



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: 18/02/2016

**Before:**

**THE HON. MRS JUSTICE PATTERSON DBE**

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**Between:**

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

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**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  
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**Approved Judgment**

## **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."

#### Legal and Policy Framework

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 'planned 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.