

# **Cherwell District Council**

## **Executive**

**5 December 2016**

<p><b>Re-adoption of Policy Bicester 13 of the Cherwell Local Plan 2011-2031</b></p>
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### **Report of Head of Strategic Planning and the Economy**

This report is public

#### **Purpose of report**

To seek re-adoption of Policy Bicester 13 of the Cherwell Local Plan 2011-2031 in accordance with a Court Order and an associated addendum to the Local Plan Inspector's Report.

#### **1.0 Recommendations**

The meeting is recommended:

- 1.1 To note the Court Judgment, Court Order and addendum to the Local Plan Inspector's report presented at Appendices 2, 3 and 4 to this report.
- 1.2 To recommend to Council to adopt Policy Bicester 13 of the Cherwell Local Plan 2011-2031 (Appendix 5) in precise accordance with the addendum to the Local Plan Inspector's Report dated 18 May 2016 and the Court Order dated 19 February 2016.
- 1.3 To note that, upon adoption by Council, Policy Bicester 13 will be inserted as modified into the published Cherwell Local Plan 2011-2031.

#### **2.0 Introduction**

- 2.1 This report concerns seventeen words of Policy Bicester 13 of the Cherwell Local Plan 2011-2031 only. Policy Bicester 13 relates to the strategic development site at Gavray Drive, Bicester. The scope of this report is tightly defined by the outcome of legal proceedings. There are no other matters considered by officers and no other implications. The advice of Counsel has been taken in the report's preparation.
- 2.2 On 20 July 2015, the Council resolved to approve the Main Modifications to the Cherwell Local Plan 2011-2031, as recommended by the Local Plan Inspector, together with additional modifications. The Plan was adopted at the same meeting. An extract from the Local Plan for Policy Bicester 13: Gavray Drive as adopted in

July 2015 is produced at Appendix 1. It includes the following 'Key site specific and place shaping principle' (third bullet point, p. 172 of the Local Plan as published):

*"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"* (emphasis added).

- 2.3 The seventeen words underlined above are those that have been the specific subject of legal proceedings. They reflect a Main Modification (no. 91) recommended by the Local Plan Inspector in his report and the proposed modifications originally approved by the Council for submission on 20 October 2014.
- 2.4 On 7 September 2015, the Council received notification that an application had been made to the High Court by (1) JJ Gallagher Ltd, (2) London and Metropolitan Developments Ltd and (3) Norman Trustees to challenge the decision of the Council to adopt the Local Plan. The application proceeded to Court and a hearing was held on 9 February 2016. Both the Council and the Secretary of State for Communities and Local Government appeared as Defendants, separately representing their own positions.
- 2.5 The Claimants' case, and the cases of the Defendants are explained in the court judgment presented at Appendix 2 to this report. I do not, in this report, summarise each case in detail, but instead identify key elements pertaining to this report and its recommendations.
- 2.6 The Claimants submitted (Appendix 2, para. 6) that in adopting the Local Plan, the Council had erred in law because:
- i) Policy Bicester 13 fails to give effect to the inspector's reasons and adopting it as it stands was illogical and irrational;
  - ii) Policy Bicester 13 is inconsistent with policy ESD11 (Conservation Target Areas) of the Local Plan and so the decision to adopt was illogical and irrational on the basis of its current wording also (adopted policy ESD 11 is reproduced at Appendix 6 to this report);
  - iii) the inspector failed to provide reasons for recommending adoption of policy Bicester 13 as drafted so that the Council's decision to adopt the plan was unlawful.
- 2.7 The factual background to the court case is summarised in the court Judgment at paragraphs 12 to 27.
- 2.8 It explains (para. 14) how the Claimants had previously sought (through representations), deletion of the relevant bullet point which stated, "*That part of the site within the Conservation Target Area should be kept free from built development.*"
- 2.9 It also explains (para. 16) how, "*At the examination before the inspector the [Council], supported by members of the public, argued that there should be no built*

*development on any part of the allocated site designated as a [Conservation Target Area]*”

- 2.10 At paragraph 17, the Judgment explains that *“The day before the examination commenced the [Council] passed a resolution that sought a modification to the policy that would designate the [Conservation Target Area] as “Local Green Space” within the meaning of paragraph 76 of the National Planning Policy Framework (“NPPF”).*
- 2.11 The Judgment also explains (para’s. 20 to 24) that following the Local Plan hearings, the draft Inspector’s Report was sent to Council officers for fact checking.
- 2.12 The Inspector’s Report as originally sent to officers included the following text: *“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...”* to meeting new housing needs (emphasis added). The implication here is that the Inspector’s view was that ‘building’ should not be precluded in the Conservation Target Area part of the site.
- 2.13 Officers were unable to reconcile this with the Inspector’s recommended Main Modification (no. 91) which included the wording for Policy Bicester 13 *“That part of the site within the Conservation Target Area should be kept free from built development...”* (emphasis added). Officers therefore queried this as part of the fact check process, seeking clarification on two occasions (Appendix 2, para’s. 20 to 24).
- 2.14 The final Inspector’s Report received by officers included the following change: *“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...”* (emphasis added to illustrate the word change). This change suggested to officers that the Inspector did not intend to preclude all development in the CTA part of the site, only ‘built’ development as specified in Main Modification no. 91. The final Inspector’s Report was presented to Members at the Council meeting on 20 July 2015.
- 2.15 However, in pursuing their legal case, the Claimants submitted that the inspector did not give any reasons as to why there should be no development within the Conservation Target Area (CTA) and that all the reasons that he gave pointed in the opposite direction, namely, that there should be some (including built) development within the CTA area. The Council conceded that the reasoning given by the inspector was unsatisfactory (Appendix 2, para. 57).
- 2.16 The Secretary of State argued that he had not erred in law, that his duty was to examine the submitted plan for its soundness, that his reasoning was clear that he had addressed matters raised during the hearing session and that it was open to the Council to make modifications to the plan which did not materially change it (Appendix 2, para. 59).
- 2.17 The Court Judgment states (Appendix 2, para’s. 65 to 69),

*“The inspector’s overall reasoning was to retain the allocation as shown on the proposals map of the submitted [Cherwell Local Plan] and to use the development*

*proposed to deliver gains to enhance the [Local Wildlife Site] 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.*

*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.*

*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 [Local Green Space]. His reasoning was that the [Local Wildlife Site] needed to be kept free from built development and protected, together with downstream [Sites of Special Scientific Interest], through an ecological management plan which would ensure the long term conservation of habitats and species within the site.*

*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.*

*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."*

2.18 In the next paragraph, the Court Judgment clarifies the scope of the Council's options in considering the Inspector's recommendations:

*"The first defendant [the Council] 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" (Appendix 2, para' 70)*

2.19 The Judge concluded that "some remedy is clearly appropriate" (Appendix 2, para' 71) and considered submissions.

2.20 The claimants sought a Court Order that included (Appendix 2, para. 72):

- i) Policy Bicester 13 be treated as not adopted and remitted to the Secretary of State;
- ii) the Secretary of State appoint a planning inspector who recommends adoption of Policy Bicester 13 subject to a modification that deletes from the

policy the words “*That part of the site within the Conservation Target Area should be kept free from built development*”;

iii) Cherwell District Council adopt Policy Bicester 13 subject to the modification recommended by the planning inspector appointed.

2.21 The Council submitted that (ii) and (iii) were inappropriate as they as they asked the Court to assume plan making powers and redraft the plan; because they would constrain the Secretary of State and Council as decision makers; and because they would exclude the public from participation. It stated 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 and not one for the Courts. The Council also highlighted that the Local Plan’s Sustainability Appraisal noted that policy Bicester 13 required that the part of the site within the CTA should be kept free from built development (Appendix 2, para’s.73-77).

2.22 The Council sought the appointment of a planning inspector (through the Secretary of State) to “...reconsider the way in which policy Bicester 13 treated the designated CTA...” and “....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....” before the inspector makes recommendations in respect of modifications and the Council re-adopts policy Bicester 13 subject to those modifications (Appendix 2, para’ 78).

2.23 The Secretary of State considered that the ‘answer’ was fully contained within the inspector’s report, that a reopened examination was not necessary, and that in respect of sustainability, without the contentious bullet point in policy Bicester 13, the policy is clear in that it says that the development must not adversely impact upon the CTA. The Secretary of State said there was no suggestion that the sustainability appraisal was not properly considered (Appendix 2, para’s. 79-82).

2.24 On the appropriate remedy, the Judge concluded that (Appendix 2 para’s. 85-87):

- an extensive examination process had taken place into the plan as a whole;
- the inspector had exercised and made clear his planning judgment on, amongst other matters, housing across the district;
- 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;
- this conclusion was reached having heard representations from the claimants, the Council and the public;
- the representations from the public argued that there should be reduced developable areas on the allocation site and that part of the site was suitable for designation as Local Green Space;
- the public had therefore fully participated in the planning process;
- the error found was not as a result of the public having any inadequate opportunity to participate in the examination process;
- there is no statutory requirement in the circumstances to 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 was 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, Local Green Space 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 the Inspector did not translate that planning judgment into an appropriately sound policy.

2.25 In those circumstances, the Judge did not agree to the Council's suggested remedy which would amount to a "...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" (Appendix 2, para. 88).

2.26 The Judge also rejected the contention that a further sustainability appraisal would be required stating, "...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" (Appendix 2, para. 88).

2.27 The claim made by Gallaghers et al succeeded. The Judge stated that the Court Order should be in the terms of paragraphs 1, 2 and 3 of the draft submitted by the claimants (Appendix 2, para's 89-90 cited at para. 2.20 above).

2.28 A subsequent appeal to the Court of Appeal was dismissed in full and no subsequent application for appeal has been registered. The Council must now fulfil its legal obligation to re-adopt Policy Bicester 13 in the requisite amended form.

### **3.0 Report Details**

3.1 The Court Order dated 19 February 2016 includes the following requirements:

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

3.2 The immediate effect of the Court Order was that Policy Bicester 13 of the adopted Cherwell Local Plan 2011-2031 could no longer be considered to be part of the adopted Development Plan. The rest of the Local Plan is unaffected.

3.3 On 10 March 2016, the Council was notified that a Planning Inspector had been appointed – Mr Nigel Payne, the original Local Plan Inspector.

3.4 On 18 May 2016 an addendum to the Local Plan Inspector's report was received (Appendix 4).

3.5 The Addendum states (Appendix 4, para' 2):

*“Following the Order of the High Court of Justice No. CO/4622/2015, dated 19 February 2016, I recommend that, in relation to Policy Bicester 13 – Gavray Drive, Main Modification No. 91, page 130, the first sentence of the third bullet point under “Key Site Specific Design and Place Shaping Principles” which states – “That part of the site within the Conservation Target Area should be kept free of built development.” be deleted in the interests of soundness, clarity and to facilitate implementation of the policy and allocation in the plan.”*

3.6 In his conclusion and recommendation, the Inspector states *“...I conclude that with the amendment to the schedule of main modifications recommended in this addendum report relating to Policy Bicester 13 the Cherwell Local Plan satisfies the requirements of Section 20(5) of the 2004 Act and meets the criteria for soundness in the National Planning Policy Framework.”*

3.7 On 15 July 2016, Mr Dominic Woodfield, an objector to Policy Bicester 13, was granted permission to appeal against the Court Order. The two grounds of appeal were:

“1. Having found that there was an error of law the judge should have remitted the matter of the wording of Policy Bicester 13 of the Cherwell Local Plan for public re-examination.

2. In directing that an order be made to revise the policy wording without remitting the matter for re-examination, the judge made an error of principle because she exercised a planning judgement which should have been exercised by [the Secretary of State’s] inspector and by [the council].”

3.8 The appeal was opposed by Gallagher and the Secretary of State. The Council played no part in the appeal. On 2 August 2016, officers sent a letter to the Court, saying its position on the appeal was “neutral”.

3.9 Officers have awaited the outcome of the appeal before proceeding to recommend re-adoption of the policy in the requisite amended form.

3.10 On 12 October 2016, the Court of Appeal’s judgment was given. It was concluded that the High Court Judge had exercised her discretion appropriately in the order she made and that there was no reason to disturb the Court Order. The appeal was dismissed in full.

3.11 The 21 day period to potentially appeal to the Supreme Court has passed. No application to appeal has been registered with the Court.

3.12 The Council must now adopt Policy Bicester 13 subject to the modification recommended by the planning inspector to comply with the Court Order dated 19 February 2016 (CO/4622/2015).

3.13 Policy Bicester 13 incorporating the Inspector’s recommended modification is presented at Appendix 5.

- 3.14 The affected bullet point of Policy Bicester 13 now reads, “*Development must avoid adversely impacting on the Conservation Target Area and comply with the requirements of Policy ESD 11 to secure a net biodiversity gain*”.
- 3.15 Members are advised to recommend to Council that it formally adopts Policy Bicester 13 as recommended to be modified and in precise accordance with the Court Order. Not to do so would leave the Council in a position of legal non-compliance.
- 3.16 There are no other implications for the Local Plan and the Judgment makes clear that no further sustainability appraisal is required (see para. 226 above). An Addendum to the Adoption Statement for Strategic Environmental Assessment / Sustainability Appraisal is presented at Appendix 7 which reflects this conclusion and will be published upon adoption of Policy Bicester 13. As highlighted by the Judge, “...*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*” (see para 2.26 above).
- 3.17 Following adoption, Policy Bicester 13 as modified will need to be inserted into the published Local Plan.

#### **4.0 Conclusion and Reasons for Recommendations**

- 4.1 A Court Order dated 19 February 2016 requires specific actions of the Secretary State, an appointed Planning Inspector and the Council pertaining to the legally prescribed modification of Policy Bicester 13 of the Cherwell Local Plan 2011-2031. A specific modification to Policy Bicester 13 has been recommended by a Planning Inspector on behalf of the Secretary of State. The modification requires the deletion of the first sentence of the third bullet point under “Key Site Specific Design and Place Shaping Principles” which states – “*That part of the site within the Conservation Target Area should be kept free of built development.*”
- 4.2 To comply with the Court Order, the Executive is advised to recommend to Council that it formally adopts Policy Bicester 13 as presented at Appendix 5 to this report in precise accordance with the Court Order.

#### **5.0 Consultation**

Internal briefing: Councillor Colin Clarke, Lead Member for Planning

#### **6.0 Alternative Options and Reasons for Rejection**

- 6.1 There are no other options. The Court Order dated 19 February 2016 states (para.3), “*The First Defendant [the Council] adopt Policy Bicester 13 subject to the modification recommended by the planning inspector appointed by the Second Defendant [the Secretary of State for Communities and Local Government]*”.



## 7.0 Implications

### Financial and Resource Implications

- 7.1 Re-adoption of Policy Bicester 13 and re-publication of the adopted Local Plan is being met within existing budgets.

Comments checked by:

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### Legal Implications

- 7.2 The Council is ordered by the High Court (Planning Court) to adopt Policy Bicester 13 subject to the modification recommended by the planning inspector. Not to do so would therefore be unlawful.

Comments checked by:

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## 8.0 Decision Information

### Key Decision:

Financial Threshold Met: No

Community Impact Threshold Met: Yes

### Wards Affected

All (including Bicester South and Ambrosden directly)

### Links to Corporate Plan and Policy Framework

Accessible, Value for Money Council

District of Opportunity

Safe and Healthy

Cleaner Greener

### Lead Councillor

Councillor, Colin Clarke, Lead Member for Planning

## Document Information

<b>Appendix No</b>	<b>Title</b>
Appendix 1	Policy Bicester 13: Gavray Drive as adopted on 20 July 2015 (Local Plan extract)
Appendix 2	High Court Judgment 18 February 2016
Appendix 3	Court Order dated 19 February 2016
Appendix 4	Addendum to the Local Plan Inspector's Report 18 May 2016
Appendix 5	Policy Bicester 13 – Modified Policy for Adoption
Appendix 6	Adopted Policy ESD11 – Conservation Target Areas (Local Plan Extract)
Appendix 7	SA Adoption Statement – Addendum
<b>Background Papers</b>	
None	
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