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

CO/1082/2017

IN THE MATTER OF A CHALLENGE UNDER S.288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N

GRAINGER PLC

Claimant

-and-

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

First Defendant

SOUTH OXFORDSHIRE DISTRICT COUNCIL

Second Defendant

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**STATEMENT OF FACTS AND GROUNDS (to accompany Form N208PC)**

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*References in the form [x/y] are to p.y of the Claim Bundle, behind Tab x*
*References in the form [DL/z] are to para. z of the Inspector's Decision*

## Introduction

1. Grainger PLC, the Claimant, challenges the legality of the decision [5/100] of Ms Katie Child ("the Inspector"), an Inspector appointed by the Defendant, the Secretary of State for Communities & Local Government, to dismiss the Claimant's appeal against the refusal of planning permission [6/115] by the Second Defendant ("the Council"). This challenge raises important issues in relation to the interpretation of planning policy both in the statutory Development Plan for South Oxfordshire and also in the National Planning Policy Framework ("the NPPF").

2. The Inspector erred in law in three material respects:



8

(1) She wrongly characterised policies contained in the Council's development plan as being 'gap' or site-specific policies or the equivalent of such policies, therefore misinterpreting them in law;

(2) She erred in relation to the weight to be given to out of date policies, thereby misinterpreting the requirements of the NPPF at para. 49;

(3) She erred in relation to her interpretation of para. 109 of the National Planning Policy Framework ("NPPF").

## Background Facts

### *(i) The Council's Decision*

3. The Claimant sought permission from the Council for the following development:

> "Outline application for the construction of circa. 170 residential dwellings with associated vehicular access from New Road, internal access roads, public open space, landscaping and parking (detailed access with all other matters reserved)."

4. This was on land east of New Road on the southern edge of Didcot ("the Appeal Site"). The Appeal Site is in arable use and is largely open, with a tree belt along its northern and western boundaries. Beyond the northern tree belt there are allotments, open space and a 1980s residential development within the Didcot Fleet Meadow estate. To the south and west the Appeal Site is surrounded by residential development which stretches north along New Road from the historic core of nearby East Hagbourne village [18/337-359].

5. South Oxfordshire is a District where there is, indisputably, a significant shortfall of housing supply. The need for affordable housing is even more acute. The appeal would provide approximately 170 houses, 40% of which would be affordable.

6. Over the years a number of studies commissioned by the Council (including landscape studies) had concluded that the Appeal Site was suitable for housing development. This included a 2006 landscape and visual assessment study by Machin Bates Associates, the Council's Core Strategy Background Paper 2011 and the Council's 2013 Strategic Housing Land Availability Assessment.

7. Officers recommended the application for approval [7/119]. The Officer Report concluded at Section 7 [7/135]:



9

"7.1 The development is in a sustainable location. The NPPF advises a presumption in favour of sustainable development and where there is a lack of 5 year housing supply, paragraph 49 is engaged, determining that housing policies restricting the support of housing are out of date. Paragraph 14 requires that the council should grant permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits. In order to judge whether a development is sustainable it must be assessed against the economic, social and environmental planning roles.

7.2 The provision of housing including 40% affordable housing is a significant social benefit. The development incorporates public open space and play space which will benefit proposed and existing residents. The development will have an economic role in that it will bring construction jobs to the area for a temporary period yet there will be a minor economic dis-benefit due to the loss of the agricultural land. There will be temporary environmental impacts resulting from construction and likely negative impacts on air quality. The key environmental impact will be upon the landscape, particularly the landscape setting of Didcot and East Hagbourne, the visual gap between the two settlements and the openness afforded to AONB views and setting. However the land is not protected by either landscape designations or a policy requirement on preserving an open visual gap. When weighed in the planning balance the impacts are not considered to be significant and demonstrable. In the context of a lack of a 5 year supply of housing the proposed scheme incorporating a mix of housing, open space and landscaping, together with provision for infrastructure is considered to be outweigh [sic] the dis-benefits of the development and it is therefore recommended that planning permission is granted."

8. Notwithstanding this recommendation, the Council's Planning Committee refused planning permission. There were three reasons for refusal, but by the time of the inquiry, only the first was operative [6/115-116]:

> "The proposed development would occupy farmland that helps to maintain distinct separation between the settlements of East Hagbourne and Didcot, which contributes to the character and appearance of the area and to the enjoyment of nearby public rights of way. The openness of the site affords views to the North Wessex Downs Area of Outstanding Natural Beauty (AONB) from New Road and from the public footpath immediately to the north of the site, and forms part of the setting of the AONB. Development of this site and the consequential loss of openness would result in a coalescence of settlements that would harm the role this site performs in protecting and enhancing the distinctive and valued landscape setting and identity of East Hagbourne and Didcot. Moreover, development of this site would result in the loss of the distinctive landscape boundaries of the settlements, which would harm the valued landscape setting of the AONB. As such, the development would result in significant and demonstrable harm and is contrary to the National Planning Policy Framework, in particular but not confined to paragraphs 7, 14, 109 and 115, and is contrary to policy CSEN1 of the South Oxfordshire Core Strategy and saved policies G2, G4, D1 (ii and iv) and C4 of the South Oxfordshire Local Plan 2011."

9. The Claimant appealed the refusal under s. 78 of the Town and Country Planning Act 1990 ("the 1990 Act").

*(ii) The Inspector's Decision*

10. In dismissing the appeal, the Inspector made the following findings [5/100]:

(i) Policies CSEN1 of the South Oxfordshire Core Strategy ("the Core Strategy"), and saved Policies G2, G4, C4 and D1 of the South Oxfordshire Local Plan 2011 ("the Local Plan") *"together, seek to protect the district's countryside from adverse development and protect landscape character and setting, including the separate identities of settlements. This generic approach is a common alternative to the designation of specific sites as 'green gaps'..."* (DL/11).

(ii) The site has a distinct rural character and appearance (DL/17).

(iii) The site *"provides a clear physical and visual separation or gap between the built-up areas of Didcot and East Hagbourne on the east side of New Road"* (DL/19).

(iv) The site has *"considerable perceptual value"* (DL/27); it constitutes a *"valued landscape"* for the purposes of NPPF at para. 109 (DL/28).

(v) Qualities in terms of (1) the Appeal Site constituting open arable land, being broadly typical of its landscape character type, and (2) including a section of public footpath are !not substantial or particularly noteworthy" (DL/26).

(vi) The proposed development would *"erode the separate identifies [sic] of [Didcot and East Hagbourne] and detract from their settings"* (DL/37).

(vii) The proposed development would not detract from the quality of views from the AONB (DL/46).

(viii) The proposed scheme would *"cause some limited harm to the setting of the AONB"*, but *"this would be insufficient to materially harm the special qualities of the AONB itself"* (DL/47).

(ix) There would be no notable harm to the setting of the AONB in respect of a change of the character of the appeal site, being part of the AONB setting (DL/48).

(x) Alternatively, *"some harm would be caused to the setting of the AONB"* (DL/59).

(xi) The proposal *"would have a significant adverse effect on the character and appearance of the area"*. The proposal was therefore contrary to policy CSEN1 of the Core Strategy and saved policies G2, G4, D1 (ii and vi) and C4 of the Local Plan (DL/49).

(xii) The parties agreed that the Council had a supply of only 3.9 years' deliverable housing land, a *"significant shortfall"* (DL/51) against the 5 years supply required by the NPPF.



11

(xiii) Policies CSEN1 of the Core Strategy and saved policies G2, G4, D1 and C4 of the Local Plan were thus deemed out of date (DL/53) by virtue of para. 49 of the NPPF. Nevertheless, substantial weight should still be attached to those policies (DL/54).

(xiv) The proposal accords with strategic objectives in the Core Strategy in relation to (DL/56):

(a) sustainability of location (public transport and facilities);

(b) meeting the housing needs of Didcot;

(c) contributing to job creation and strategic economic investment within the Science Vale area;

(d) construction jobs;

(e) increased Council tax receipts;

(f) New Homes Bonus payments;

(g) additional spending by local residents on local shops and services;

(h) additional publicly accessible open space and play space;

(i) connections to existing green infrastructure;

(j) walking/cycling links;

(k) possible biodiversity benefits.

(xv) The absence of environmental/landscape designations and other site-specific constraints or problems are mitigating factors (DL/57).

(xvi) Loss of agricultural land deserved only a limited degree of weight, and there was no evidence before the Inspector to suggest that the appeal site is or would be used for local food production (DL/58).

(xvii) The tilted balance was not met, on the basis of the increased coalescence and the harm to the character and setting of Didcot and East Hagbourne meant that the adverse effects of the proposal would significantly and demonstrably outweigh the benefits (DL/60).

*(iii) Planning Policies*

11. Core Strategy Policy CSEN1 provides (as is relevant) [10/161]:

> **Policy CSEN1 Landscape**
> The district's distinct landscape character and key features will be protected against inappropriate development and where possible enhanced.
> (i) Where development is acceptable in principle, measures will be sought to integrate it into the landscape character of the area.



12

(ii) High priority will be given to conservation and enhancement of the Chilterns and North Wessex Downs Areas of Outstanding Natural Beauty (AONBs) and planning decisions will have regard to their setting. Proposals which support the economies and social well being of the AONBs and their communities, including affordable housing schemes, will be encouraged provided they do not conflict with the aims of conservation and enhancement.

...

12. Policy CSEN1 is followed by this supporting text [10/161]:

> "14.2 The South Oxfordshire Landscape Assessment SPG[1] describes the district as mainly rural with a high proportion of attractive countryside and details the landscape character of the district and how landscape influences settlement character. It divides the district into 11 local character areas and includes guidelines for landscape enhancement, planning and development. We have also commissioned more detailed landscape assessments around the towns to inform the strategic site allocations and help assess the capacity for housing at Henley."

13. Certain policies of the Local Plan have been saved. Policy G2 has been saved in part [11/163]:

**Policy G2**
The district's countryside, settlements and environmental resources will be protected from adverse developments ~~and opportunities sought to enhance the environment wherever they arise~~.

14. Policy G2 is followed by the following partially-saved supporting text [11/163:

> "2.12 This reflects the Council's aim to balance the protection and enhancement of the district's resources, whilst meeting development needs ~~in accordance with Policy C1 and the Structure Plan requirement~~."

15. Policy G4 has been saved in part [11/164]:

**Policy G4**
The need to protect the countryside for its own sake is an important consideration when assessing proposals for development. ~~Unless permitted by other policies in the plan, new built development in the countryside, in the open gaps between settlements and on the edge of settlements where the built-up area would be extended, will not normally be permitted, except for agriculture and forestry.~~

16. None of the supporting text to Policy G4 has been saved. It read [11/164]:

> "2.14 ~~This policy seeks to prevent development in the countryside, ribbon development on roads extending away from settlements and unplanned expansion of settlements beyond their existing built-up area. This policy also reflects the Government's overall aim in PPS7 which is to protect the countryside for the sake of its intrinsic character and beauty, the diversity of its landscapes, heritage and wildlife,~~

[1] Footnote to South Oxfordshire Landscape Assessment, adopted as Supplementary Planning Guidance in July 2003 [12/169].



13

~~the wealth of its natural resources and so it may be enjoyed by all. When considering proposals for development the Council will give high priority to retaining the open and rural character of the area, and the countryside generally. In the period of 2011 the strategic development requirements in South Oxfordshire can be met in an acceptable way by the policies and proposals in this plan. The Council considers that in accordance with PPG3 there is therefore no need to contemplate urban expansions or development in the countryside, other than in the agreed case of Didcot.~~"

17. Thus it will be seen that in the policy itself reference to "*new built … in the open gaps between settlements and on the edge of settlements … not normally be permitted*" has not been saved, and stands deleted. As does the supporting text referring to "*ribbon development on roads extending away from settlements and unplanned expansion of settlements beyond their existing built-up area*".

18. Policy D1 has been saved in its entirety. It provides [11/165]:

> **Policy D1**
>
> The principles of good design and the protection and reinforcement of local distinctiveness should be taken into account in all new development through:
>
> (i) the provision of a clear structure of spaces;
> (ii) respecting existing settlement patterns;
> (iii) providing for a choice of routes and transport modes to, from and within the development;
> (iv) providing a development that users find easy to understand through the use of landmarks, vistas and focal points;
> (v) providing landscape structure as a framework for new development;
> (vi) respecting the character of the existing landscape;
> (vii) respecting distinctive settlement types and their character;
> (viii) providing good quality site and building design and appropriate materials; and
> (ix) providing well-designed external areas.

19. The supporting text following D1 is lengthy, but it includes two paragraphs relevant to D1(ii) and (vi)[2] [11/166]:

> "4.8 Modern housing layouts rarely match the established patterns of traditional settlements and often only serve to emphasise the difference between the old and the new. New development should respond to then local pattern of streets and spaces, follow the natural topography and take account of traditional settlement form. The arrangement of plots and buildings on a site should reflect the established layout and grain of adjacent areas, and provide links to adjoining development in the form of vehicle, cycle and pedestrian through-routes. The Council will resist developments based on the branched form of street pattern and suburban housing types that has been common in new housing over the past 25 years. Culs-de-sac, linked to a tree-like road system will, therefore, no longer be generally acceptable as an approach to the development of a site.
>
> …

[2] See DL/7.



14

4.12 New development in the district will be required to take into account its context in relation to both the wider and local landscape character and setting. The character of the built environment in South Oxfordshire has traditionally been closely related to the character of the landscape. In more recent years, however, this relationship has been weakened and, in some cases the link between settlements and their local landscape character has been lost. In formulating proposals for development, account should be taken of the district-wide Landscape Assessment.[3] The SODG highlights the broad landscape influences upon the built environment of South Oxfordshire and provides more detailed analysis of settlement form and character in relation to local landscape context. Proposals for new development should have regard to this advice."

20. Policy C4 was saved in its entirety, and provides [11/168]:

> **Policy C4**
> Development which would damage the attractive landscape setting of the settlements of the district will not be permitted. The effect of any proposal on important local landscape features which contribute to the visual and historic character and appearance of a settlement will be considered.

21. The supporting text states [11/168]:

> "3.16 The relationship between settlements and their surrounding countryside is a significant element in the character of the area. The links and contrasts between towns and villages and their rural surroundings were often important historically, and then attractive juxtaposition of the two elements is the quintessence of English rural landscapes. The countryside around towns and villages is also highly valued, both visually and for informal recreation. The Council will seek to ensure that the landscape setting of settlements is protected from damaging development. In assessing proposals for development which would affect the landscape setting of a settlement, reference will be made to the South Oxfordshire Landscape Assessment."

22. Two of the policies considered above refer, by footnote, to the South Oxfordshire District Council Landscape Assessment ("the SOLA"). This included at p.50 [12/174]:

> "**Planning and development issues**
> Large-scale development of any kind will be inappropriate within open countryside areas. Any development associated with future expansion of the main urban centres of Didcot and Wallingford would require careful integration to minimise its impact on surrounding areas.
> The ability of the landscape to accommodate development will depend upon:
> - the potential impact on distinctive landscape and settlement character;
> - the potential impacts on intrinsic landscape quality and valued features and the overall sensitivity of the landscape to change;
> - the visual sensitivity of the receiving landscape.
>
> ...
> Some general conclusions are that:
> ...
> - landscapes on the fringes of settlements are particularly vulnerable to change and special attention should be paid to creating strong landscape 'edges' to reduce the

[3] Footnote to the South Oxfordshire Landscape Assessment 1998, South Oxfordshire District Council [12/169].

urbanising influences of development on adjacent countryside and to prevent the coalescence of settlements..."

23. The SOLA is not part of the statutory Development Plan, it is dated April 1998 and was adopted as SPG by the Council in July 2003.

24. The NPPF at para. 109 provides, as is material [19/364]:

> "The planning system should contribute to and enhance the natural and local environment by:
> - protecting and enhancing valued landscapes, geological conservation interests and soils;
> ..."

**Ground 1 – Misinterpretation of Development Plan Policies**

25. It is well-established as a matter of law that the interpretation of development plan policies is a matter of law for the court: ***Tesco Stores Ltd v Dundee City Council*** [2012] PTSR 983 [24/442]. Thus *"policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context"* (per Lord Reed at para. 18). A planning decision-maker is required by s. 38(6) of the Planning and Compulsory Purchase Act 2004 [27/489] to consider whether a proposal is in *"accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described*[4] *as "a proper interpretation" of the relevant provisions of the plan"* (ibid para. 19). This is important, because *"a development plan has a legal status and legal effects"* (ibid para. 20).

26. A material, indeed essential, part of the Inspector's conclusion was her finding that the proposed development would erode the gap between East Hagbourne and Didcot. Her conclusions regarding the loss of the gap were given special significance by virtue of her finding that Core Strategy CSEN1 and Local Plan policies G2, G4, D1(ii and vi), and C4 ("the Development Plan Policies") involve protecting the separate identities of settlement, as an alternative to specific green gap policies. In reaching the conclusion that the Development Plan Policies perform an equivalent role to a gap policy, the Inspector erred in law:

[4] *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447.

(1) Reference to open gaps was in policy G4 of the Local Plan as originally enacted, but this was not saved along with the rest of the policy;
(2) The development plan policies do not refer to protection of gaps;
(3) The supporting text to policies cannot impose a policy requirement to protect gaps, either itself or by incorporating the SOLA;
(4) Guidance has indicated a difference between 'gap' policies and general policies for the protection of the countryside;
(5) The Inspector's conclusion is internally inconsistent.

*(i) Policy G4 as Saved*

27. Policy G4 of the Local Plan [11/164] originally referred to development in the open gaps between settlements not normally being permitted, unless permitted by other policies in the plan. When Policy G4 was saved, the aspect relating to open gaps was not. This aspect is therefore struck through on the current version of the Local Plan. As is all the supporting text: see above.

28. Had it been intended that the open gaps aspect of G4 remain part of the Local Plan, and therefore gaps be given particular protection, the reference to open gaps would have been saved. The failure to save it indicates that the open gaps between settlements are to have no greater protection than the rest of the countryside.

29. The Inspector erred in concluding that the Local Plan seeks to protect the separate identities of settlements. Through the Secretary of State's decision on saving certain policies, the Local Plan no longer seeks to do so.

*(ii) The Effect of the Development Plan Policies*

30. The Development Plan Policies properly interpreted do not give any special protection to gaps between settlements – the protection given is the same to any land outside settlements and in the countryside; no more and no less. This is clear from the content of the policies themselves:
    a. The Core Strategy: Policy CSEN1 [10/161] of the Core Strategy seeks to: (i) protect distinct landscape character and key features, with integration of development into the countryside; and (ii) to give particular protection to AONBs.



17

b. The saved Local Plan (and looking at the words of the policies *as saved)*:

i. Policy G2 of the Local Plan [11/163] seeks to protect the countryside, settlements and environmental resources from adverse developments.

ii. Policy G4 of the Local Plan [11/164] emphasises that the protection of the environment for its own sake is an important consideration.

iii. Policy D1(ii) of the Local Plan [11/165] concerns existing settlement patterns, which concerns the patterning of streets and spaces.

iv. Policy D1(vi) of the Local Plan [11/165] requires development to respect the character of the existing landscape.

v. Policy C4 of the Local Plan [11/168] protects attractive landscape settings of settlements, and requires decision-makers to take into account the impact of proposals on important local landscape features contributing to the visual and historic character and appearance of a settlement.

31. As the Officer Report states at para. 7.2 [7/135], *"the land is not protected by either landscape designations or a policy requirement on preserving an open visual gap"*. Likewise, the Statement of Common Ground prepared for the inquiry stated at para. 5.4.4 [9/156], *"[t]here is no 'green gap' or 'green wedge' designation as can sometimes be found in Local Plans. There is also no development plan policy concerning coalescence"*[5].

32. There is thus no basis for saying, as the Inspector does at DL/11, that these policies – in term of the policies themselves and the wording used - seek to protect the separate identities of settlements. Still less do these policies perform anything like a settlement

[5] The submission that was made by Claimant in closing was (see the closing at para. 25) [13/184]:
*" … the starting point must be, as is recorded in the SCG that "[t]here is no 'green gap' or 'green wedge' designation as can sometimes be found in Local Plans". In the OR the way it was put (rightly) was that "neither the landscape of the site nor the open gap are afforded special protection" and that "there is no Development Plan policy requiring the preservation of the gap or prevention of coalescence …". There are two key points that arise from this:*
*i. the absence of any policy and thus of any plan showing the extent of the alleged "gap" creates real practical difficulties most notably in identifying the extent of the "gap" and the role the Appeal Site plays in that. Mr Flood accepted that where there is 'green gap' or 'green wedge' designation in policy invariably that is accompanied by a plan showing the extent of this;*
*ii. the Appeal Site is thus no more and no less protected in policy terms than any other site outside of a settlement. The policies relied on by the Council and MtGG would apply equally to any such sites. This is important given that, as the OR recognises, "invariably" to meet Didcot's housing needs it is necessary to look beyond Didcot. Any such land that was to be looked at beyond Didcot would thus have the exact same policy protection as does the Appeal Site"*

gap function. The Inspector erred in reading the Development Plan Policies as, or equivalent to, site-specific policies. They do not have that status.

*(iii) Supporting Text and the SOLA*

33. The SOLA refers to preventing the coalescence of settlements [12/174]. The SOLA is referred to in two pieces supporting text to the Development Plan Policies. However, this does not mean that the reference to coalescence of settlements is thereby incorporated into the Development Plan Policies.

34. The relationship between a development plan policy and its supporting text was considered by the Court of Appeal in ***R (Cherkley Campaign Ltd) v Mole Valley District Council*** [2014] EWCA Civ 567 [20/367]. Richards LJ held at para. 16 (emphasis added):

> "... it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed *policies* for the development and use of land in the area. The supporting text consists of *descriptive and explanatory matter* in respect of the policies and/or a *reasoned justification* of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the polices [sic] will be implemented."

35. Therefore, to the extent that the Inspector relied on supporting text or SOLA which is referred to in that supporting text to introduce a requirement, test or consideration beyond that in the Development Plan Policies themselves, she erred in law. This was an error which was encouraged by the Council's Closing Statement before the Inquiry. This stated at para. 25(vi) [14/233]:

> "The policy context provided in the development plan specifically addresses the issues of coalescence as between Didcot and East Hagbourne by referring the reader to relevant landscape character assessments.[6]"

*(iv) Guidance on 'Gap' Policies*

36. The Inspector stated at DL/11 that the generic approach in the Development Plan Policies *"is a common alternative to the designation of specific sites as 'green gaps'"*. She refers to no evidence before the Inquiry as to other examples of such a practice. This

[6] Footnote reads *"See C4 and the text at para 3.16 in the local plan – CD 5.3"*.

finding appears to have been based on a submission made in the Rule 6 Party's Closing (emphasis added) [15/266]:

> "42. Should the Appellant lose the argument as to whether there is a Gap or not, the next line of defence is in place. This is to argue that none is required at this location. The Appellant is, of course, quite correct to point out that the Appeal Site is not protected by a Strategic Gap policy. This, however, is to rather miss the point wilfully. The Green Gap has not been explicitly omitted from any such designation; as was pointed out to Mr Rees during xx, no site in South Oxfordshire enjoys such designation. This does not mean that worthy gaps between settlements ought not to be maintained. Even if it were protected, a Strategic Gap policy is clearly quite restrictive and the policy would certainly be deemed to be out of date. As Mr Wright stated in his evidence in chief the absence of specific site policy is both hypothetical and moot.
> 43. This Council's decision not to deploy Strategic Gap policies is far from unusual. It is common across many Councils. It is, however, a huge leap of misdirection to suggest that sites such as the Appeal Site are unprotected in policy terms and / or that there is tacit encouragement to develop such sites.
> 44. The harm caused by the closing of a gap between settlements is, of course, coalescence ..."

37. Of course there is no dispute that not all local planning authorities have gap policies. But it seems that what the Rule 6 Party submitted has been interpreted by the Inspector as going rather further. Thus she says that general countryside/landscape policies are "*a common alternative to the designation of specific sites as 'green gaps'*". That is simply not correct, given the differing content and purpose of these policies, and there is no evidential or other basis to support such a contention.

38. On the basis that the Inspector's decision on this point appears to have been based on no evidence, and is wrong, the Claimant refers to the Office of the Deputy Prime Minister publication 'Strategic gap and green wedge policies in structure plans: main report' (January 2001) [16/283]. This is an empirical study of the use of certain local designations. The study shows the position to be considerably different to that presented by the Rule 6 Party and/or understood by the Inspector:
    (1) Para. 6 of the Executive Summary [16/287] states that the basic purpose of the strategic gap designation is "*to protect the setting and separate identity of settlements, and to avoid coalescence; retain the existing settlement pattern by maintaining the openness of the land; and retain the physical and psychological benefits of having open land near to where people live*".

(2) Para. 12 of the Executive Summary [16/289] states that "*the strategic gap and green wedge policies constituted an additional presumption against development, over and above the strict controls normally available to local authorities for the countryside*".

39. Where local planning authorities do have "gap" policies these are not in substitution for general countryside/landscape policies they are in addition to those providing elevated protection.

40. The Inspector's wholly approach is to elevate ordinary policies for the protection of the countryside/landscape to the more restrictive policies in relation to the preservation of strategic gaps. In doing so, she erred in law.

*(iv) Internal Inconsistency in the Decision Letter*

41. The Inspector found, correctly, at DL/57 that there were no environmental or landscape designations affecting the Appeal Site. This is correct. There are no site-specific policies affecting the Appeal Site. This is inconsistent with the approach taken in DL/11, treating the Development Plan Policies as, or as equivalent to, a site-specific policy.

*Conclusions on and materiality of Ground 1*

42. It is clear that the Inspector relied upon her finding that the Development Plan Policies were breached, as opposed to merely finding that there is currently a gap at the Appeal Site, and protecting it constitutes a material consideration (DL/53, 54, 59). Therefore, her erroneous interpretation of the Development Plan Policies, as having an effect equivalent to a 'gap' policy, is material. The Inspector's decision should be quashed on this basis.

**Ground 2 – Error in Relation to the Weight to be Given to Out of Date Policies**

43. The Inspector found, correctly, that the Development Plan Policies, being policies for the supply of housing, are out of date (DL/53) by virtue of para. 49 of the NPPF [19/363] because the Council cannot demonstrate a 5 year supply of housing. However, the Inspector does not state anywhere in her decision, as she should have done, that as a result the Development Plan Policies should, for that reason, carry less

weight. She merely states at DL/54 that the Development Plan Policies should still carry "*substantial weight*".

44. The Court of Appeal considered the weight to be attached to out of date policies in ***Hopkins Homes Ltd v Secretary of State for Communities and Local Government*** [2016] PTSR 1315 [23/416]. The Court of Appeal held at para. 47:

> "One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements."

45. The Claimant makes two submissions:
    (1) As the Inspector has erred in relation to the purpose of the Development Plan Policies, her decision regarding the weight to be given to them (out of date as they are) is fatally flawed.
    (2) Whilst weight is a matter for the decision-maker, this is constrained by public law limitations. Here, the fact that the policies were out of date means that they would have to carry less weight to some degree.

46. The first point flows from Ground 1, above. The Inspector misinterpreted the Development Plan Policies, finding that they related to gap and settlement separation. They did not. As the purpose of a restrictive out of date policy is relevant to the weight to be given to it, and something the Inspector addressed at DL/54, misattribution of a purpose of a policy is likely to render the weight given to it legally impermissible.

47. The second point is freestanding, independent of the success of Ground 1. Whilst the decision regarding the weight to be given to the Development Plan Policies was a matter for the decision-maker, that discretion is bounded by law. Some conclusions would not have been open to her. For instance, a conclusion than the Development Plan Policies, being out of date, should carry more weight that policies that are up to date. This is because while weight is for decision-maker, that is subject to one restriction namely ***Wednesbury*** unreasonableness; to conclude, by way of example,

that out of date polices carry more weight than up to date policies would self-evidently be irrational.

48. Here, it was not open to the Inspector to conclude that the Development Plan Policies should carry full weight notwithstanding the fact that they were out of date. The contrary is found, for instance, in the Council's Statement of Case, which says at para. 6.2 that the Council *"will acknowledge that policies relating to the supply of housing are given less weight in decision making due to the current shortfall in terms of five year housing land supply."* It is submitted that it would be ***Wednesbury*** unreasonable to give an out of date policy precisely the same weight as a policy which was not out of date; it would be illogical by virtue of the fact that they were out of date to give them the same weight as if they were not out of date. That would self-evidently be irrational.

49. It is important to recall what it is that makes a policy out of date pursuant to the NPPF at para. 49:[7] it is that a policy is relevant for the supply of housing, but that the local planning authority is unable to demonstrate an adequate supply of housing land. It represents a finding that the policies bearing on the supply of housing land are not functioning adequately in bringing forward enough land for housing development. Given the policy imperative in the NPPF at para. 47 [19/362],[8] it is irrational to consider that housing policies which are failing to achieve their aim should be given full weight. The reduction in weight to be given to them is a matter for the decision-maker on the facts, but the allocation of full weight is not a decision open to him or her.

50. On the basis of submissions made at the Inquiry, it may be that the Inspector was drawing a distinction between *"substantial weight"* and *"full weight"*. However, if she was drawing this important distinction, then this should have been made clear on the face of her decision. This was a key matter in dispute on which the reasoning needed to be clear: see ***South Bucks v Porter No. 2*** [2004] 1 WLR 1953 [22/398].

**Ground 3 – Misinterpretation of the NPPF at para. 109**

[7] *"Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."*
[8] That Local Planning Authorities should *"boost significantly the supply of housing"*.

51. The meaning of "*valued landscape*" is not defined in the NPPF. However, propositions in relation to its meaning can be drawn from recent case law:

(1) A landscape being valued is not the same as a landscape being designated (***Stroud District Council v Secretary of State for Communities and Local Government*** [2015] EWHC 488 (Admin), para. 13) [21/387].

(2) In order to be valued, a site must show a demonstrable physical attribute, rather than merely be popular (***Stroud***, para. 14).

(3) The demonstrable physical attribute(s) must take a site beyond "mere countryside" (***Stroud***, para. 16).

(4) The Landscape Institute's Guidelines for Landscape and Visual Impact Assessment ("GLVIA") identify factors which may be relevant in the assessment of landscape value (***Forest of Dean District Council v Secretary of State for Communities and Local Government*** [2016] EWHC 2429 (Admin), para. 14) [25/455].

52. In ***Forest of Dean***, Hickinbottom J (as he then was) referred to 'Box 5.1' in GLVIA. This states:

> "Range of factors that can help in the identification of valued landscapes
> - **Landscape quality (condition)**: A measure of the physical state of the landscape. It may include the extent to which typical character is represented in individual areas, the intactness of the landscape and the condition of individual elements.
> - **Scenic quality**: The term used to describe landscapes that appeal primarily to the senses (primarily but not wholly the visual senses).
> - **Rarity:** The presence of rare elements or features in the landscape or the presence of a rare Landscape Character Type.
> - **Representativeness**: Whether the landscape contains a particular character and/or features or elements which are considered particularly important examples.
> - **Conservation interests**: The presence of features of wildlife, earth science or archaeological or historical and cultural interest can add to the value of the landscape as well as having value in their own right.
> - **Recreation value**: Evidence that the landscape is valued for recreational activity where experience of the landscape is important.
> - **Perceptual aspects**: A landscape may be valued for its perceptual qualities, notably wildness and/or tranquillity.
> - **Associations**: Some landscapes are associated with particular people, such as artists or writers, or events in history that contribute to perceptions of the natural beauty of the area."

53. The Inspector here found that landscape quality (condition) and recreational value are not substantial or particularly noteworthy (DL/26). The Inspector concludes that the

appeal site is a valued landscape on the basis that there are views across it, and due to local distinctiveness due to being the last remaining stretch of open countryside alongside New Road (DL/27-28).

54. With respect, this forms an untenable, and thus unlawful, interpretation of the NPPF at para. 109 [19/364]. In order to constitute a valued landscape, a site must have demonstrable physical attributes beyond *"mere countryside"*. The Inspector has identified the physical attribute that the Appeal Site is a field, i.e. it is not built upon and is hence open. Absence of any features other than openness is exemplary of *"mere countryside"*. The fact that there are views across the Appeal Site does not change this. The inspector expressly relies on para. 5.30 of GLVIA3 [17/336]. This states:

> "Individual components of the landscape, including particular landscape features, and notable aesthetic or perceptual qualities can be judged on their importance in their own right, including whether or not they can realistically be replaced. They can also be judged on their contribution to the overall character and value of the wider landscape. For example, an ancient hedgerow may have high value in its own right but also be important because it is part of a hedgerow pattern that contributes significantly to landscape character."

55. This refers to components of the landscape, and landscape features. A blank field lacks components and features. Merely permitting other landscape features to be seen is insufficient to constitute a field being more than 'mere countryside', and it is insufficient, by definition, to constitute a *"valued landscape"* that is given heightened protection by the NPPF. By definition almost any field is not going to be built on, and hence to be open, such that it accords some views beyond it. The Inspector's approach is one that would result in pretty much any field, and especially it seems any field on the edge of a settlement, being regarded as a *"valued landscape"* by reason of the fact that it is open and allows views beyond it. That would be to enlarge the term *"valued landscape"* beyond what can possibly have been intended to be its proper meaning. The effect of para. 109 of the NPPF is to give additional policy protection to a *"valued landscape"*. It is not intended to protect the countryside *per se*. Other parts of the NPPF address the countryside generally: see ***Cawrey Limited v Secretary of State for Communities & Local Government*** [2016] EWHC 1198 (Admin) [26/465] para. 49.

56. The Inspector therefore erred in finding the interpretation of the NPPF at para. 109 capable of including the Appeal Site. This error was material: it features in her

assessment of the factors weighing against the proposed development at DL/59. The decision should therefore be quashed on this basis.

Conclusions

57. The Inspector's decision is fundamentally flawed by material legal errors. For all these reasons there is an arguable case for the quashing of the appeal decision and leave, under s. 288(4A) of the 1990 Act should be granted to allow this claim to be brought.

58. For all of the above reasons, the Claimant respectfully requests that the Court:
    (1) Grant permission;
    (2) Quash the decision of the Secretary of State's Inspector dated 21 March 2017;
    (3) Order that the Defendant pay the Claimant's costs of these proceedings.

**JAMES MAURICI QC**
**ALISTAIR MILLS**
**TUESDAY 2 MAY 2017**
**LANDMARK CHAMBERS**
**180 FLEET STREET**
**LONDON**
**EC4A 2HG**

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF A CHALLENGE UNDER S.288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N

GRAINGER PLC

Claimant

-and-

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

First Defendant

SOUTH OXFORDSHIRE DISTRICT COUNCIL

Second Defendant

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STATEMENT OF FACTS AND GROUNDS (to accompany Form N208PC)

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27