used in this way, the court's power to give directions can overcome deficiencies in the process without its trespassing into the realm of planning judgment and without arrogating to itself the functions of the inspector who has conducted the examination of a local plan or of the local planning authority in preparing and adopting the plan.

34. There will, I think, be cases where the court can give directions requiring an inspector to recommend a modification in a particular form to reflect the conclusions in his report. In my view Mr Turney was right to accept that. But I think there will also be cases in which the court can properly give a direction under section 113(7A) requiring a local planning authority to adopt a local plan with a particular modification or modifications. Whether a direction of either kind is appropriate in a particular case will always depend on the individual circumstances of that case. In some cases it will be clear that the court can give such directions without transgressing the limits of its jurisdiction under section 113. It may only do so if the relevant planning judgment has already been lawfully exercised within the plan-making process itself, and the relevant consequences of that planning judgment are plain. The directions it gives, if crafted as they should be, will then result in the inspector's or the local planning authority's planning judgment – whichever it is – being given its true and intended effect. The court will have confined itself to rectifying the errors of law it has found, which is its proper remit in proceedings impugning the validity of an adopted local plan. And it will not have ventured into the forbidden realm of planning judgment, or usurped any function of the "person or body" whose error requires to be put right by the "action" prescribed for them under section 113(7A). There is nothing "constitutionally improper" about this, and nothing inconsistent with the ambit of remedies in public law nor with the court's powers to grant relief in claims for judicial review or under other kindred statutory provisions for challenges to planning decisions.

35. In my view therefore, the order made by the judge in this case was, in principle, an order within the scope of the court's powers under section 113.

Was the judge's order, in the circumstances of this case, misconceived?

36. As Mr Turney emphasized, the inspector did not recommend the amendment of Policy Bicester 13 by the deletion of the sentence in issue, even though the council had taken pains to clarify the matter with the Planning Inspectorate before proceeding to adopt the local plan. It is also clear, said Mr Turney, that the council did not want that sentence to be omitted from the adopted version of Policy Bicester 13. Yet the judge's order mandates that outcome. The concept of reducing the "developable area" of the site might mean excluding all forms of development from the Conservation Target Area or the exclusion only of "built development". The sentence in issue prevents the construction of buildings in the Conservation Target Area. It does not prohibit other forms of development, such as the recreational facilities required in any development of housing on the site – one of several possibilities discussed at the examination. Yet the judge seems to have overlooked the distinction between a prohibition on "any development" and a prohibition only on "built development" in the Conservation Target Area. She does not seem to have appreciated that in paragraph 139 of his report the inspector was not addressing the council's case; he was addressing and rejecting a case put forward by third party objectors.

37. If the inspector were given the chance to consider the matter again, Mr Turney submitted, he might conclude unequivocally that no "built development", as opposed to no development at all, should take place within the Conservation Target Area, or perhaps that the number of dwellings in the allocation should come down – maybe to the level suggested by Mr Woodfield. There are several potential outcomes. Depending on the modification recommended by the inspector, the council might decide not to change the policy, and not to adopt it. After all, when it adopted the local plan it resolved to pursue the

designation of the Conservation Target Area as Local Green Space – which would prevent built development in that part of the site. But the judge's order makes those other outcomes impossible. In effect, she exercised a planning judgment of her own, instead of leaving these questions, as she should have done, to the inspector and the council. Broad as the power to give directions in section 113(7A) may be, her order in this case went beyond it.

38. I cannot accept Mr Turney's argument here. In my view, Mr Choongh and Mr Kimblin were right in their submission that the judge's conclusions in paragraphs 86 to 89 of her judgment are sound.

39. Patterson J. did not engage in an exercise of planning judgment. She identified the relevant reasoning of the inspector, and stated her understanding of it. And her analysis of what he said seems to me to be correct. She recognized that the relevant planning issues had been thoroughly aired before him at the examination hearing. He heard detailed representations from the council, Gallagher and objectors on the appropriate extent of development within the allocated site, given the site's ecological interest; on the question of whether development – both built and other development – should be contemplated within the Conservation Target Area, and, if so, whether it should be contemplated in the Local Wildlife Site; and on the concept of designating the Conservation Target Area as Local Green Space. It is clear from the transcript of the discussion at the examination hearing that all of these questions were very fully debated, with the benefit of the plan produced by Gallagher showing development within the Conservation Target Area.

40. Before us there has been no criticism of the inspector's treatment of the planning issues he had to grapple with, or of the conclusions he reached. Nor could there be.

41. As the judge concluded, it is clear from the relevant passage of his report – in particular, paragraphs 135, 137 and 139 to 141 – that the inspector saw no justification for retaining the provision in Policy Bicester 13 which referred to the part of the allocated site within the Conservation Target Area being kept free of "built development"; that in his view that provision would work against the contribution the site should be making to the supply of housing, might render its development unviable or incapable of delivering as much affordable housing as it should, and might also frustrate the enhancement of the ecological interest in the Local Wildlife Area and the achievement of the main objective of the Conservation Target Area; that the designation of the land to the east of Langford Brook as Local Green Space was unjustified; that sufficient protection to biodiversity on the site was afforded by Policy ESD 10 and Policy ESD 11; and that, given the requirements of those policies, the site of approximately 23 hectares should be allocated for the development of 300 dwellings. He could see the need to keep the part of the allocated site within the Local Wildlife Site and to the east of Langford Brook free from "built development" (paragraph 137 of his report), but not a need to reduce the developable area of the site by preventing development elsewhere in the Conservation Target Area (paragraph 139). Those conclusions were reached in the light of the parties' representations and the discussion at the examination, and expressly in reliance on Gallagher's "indicative layouts" showing development in the Conservation Target Area – to which the inspector referred in paragraph 136 of his report.

42. The relevant reasoning in the inspector's report is, as Mr Choongh and Mr Kimblin submitted, complete and clear. It points to the conclusion that the sentence in Policy Bicester 13 precluding "built development" in the Conservation Target Area must be removed. On a fair reading of the inspector's relevant conclusions as a whole, and in

particular those in paragraph 139, the retention of that sentence is incompatible with them. Its deletion was therefore necessary.

43. As was also submitted by Mr Choongh and Mr Kimblin, there is no force in Mr Turney's argument that, upon reconsideration, the inspector might now recommend that Policy Bicester 13 be altered by reducing the number of dwellings in the allocation or adopted with a provision precluding "built development", but not other forms of development, in the Conservation Target Area. No support for that submission is to be found in his report. Having had all of the planning issues ventilated before him at the examination hearing and having dealt comprehensively with them in his report, he firmly endorsed the allocation of 300 dwellings on the site, concluding that it struck the best balance between housing need and the protection and enhancement of "environmental assets" and finding it consistent with the aim of securing a "net gain in biodiversity … from the scheme as a whole" (paragraph 141 of his report). In reaching that conclusion he was obviously rejecting the council's and objectors' efforts to have some limit imposed in Policy Bicester 13 on development within the Conservation Target Area as a whole.

44. Paragraph 139 of the report must be read together with the preceding two paragraphs. In those three paragraphs the inspector was considering whether the developable area of the allocated site should be reduced, and if it should, how and why. The only parts of the site that he considered should be subject to any restriction on development under Policy Bicester 13 were the area of just less than 10 hectares within the Local Wildlife Site to the east of Langford Brook (paragraph 137) and the land within flood zone 3 (paragraph 138). He expressly rejected the "requests" that the developable area of the site be reduced by precluding development from the Conservation Target Area as a whole (paragraph 139). He reinforced that conclusion by dismissing the notion of the land to the east of the Langford Brook being retained as public open space or designated as Local Green Space (paragraph 140). And he maintained it after the council had twice queried the first sentence of paragraph 139 in his draft report. He did not seek to qualify it in any way: by differentiating between the various relevant "requests" for a reduction in the developable area presented to him at the examination hearing, or by distinguishing between development of different kinds – for example, between "built development" and other forms of development – or by stating that, in his view, only "built development" should be excluded from this part of the site.

45. This does not mean that a particular scheme of development in which "built development" or development of some other kind is proposed within the Conservation Target Area would necessarily be acceptable when submitted as an application for planning permission; merely that Policy Bicester 13 did not have to rule out development in that part of the site in principle. Any scheme would, after all, still have to comply with the local plan's policy for Conservation Target Areas – Policy ESD 11, as well as the various criteria in Policy Bicester 13 itself. The inspector's conclusions make this perfectly clear.

46. There is, in truth, nothing in the inspector' report to suggest that he saw any justification for reducing the developable area of the allocated site by including in Policy Bicester 13 either a sentence stating that "built development" should not extend into the Conservation Target Area or a sentence stating that "built development" was precluded in that part of the site but other forms of development were not. To read any such concept into his report would be quite wrong. On the contrary, on a fair reading of his conclusions in paragraphs 135 to 141, he clearly did not accept there was a need for any reduction in the developable area of the allocated site beyond those to which he referred in paragraphs 137 and 138. If

he had accepted that, he would undoubtedly have said so. And he would have had to explain why. He would have had to identify the kinds of development which might be acceptable in the Conservation Target Area and give reasons for excluding the rest. But he did not do that. In fact, in paragraph 139 he set out cogent reasons for reaching the very opposite conclusion – that the developable area of the site did not have to be further reduced by excluding development of any kind from "the whole of the River Ray Conservation Target Area". In that paragraph he was not confining himself merely to the third party objections. He was addressing the council's case as well. That, in my view, is clear.

47. Patterson J. was therefore right to find the inspector's recommendation irreconcilable with the reasoning in the relevant part of his report, and to conclude that he ought to have recommended the deletion of the contentious provision in Policy Bicester 13. In these circumstances paragraph 2 of the judge's order was not, in my view, misconceived. On the contrary, it was fully justified, appropriate and necessary. The direction it contains was nothing more or less than was required to correct the inspector's mistake. It gave proper effect to the conclusions he had expressed in his report. It ensured that his recommendation would be consonant with his planning judgment, displayed in those conclusions. It remedied his error in a specific and proportionate way. And it did so without exceeding the court's jurisdiction under section 113(7), (7A) and (7B).

48. That leaves paragraph 3 of the order. In the particular circumstances of this case, was the judge entitled, and right, to require the council to adopt the corrected Policy Bicester 13, as recommended by the inspector in accordance with paragraph 2 of her order? In my view she was.

49. As I have said, although the council invited the judge, in effect, to order that the inspector be given the opportunity to reconsider his recommendation on the terms of Policy Bicester 13 after hearing the parties' further representations, it also invited her to order it to adopt whatever "modification" the inspector might then recommend. The precise form of this part of the council's draft order, which was presented to the court below by the council's solicitor, Mr Nigel Bell, as an exhibit to his witness statement dated 12 November 2015, was this – in paragraph 5:

> "5. The [council] shall adopt Policy Bicester 13 subject to whatever modification (if any) of Policy Bicester 13 is recommended by the appointed planning inspector."

50. Two things therefore are clear. First, the council was not opposing, in principle, a mandatory order which required it ultimately to adopt Policy Bicester 13 in whatever form the inspector might recommend. This would of course include a version of Policy Bicester 13 in which the provision precluding "built development" in the Conservation Target Area had been deleted and no restriction on development in that part of the site inserted in its place – the amendment which in my view the inspector ought to have recommended and which the judge was right to direct him to recommend. Mr Bell did not say in his witness statement that the council would, in principle, oppose an order requiring it to adopt the policy in that particular form, whether or not the inspector was required by the court to recommend that course. The council has not appealed against paragraph 3 of the judge's order, or any part of it. Nor does its letter to the court dated 2 August 2016 reveal any misgivings about the order in the light the judge's conclusions in paragraphs 86 to 88 of her judgment. Secondly, before the judge the council did not seek to keep open the

possibility of deciding in the end not to adopt the local plan, or at least not to adopt Policy Bicester 13 in a particular form. It was asking for an order which would effectively compel it to adopt the policy in any event. It was not saying that if the policy were remitted to the inspector and he recommended an amendment in which the provision precluding "built development" in the Conservation Target Area was removed, it would not then – or might not – adopt the policy, or even that it would want to consider non-adoption. Even now, in its letter of 2 August 2016, the inspector having recommended the deletion of this provision in accordance with paragraph 2 of the judge's order, it has not said that.

51. That being the council's position, I cannot accept Mr Turney's submission that paragraph 3 of the judge's order had the effect of overriding the council's discretion as to adoption under section 23 of the 2004 Act. The draft order presented to the court by the council embodies the exercise of that discretion. The council had manifestly decided to exercise its power to adopt Policy Bicester 13, and to do so even if the policy did not restrict the developable area of the allocated site by precluding "built development" in the Conservation Target Area. Again, the judge was not stepping beyond the limits of the court's jurisdiction under section 113. Paragraph 3 of her order was not misconceived. With paragraphs 1 and 2 of the order, it provided the logical and complete remedy to the unlawfulness in the plan-making process. It ensured not only that the inspector's recommendation accurately reflected the conclusions in his report, but also that his recommendation was translated faithfully into the adoption of Policy Bicester 13 in the form it would then have to take.

Was the judge's order at odds with the regime for public participation in plan-making?

52. Mr Turney submitted that the judge ought to have remitted Policy Bicester 13 to the inspector, as the council had sought, requiring him to permit further representations by interested parties on the content of the policy and its drafting. The judge's order undermines the provisions for public participation in development plan-making under domestic, European Union and international law. It denies Mr Woodfield and others the opportunity to argue for a different outcome in the adopted Policy Bicester 13. Contrary to the statutory scheme in Part 2 of the 2004 Act and Part 6 of the Town and Country Planning (Local Planning) (England) Regulations 2012, it prevents public participation in the plan-making process. Because the sustainability appraisal prepared for the local plan under Directive 2001/42/EC "on the assessment of the effects of certain plans and programmes" ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA regulations") had been undertaken on the basis that Policy Bicester 13 would preclude "built development" in the Conservation Target Area, the adoption of the policy in a materially different form would be unlawful. It would, said Mr Turney, offend the provisions for effective public participation in article 6(4) and article 7 of the Aarhus Convention. Further environmental assessment would be necessary before the local plan could be adopted lawfully.

53. I cannot accept those submissions.

54. As the judge observed in paragraphs 86 to 88 of her judgment, the statutory plan-making process has in this case run its full course without legal error until its penultimate and final stage, the public has participated fully in the process, the examination hearing was faultlessly conducted, interested parties have had their say, the planning issues arising from the policies in the local plan – including Policy Bicester 13 – have been resolved in the

light of the representations made. Mr Turney was unable to point to any provision relating to public participation in the 2004 Act and the 2012 regulations which had not been complied with. The examination does not need to be rerun. The examination hearing does not need to be reopened. The only errors of law lie in the failure by the inspector to translate his conclusions on one aspect of one policy into the recommendation following from those conclusions, and in the consequent failure of the council to adopt the policy in its proper form. Relief less focused on those errors of law than the order made by the judge would be needlessly wasteful of time and cost. It would be disproportionate. It might also have implications for other policies in the local plan, in particular those providing for the supply of housing in the council's area in the plan period.

55. The submission that the judge's order breaches the requirements of the SEA Directive, the SEA regulations and the Aarhus Convention is also mistaken. The answer to it was given by the judge at the end of paragraph 88 of her judgment. Policy Bicester 13, amended by the deletion of the provision ruling out "built development" in the Conservation Target Area, will still provide that "[development] must avoid adversely impacting on the Conservation Target Area and comply with the requirements of Policy ESD 11 to secure a net biodiversity gain". The counterpart provision in Policy ESD 11, which appeared in the local plan from the outset, says that "[development] which would prevent the aim of a Conservation Target Area being achieved will not be permitted". Together, these two provisions in the local plan will operate to prevent development which would have any significant environmental effect on the Conservation Target Area, save perhaps for a significant beneficial effect on biodiversity, which was always a prospect inherent in Policy Bicester 13. The policy also contains provisions to protect the Local Wildlife Site and its "ecological value". The assumption on which it was considered in the sustainability appraisal addendum – that it would serve "to protect and enhance biodiversity" – was therefore valid. The inspector's consideration of the policy and the environmental effects of its implementation, in paragraphs 135 to 141 of his report, was informed by an up to date sustainability appraisal, in which no "likely significant effects on the environment" were left out of account.

Conclusion

56. In my view, for the reasons I have given, the judge exercised her discretion appropriately in the order she made. I see no reason to disturb paragraphs 2 and 3 of that order. I would therefore dismiss this appeal.

Lord Justice Laws

57. I agree.