IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **C1/2017/1360**

GOODMAN LOGISTICS DEVELOPMENT (UK) LTD **–v–** **SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT**

ORDER made by the Rt. Hon. Lord Justice Sales

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal, against the refusal of the High Court to grant permission to apply for a planning statutory review

Decision: granted, refused, adjourned. An order granting permission may limit the issues to be heard or be made subject to conditions.

Permission to appeal: ☐ **Granted** ☒ **Refused** ☐ **Adjourned**

OR

Permission to apply for a planning statutory review: ☐ **Granted**

Where permission to apply for a statutory review is granted, the application should be returned to the Administrative Court ☐

OR

There are special reasons (set out below) why the application should be retained in the Court of Appeal ☐

Reasons

Re Ground of challenge (2): The judge was correct in his approach to interpretation of development plan policy CP2, and was correct in the interpretation he gave that policy. I agree with his reasons and conclusion. CP2 is intended to impose a stringent test over and above ordinary Green Belt policy. I accept the submissions made by the Secretary of State on this issue in opposing permission to appeal. There is no real prospect of success in relation to it.

Re Ground of challenge (3): The judge directed himself correctly regarding the test in *Simplex* and was fully entitled to make the assessment of the factual position which he did. He was entitled to make that assessment by reference to the materials before him, the inspector's report and Secretary of State's decision letter. Again, I accept the submissions of the Secretary of State on this point. There is no real prospect of success in relation to it.

There is no other compelling reason to give permission to appeal.

Where permission has been granted and the matter will be retained in the Court of Appeal

(a) time estimate (excluding judgment)

(b) any expedition

HER MAJESTY'S COURT OF APPEAL E & W

Signed:
Date: 25 July 2017

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Rule 52.15 provides that, in granting permission, the Court of Appeal may grant permission to appeal or permission to apply for judicial review. Where the Court grants permission to apply for judicial review, the Court may direct that the matter be retained by the Court of Appeal or returned to the Administrative Court.

Case Number: **C1/2017/1360**

By the Court

DATED 25TH JULY 2017
IN THE COURT OF APPEAL

GOODMAN LOGISTICS (UK) LIMITED

- and -

THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL G

- and -

SLOUGH BOROUGH COUNCIL

ORDER

Copies to:

Gowling Wlg (Uk) Llp
Dx 312501
Birmingham 86
Ref: 1978964/GZW1

Government Legal Department
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Kingsway 6
Ref: Z1624010/NUT/B5

Slough Borough Council
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Slough
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Lower Court Ref: CO42172016

CIVIL APPEALS OFFICE
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Gowling Wlg (Uk) Llp
Dx 312501
Birmingham 86

DATE: 17 MAY 2017

YOUR REF: 1978964/GZW1

OUR REF: C1/2017/1360

Dear Sir/Madam,

Re: Goodman Logistics (UK) Ltd -v- The Secretary of State for Communities and Local Government and Anr

The appellant's notice you filed on 16 May 2017 in this case seeking permission to appeal from the order of Mr Justice Holgate dated 27 April 2017, has now been entered in the Court's records and given the full reference number C1/2017/1360. Please quote this reference in all future correspondence.

1. What you must do next:

1. **If you have not already done so, serve a copy of the appellant's notice and a copy of this letter on all other parties.**

2. **The certificate of service must be completed and returned to this office by 31 May 2017 (see paragraph 5 below).**

3. **The enclosed party details form must be completed and returned to this office within four days of receipt (see paragraph 2 below).**

4. **The core bundle of documents should be lodged at the Civil Appeals Office by 30 May 2017 . Do not serve a copy of the bundle on any other party (see paragraph 3 below). If an extension of time is required, see paragraph 7 below.**

5. **You must serve the index to the core bundle and any supplementary bundle on the respondent(s) by 30 May 2017.**

6. **Two copies of the skeleton argument should have been lodged in the Civil Appeals Office by 16 May 2017 (see paragraph 4 below). If an extension of time is required, see paragraph 7 below.**

7. **If you do not already have the transcript of judgment, the transcript should be ordered without delay. Obtaining the transcript of judgment can take some time and it may significantly delay matters if the transcript of judgment is not ordered immediately (see paragraph 3 below).**

What the respondent should do next: A respondent is not required to take any action at the permission stage, unless directed to do so by the Court. In all cases, however, the respondent is permitted, and is encouraged, to file a brief written statement setting out any reasons why permission should be refused in whole or in part. The respondent should do so within 14 days of service of the appellant's notice or skeleton argument if later. Any written statement filed with the court should be served on all other parties. It should be noted, however, that there will normally be no order for the recovery of costs of a respondent's written statement. See CPR PD 52C, paragraphs 19 and 20.

2. Party Details: You are reminded that you are required to inform the Court immediately of any change in representation by counsel or alteration in the address, telephone number or reference of solicitors on record.

3. Bundle of Documents: Applicants must lodge a core bundle containing only those documents listed in the relevant core bundle index, a copy of which is attached. The core bundle contains the key documents required by the court. If other documents are necessary for the court to determine the application, it is your responsibility to include them in a supplementary bundle. The core bundle and any supplementary bundle of documents should be lodged in the Civil Appeals Office in accordance with CPR PD 52C paragraphs 14 and 27 by 30 May 2017. The enclosed leaflet *How to Prepare an Appeal Bundle for the Court of Appeal* explains what you should do. If an extension of time is required, see paragraph 7 below.

Transcripts of Judgment: **If you have not done so already. a transcript of the Administrative Court judgment should be ordered without delay by contacting DTI 165 Fleet Street, London EC4A 2DY tel 020 7421 4036 E-mail: RCJ@dtiglobal.eu In order to obtain a transcript you must: I) make a request in writing; ii) pay for the transcript in advance; and iii) send a copy of the Administrative Court bundle to DTI. Enquiries may be made by telephone on 020 7421 4036.**

Advocates must ensure that relevant certificate(s) are included in any list of authorities lodged, in accordance with CPR PD 52C paragraph 29 (5).

General Bundle Guidance: Do not serve the bundle on any other party unless you are directed to do so by this court.

All parties filing bundles with the Court must retain a copy of the bundle:

(a) for their own use in the proceedings; and
(b) as an essential back up should the court bundle(s) be accidentally misplaced, damaged or destroyed; and
(c) for the purposes of any onward appeal.

The parties should ensure that bundles filed with the Court do not contain original material such as original documents, photographs, recording media etc. If it is necessary to use original material, copies should still be included in the court bundles and the originals should be brought to the hearing. Parties must ensure they retrieve any original material handed up to the judge before leaving court. Any original material placed in the court bundle will be destroyed with the court bundle at the conclusion of proceedings (see paragraph 27(4) and (5) of Practice Direction 52C).

Documents should be sent or taken to the Civil Appeals Office Registry, Room E307, 3rd Floor East Block, Royal Courts of Justice. The office is open Monday to Friday, 10.00am to 4.30pm.

4. Skeleton Argument: Our records show that the skeleton argument has been included in the Appellant's Notice. A copy should be or should have been served on the respondent(s) by 23 May 2017.

Your attention is drawn to CPR PD 52C paragraph 31(1) which provides that a skeleton argument must not normally exceed 25 pages (excluding front and back sheets) and be printed on A4 paper in not less than 12 point font and 1.5 line spacing. It should be labelled the "applicant's PTA skeleton argument". Further requirements as to the content of skeleton arguments can be found at CPR PD 52A paragraph 5. Please note that any skeleton argument which fails to comply with CPR PD 52C paragraph 31.1 will be returned by the Civil Appeals Office. If re-filed out of time it must be accompanied by a formal application under Part 2.3 seeking permission to rely on it.

Documents should be sent to or taken to the Civil Appeals Office Registry, Room E307, 3rd Floor East Block, Royal Courts of Justice. The office is open Monday to Friday, 10am to 4.30pm.

5. Certificate of Service: The Certificate of Service must be completed and returned to this office by 31 May 2017.

6. Default: If you do not comply with the requirements set out in this letter without good reason, the case is likely to be dismissed with costs.

7. Extensions of Time: If you are unable to comply with any of the relevant time limits and there are good reasons for an extension of time, you should write, wherever possible before the time limit has expired, to the Civil Appeals Office setting out the reasons and the length of extension sought. You will then be informed whether or not an extension has been granted.

8. Determination of Application: When we have received all of the documents we need to comply with the Court's requirements, the papers will be referred to a single Lord Justice. Applications for permission to appeal will be determined on paper without an oral hearing unless the judge directs that an oral hearing is required. A copy of any Order made will be sent by post to you and to the respondent.

9. Disposal of Bundles: If permission to appeal is granted the bundle of documents will be retained for use at the appeal hearing and you will be advised of any additional requirements. If permission to appeal is refused the bundle will be destroyed in accordance with paragraph 27 (15) of Practice Direction 52C, which supplements Civil Procedure Rules Part 52. Therefore it is essential that the bundle does not contain original documents.

Yours faithfully,

Ms K Coleman
Case Progression Manager - Section C1
civilappeals.cmsc@hmcts.gsi.gov.uk

Enc: Forms **235 240A**
204 How to Prepare an Appeal Bundle for the Court of Appeal
Core Bundle Index

PLEASE NOTE THAT YOU SHOULD USE THE TELEPHONE NUMBER LOCATED ON THE FRONT PAGE OF THIS LETTER FOR ANY FUTURE ENQUIRIES

FORM 235

PARTY DETAILS

CIVIL APPEALS OFFICE
REGISTRY
Room E307
Royal Courts of Justice
Strand, London WC2A 2LL

DX 44456 STRAND

PLEASE COMPLETE THIS FORM AND RETURN IT TO THE CIVIL APPEALS OFFICE REGISTRY
BY POST OR DX WITHIN 4 DAYS OF RECEIPT
PLEASE DO NOT RETURN THIS FORM BY FAX OR EMAIL UNLESS REQUESTED TO DO SO BY THE COURT

Court of Appeal Reference: **C1/2017/1360**

Title: Goodman Logistics (UK) Ltd -v- The Secretary of State for Communities and Local Government and Anr

APPELLANT	RESPONDENT
NAME	**NAME**
Address *(if in person)*	Address *(if in person)*
Tel.No. *(if in person)*	Tel.No. *(if in person)*
e-mail address	e-mail address
SOLICITORS	**SOLICITORS**
DX	DX
Address	Address
Tel.No. Fax No.	Tel.No. Fax No.
e-mail address	e-mail address
Reference	Reference
LONDON AGENTS	**LONDON AGENTS**
DX	DX
Address	Address
Tel.No.	Tel.No.
e-mail address	e-mail address
Reference	Reference
ADVOCATE **Junior**	**ADVOCATE** **Junior**
DX Tel.No.	DX Tel.No.
e-mail address	e-mail address
Leading	**Leading**
DX Tel.No.	DX Tel.No.
e-mail address	e-mail address

Any Appellant's Legal Aid Certificate which is relevant and not already submitted must be attached to this Form

YOU MUST NOTIFY THIS OFFICE IMMEDIATELY IF ANY OF THESE DETAILS CHANGE

IF THERE ARE OTHER APPELLANTS/RESPONDENTS WHO WILL BE SEPARATELY REPRESENTED PLEASE PROVIDE FULL DETAILS ON ADDITIONAL SHEETS

FORM 240A
[Permission and/or an Extension of Time]

CERTIFICATE OF SERVICE

CIVIL APPEALS OFFICE
REGISTRY
Room E307
Royal Courts of Justice
Strand, London WC2A 2LL

DX 44456 STRAND

Court of Appeal Reference: **C1/2017/1360**

Goodman Logistics (UK) Ltd -v- The Secretary of State for Communities and Local Government and Anr

THE COMPLETED CERTIFICATE OF SERVICE MUST BE RETURNED TO THE CIVIL APPEALS OFFICE by **31 May 2017**
PLEASE DO NOT RETURN THIS FORM BY FAX UNLESS REQUESTED TO DO SO BY THE COURT

I/WE, solicitor(s)* for the applicant(s), HEREBY CERTIFY that a copy of the appellant's notice and the letter dated 17 May 2017 from the Civil Appeals Office were served on all respondents to the application

on _____

Statement of Truth: I believe that the facts stated in the certificate(s) of service contained within this document are true.

This form should be signed by the Solicitor with the conduct of the case for the Applicant(s), or by the Applicant if acting in person

Signed _____ Date _____

Name _____ Telephone _____
(in block capitals)

Firm _____ DX _____
(in block capitals)

* *If you are acting in person, please delete as appropriate*

Court of Appeal Ref:

Name v Name

CORE BUNDLE INDEX

Document	Pages
1. Sealed Appellant's Notice and grounds of appeal	
2. Skeleton argument	
3. Chronology of relevant events	
4. Sealed order being appealed	
5. Where the order was made at or following a hearing, Administrative Court judgment (either transcript or as handed down)	
6. N460 - reasons for allowing or refusing permission to appeal to the Court of Appeal (if applicable)	
7. Detailed Grounds of Defence (if applicable)	
8. Skeleton argument lodged by either party in the Administrative Court (if applicable)	
9. Order granting permission to apply for judicial review (if applicable)	
10. Order made on paper refusing permission to apply for judicial review (if applicable)	
11. Judicial Review Acknowledgment of Service and summary grounds of defence (N462)	
12. Sealed Judicial Review Claim Form and grounds (N461)	
13. Copy of the decision which was the subject of the judicial review	

Use for: Judicial Review appeals from the Administrative Court **except** Judicial Reviews of a decision of the Upper Tribunal (C1/C4/T3)

IN THE COURT OF APPEAL

ON APPEAL FROM

PLANNING COURT (HOLGATE J.)

QUEEN'S BENCH DIVISION

BETWEEN:

GOODMAN LOGISTICS DEVELOPMENT (UK) LIMITED

Claimant

- And –

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) SLOUGH BOROUGH COUNCIL

Defendants

SKELETON ARGUMENT IN SUPPORT OF THE CLAIMANT'S APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. This is an application for permission to appeal from the decision of Holgate J. dated 27 April 2017[1].

2. By that decision the learned Judge dismissed the Claimant's application for statutory review of the Secretary of State's decision to refuse planning permission for construction of a Strategic Rail Freight Interchange on land at Colnbrook near Slough.

[1] The documents referred to in this skeleton argument are the Judgment, the Decision Letter and Inspector's Report, the Core Strategy policy CP2 and CP1, the National Planning Policy Framework, and the Council's Closing Submissions. This skeleton has been prepared so that only the Decision Letter, Inspector's Report and the Judgment need to be referred to by the reader.

3. A Strategic Rail Freight Interchange is a facility that contains an intermodal terminal (i.e. a terminal where freight can be transferred from rail transportation to road transportation and vice versa) together with significant warehousing floorspace and facilities. The application was for outline planning permission with all matters other than access reserved for future consideration. The development is a very significant one – covering almost 60 hectares, and delivering not only the rail terminal but nearly 200,000 sq m of commercial floorspace.

4. The development was proposed on land north of the A4 (Colnbrook Bypass), Colnbrook, Slough SL3 0FE ("the Appeal Site"). The Appeal Site lies between the M4 motorway to the north and the A4 to the south. The M25 is approximately 500 metres to the east.

5. The Appeal Site is located within the Metropolitan Green Belt and within an area of land designated as a 'Strategic Gap' within the adopted Local Plan[2]. It also lies within the Colne Valley Park[3], a local designation.

6. The First Defendant is the Secretary of State. The planning appeal was recovered for the Secretary of State's determination because it is a development of major importance. The Second Defendant is the local planning authority ("the Council"), who has played no part in these proceedings.

7. In the Planning Court the Claimant challenged the Secretary of State's decision on three grounds (recorded at paragraph 11 of the Judgment). The Judge found that grounds (1) and (2) disclosed no error of law. He found that ground (3) disclosed a material error of law but exercised his discretion not to quash the decision.

8. This application seeks permission to appeal from the Judge's decision on grounds (2) and (3). The Claimant unsuccessfully sought permission to appeal from Holgate J. No reasons were given.

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[2] Slough Core Strategy, Core Policy 1 and 2
[3] Slough Core Strategy CP2.

9. The Claimant submits that the appeal has a real prospect of success and in relation to ground (2) there is some other compelling reason for the appeal to be heard (CPR 52.6).

Grounds of Appeal

10. The Claimant contends:

(a) Ground (2):

The Judge's approach to the interpretation of the critical development plan policy CP2 was wrong as a matter of law as was his interpretation of it.

(b) Ground (3):

Having found an error of law that was "obviously material" to the decision the Judge was wrong to exercise his decision and not quash the decision.

Background

11. The background to the claim is summarised in paragraphs 1 to 10 of the Judgment.

GROUND 2

Key Development Plan policy on Strategic Gap

12. Given that the development was to be located within the Strategic Gap the strategic gap policy within the Council's Core Strategy was relevant. As relevant this read:

> "*Development will only be permitted in the Strategic Gap between Slough and Greater London and the open areas of the Colne Valley Park if it is essential to be in that location.*" (emphasis added)

13. The supporting text of the Core Strategy read at 7.26:

"The remaining open land in Colnbrook & Poyle, east of Langley/Brands Hill, is particularly important because it forms part of the Colne Valley Park and acts as the strategic gap between the eastern edge of Slough and Greater London. Additional restraint will therefore be applied to this fragmented and vulnerable part of the Green Belt which will mean that only essential development that cannot take place elsewhere will be permitted in this location." (emphasis added)

The Decision of the Secretary of State

14. The Secretary of State accepted the Inspector's recommendation that planning permission be refused. The Inspector's reasoning and that of the Secretary of State is summarised in the Judgment in paragraphs 20 to 23.

15. Of particular relevance to Ground 2 are paragraphs 12.26, 12.27, 12.30 and 12.199 of the Inspector's Report. Paragraph 12.26 reads:

> *"The application of the policy raises two matters (i) whether "essential" applies to the development and/or the location, and (ii) should Slough or a wider area be considered. The policy test, on a straightforward reading, means that a development must have to be located in the Strategic Gap as opposed to anywhere else. However, the supporting text to the policy states that the additional restraint "will mean that only essential development that cannot take place elsewhere will be permitted". This implies that the development itself, as well as a location in the Strategic Gap, must be essential. SBC and the appellant took the latter approach and considered the two matters."*

16. The Inspector considered that the straightforward reading meant that the development had to be located in the Strategic Gap as opposed to anywhere else; that is she read the policy as meaning essential as to location.

17. However, as a result of the supporting text she introduced an additional test, one of objectively essential development.

18. It is also notable that the Inspector recorded the position of the parties as being to take the latter approach. That is incorrect. Not even the Council who were seeking to apply the policy as a high test argued that the development itself had to be essential[4].

19. The Inspector then applied this interpretation of the policy at paragraph 12.199 and concluded: "*Nevertheless, I am not convinced that the SIFE scheme is essential within the Strategic Gap, when account is taken of the complementary SRFIs that have been identified and which will probably be developed to serve the region...For these reasons the additional policy test is not met and the development is contrary to Core Policy 2.*"

The Judgment

20. Ground 2 is addressed from paragraphs 40 to 57 of the Judgment.

21. The Judge concluded that the policy meant: "*the development and its location within the Strategic Gap are both essential*" (paragraph 51).

22. The Judge approached the question of interpretation as follows:

"50. *Given that the argument of Mr. Katkowski QC was focused so much on the language of CP2 I agree with Mr. Buley that I should begin by considering whether that language can only bear the meaning for which the claimant contends, or whether it is consistent with the defendant's interpretation. Mr. Buley submits that the phrase "it is essential to be in that location" is a compressed piece of drafting which is capable of referring to two aspects of "essentiality", the development itself as well as its location in the Strategic Gap. I accept Mr. Buley's submission.*"

Legal Principles

[4] See Council's Closing Submissions at para 3.3 – 3.8, 3.12 13.1 – 13.10

23. The correct interpretation of a policy in a development plan is an objective question of law for the Court to determine. The policy should be interpreted objectively in accordance with the language used, read in its proper context. That is not to say it should be construed as if it were a statutory or contractual provision. (*Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983).

24. *Tesco* was considered by the Supreme Court in its 10 May 2017 judgment in *Suffolk Coastal District Council v Hopkins Homes Ltd [2017] UKSSC 37*. This Supreme Court decision is yet to be applied by the lower courts. The Court endorsed *Tesco*, emphasising that development plan policies are statements of policy not statutes, and suggesting the courts should respect the expertise of specialist planning inspectors and start from the presumption that they will have understood the policy framework correctly. Recourse to the courts should be to resolve distinct issues of law or to ensure consistency of interpretation in relation to specific policies. Claims should distinguish between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy.

25. The supporting text to a development plan policy may be read to inform the reading of the policy itself, but it cannot impose a requirement that the policy does not contain (*The Queen on the application of Cherkley Campaign Limited v Mole Valley DC* [2014] EWCA Civ 567, paragraphs 16 and 17). A development that accords with the policy itself cannot be found not to conform because of an additional criterion only in the supporting text (paragraph 16).

Submissions

26. The issue for the Court here is a straight question of law as to the correct interpretation of policy, not as to its application.

27. The Judge accepted that the words were capable of bearing the meaning for which the Claimant contends.

28. The Inspector herself considered the Claimant's interpretation to be the straightforward reading of the policy. However, she introduced the additional

requirement that the development itself must be essential not only its location from the supporting text at 7.26. This was contrary to this Court's ruling in *Cherkeley* (above).

29. The Council did not contend for the interpretation of its own policy CP2 as interpreted by the inspector. (Nor did the Claimant.)

30. The Judge was wrong in his approach in that he failed to set out the correct interpretation of the policy but chose instead to consider whether the language can only bear the meaning for which the claimant contends (paragraph 50 of the Judgment) this being an approach wholly inconsistent with that set out by the Supreme Court in *Tesco*.

31. Further and in any event, the Judge's interpretation of the policy was wrong. The policy wording is clear: "it is essential to be in that location". It is a locational policy. The "it" is plainly the development. It does not impose a test that in its own right the development be essential.

32. It is a locational policy that protects a specific area within the Council's much larger administrative area.

33. The reasoning of the Judge is flawed. The interpretation given by the Court requires that a development proposal in the strategic gap must not only show that it is "essential to be in that location" (i.e. the actual wording of the policy test) but that it must also be objectively essential. This is not correct:

    a) It departs impermissibly from the meaning of the words used and their ordinary meaning;

b) It introduces a test from the supporting text (at 7.26[5]) and uses this unlawfully as a development control test (contrary to this Court's ruling in *Cherkeley*);

c) It ignores the context of the policy (CP2) that sits within Green Belt policy (CP1). A proposal in the strategic gap must also meet the requirement for very special circumstances encapsulated in CP1. Therefore, the surrounding policy context provides for a freestanding justification for the development. The judgment at paragraph 51 suggests that a development could meet CP2 even if there was no need for it at all (see also 53 which suggests considerations of need and the extent of the need would be irrelevant on the Claimant's interpretation). That is incorrect: it ignores the policy context within the same development plan document, and the Green Belt location. The strategic gap is a sub-set in this local planning authority area of the Green Belt. Per *Tesco*, the policy must be interpreted in its context. The Judge has failed to do so;

d) It introduces an unreasonably high test. How is an applicant to demonstrate that a development is objectively essential regardless of location? This was not the interpretation of the policy that the local planning authority itself contended for at the inquiry[6], who argued that it should mean it was essential to have an SRFI at Colnbrook within the Strategic Gap as opposed to at any other location outside the gap;

e) The reasoning at paragraph 55 of the judgment is entirely consistent with the claimant's interpretation in requiring consideration of alternative sites – that is a locational consideration rather than an objective essentiality. The strategic gap is protected as an additional restraint because the only development that will pass the policy test is development:

    1. That is justified by very special circumstances that clearly outweigh the harm to the Green Belt (CP1); and
    2. Can only go in the Strategic Gap as opposed to anywhere else in the sub-region.

[5] See paragraph 52 of the Judgment

[6] See Council's Closing Submissions at Trial Bundle Tab 11, p384 para 3.3 – 3.8, 3.12 , p442 paras 13.1 – 13.10

34. For these reasons it is submitted that the tests for permission are met. Firstly, there is a reasonable prospect of success. Secondly, this is a matter of policy interpretation with wider consequences. It will be relevant to any future development proposals on the Claimant's site, which is a large site within the strategic gap, but also to all other sites within the strategic gap and Colne Valley Park (to which the same policy applies). There is accordingly, a good reason for permission to appeal to be granted.

35. Paragraph 57 of the judgment concludes that DL41 and 42 deal with the matter adequately on the alternative basis. However, those paragraphs do not address the matter of compliance with CP2 at all. Nor does the Secretary of State strike the balance firmly against the development at all, let alone by reference to the issue of compliance with CP2 (see paragraph 57 of the judgment) If the Inspector and Secretary of State misinterpreted the policy then they have failed to have regard to a key policy of the development plan (see Tesco at 18). The section 38(6) duty to determine applications in accordance with the development plan unless material considerations indicate otherwise has not been complied with. Here, compliance with the strategic gap policy would have weighed in favour of the development, and not pulled against it. The decision letter does not deal with this at all.

Ground 3

Key Policy

36. Core Strategy policy CP1 only allowed development in the Green Belt where "there are very special circumstances that would justify the use of Green Belt land".

37. National policy in the National Planning Policy Framework provides a balancing exercise for inappropriate development (which the SRFI would be) in the Green Belt:

> "*88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.*"

38. The National Policy Statement for National Networks (January 2015) concludes:

2.56 The Government has concluded that there is a compelling need for an expanded network of SRFIs....

The Decision of the Secretary of State

39. The Secretary of State struck the planning balance in paragraphs 39 to 42 of the decision. In summary:

Against the development

- Severe loss of openness (DL13)
- Conflict with three purposes of the Green Belt (substantial weight)(DL14)
- Leading to very substantial weight to the totality of harm to the Green Belt (DL39)
- Harm to strategic gap (significant weight) (DL39)
- Localised harm to Colne Valley Park (moderate weight) (DL39)
- Air quality, quality of life (limited/small weight).

In favour of the development

- Contribution to meeting the need set out in the National Policy Statement for a network of SRFIs in the London and SE region – considerable contribution;
- Operating as a SRFI to a very good standard – significant weight;
- No less harmful site identified in the area – considerable weight;
- Economic benefits, reduction in carbon emissions and improvements – moderate weight.

40. The Secretary of State's overall conclusion was: "*In common with the Inspector in her conclusion, the Secretary of State has been persuaded by the irreparable harm that would be caused to this very sensitive part of the Green Belt in the Colnbrook area, leading to the high level of weight he attaches to this consideration. Overall, the Secretary of State concludes that the benefits of the scheme do not clearly overcome the harm" (DL42).*

The Judgment

41. The Judge held that the Secretary of State's findings on the degree of harm to the openness of the Green Belt were based on an error of law (paragraphs 71 to 88).

42. On the basis of her understanding of the law as it stood at the time of writing her report, the Inspector had ruled out taking visual matters, particularly perception (e.g. the degree of containment of the site and the proposed development from wider views) and the effect of landscaping in limiting the extent of views of the proposed development into account when considering the degree of harm to the Green Belt.

43. The Claimant had led evidence that the impact on openness would be reduced substantially because of these matters (see Judgment paragraph 59). However the Inspector and Secretary of State in agreeing with her in concluding that the impact on openness was "severe" did not take into account the evidence led by the Claimant (having ruled it out as irrelevant).

44. In-between the date of the Inspector's report and the Secretary of State's decision letter, the Court of Appeal in *Turner v SSCLG* [2016] EWCA Civ 74 ruled that Green Belt openness does have a visual aspect (Judgment paragraphs 62 and 82) meaning that on a correct understanding of the law the evidence led by the Claimant was relevant to the issue of the degree of harm that would be caused to the openness of the Green Belt.

45. The Judge accordingly held that the Secretary of State's conclusion on openness was based on a misunderstanding of the law that had left a material consideration out of account (Judgment paragraph 88).

46. The Judge further concluded that the visual aspect of openness was "*raised as an intrinsic part of the claimant's appeal. It went directly to a principal important issue, indeed a critical issue, in the appeal, namely the effect of built development on the openness of the Green Belt.* (Judgment paragraph 93).

47. As a result the visual aspect of openness was an obviously relevant consideration that was wrongly disregarded (Judgment paragraph 94).

48. However, the Judge went on to find that if the error had not been made the decision to refuse planning permission would inevitably have been the same (Judgment paragraph 107).

Legal Principles

49. The burden lies on the Defendant to show that if the legal error identified had not occurred the decision to refuse planning permission would inevitably have been the same (*Simplex G E (Holdings) v Environment Secretary* (1989) 57 P&CR 306).

50. The Court must not stray from its proper role of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the case (*R (Smith) v North Eastern Derbyshire PCT* [2006] 1 WLR 3315).

51. The test for exercising discretion is a stringent one. The Court must be persuaded by the defendant that the decision would necessarily have been the same (*SSCLG v South Gloucestershire Council* [2016] EWCA Civ 74, paragraph 25):

> *"...it is not for the court "normally to pre-empt" what the outcome of a section 78 appeal would be if identified errors of law had not been made... If the court is to exercise its discretion not to grant relief where unlawfulness has been found, it must be satisfied that the decision-maker would necessarily have reached the same decision but for the legal error....It must be persuaded that the decision necessarily would have been the same. It is consistent, as I see it, with perhaps the most elementary principle of planning law, that the exercise of planning judgment is a matter for the decision-maker and not for the court...".*

52. The role of the Court of Appeal is to consider whether the Judge was "wrong" or reached his conclusions on legitimate and proper grounds (*Smech Properties Ltd v Runnymede BC* [2016] EWCA Civ 42).

Submissions

53. The Claimant submits that there is a real prospect that the Court of Appeal will find that the learned Judge was wrong in his exercise of discretion.

54. The Judge erred in that he (a) took the wrong starting point for the Secretary of State's conclusion; and (b) engaged in a re-balancing exercise that did indeed pre-empt what the outcome would have been if the error had not been made.

55. This is a statutory planning review. The Judge did not hear any evidence. The exercise of discretion is based on no more than the decision letter and the Inspector's report.

56. First, the Judge engaged in an exercise of trying to work out what weight may have been given to harm to the Strategic Gap in the event that lesser harm to the Green Belt was found (paragraph 105). This is wrong. The Inspector gave significant weight to the harm to the Strategic Gap. In considering discretion it is not for the Court to re-evaluate the weight to be given to findings of harm or benefit (see *North Eastern Derbyshire (above)).*

57. Secondly, the Judge identifies the Green Belt test as requiring that the very special circumstances clearly outweigh the harm. He concluded that for a different result to be obtained "*the scales would have needed to tip substantially in the opposite direction in favour of the proposal*" (paragraph 106). In paragraph 57 the Judge said "*the SSCLG struck the balance so firmly against the proposal...*".

58. These comments disclose that the Judge worked from the wrong starting point in exercising his discretion. He appears to have assumed that the Secretary of State struck the balance firmly against the development. That is incorrect. The Inspector was very clear that there were powerful considerations for and against, and offered further the view that if the Claimant's case is found to be compelling there is much to

commend in the outline proposals and there is the basis for a very well designed scheme (IR 12.206).

59. The Secretary of State also referred to the benefits of the scheme being considerable and significant, making a considerable contribution to the compelling need for an expanded network of SRFIs.

60. There is no justification for the Judge starting so far behind the base line. In DL42 the Secretary of State is not saying that the harm clearly outweigh the benefits. All he is saying is that the benefits do not clearly outweigh the harm – i.e. noting that the NPPF threshold test is not met. There is no finding to the effect that the benefits do not attract the same weight as the harm, and there is no explanation as to why the Judge in paragraph 106 and at 107(3) thinks that that is what the Secretary of State thought.

61. Thirdly, the error of law infected the finding on harm to openness. The harm to openness was the single most telling factor against the development. It is the only adverse impact described as severe. The Court cannot judge by how much that harm would be reduced if the visual aspect of openness had been considered. To do so would be to evaluate directly the planning merits. In paragraph 107(9) of the Judgment and directly contrary to *South Gloucestershire* the Judge substitutes his own assessment of the degree of harm to openness taking into account the visual aspect concluding that the Inspector and Defendant would have found there to be a severe loss of openness even taking into account the visual aspect.

62. The Judge accepted in paragraph 100 that as a result of the legal error the Inspector did not assess whether or to what extent the visual matters may reduce harm to openness. Accordingly, her conclusion that the impact on openness would be "severe" is unreliable, and can only have overstated the impact.

63. The Court should approach the exercise of discretion on the following basis:

    (a) Based on his unlawful conclusion on harm to openness the Secretary of State found the harm to openness to be severe and the total Green Belt harm to be very substantial;
    (b) Overall he found the benefits did not clearly outweigh the harm;

(c) If he had reached a view that the harm to openness was materially less *might* he have come to a conclusion that the benefits did clearly outweigh the harm?

64. Approached properly, without re-evaluating the planning merits, the only answer to that question is yes. If the degree of harm changes to the greatest element of harm, then the overall balance between benefit and harm will change. The Court cannot then re-strike that balance.

65. As a result, the Judge's exercise of discretion in paragraph 107 of the Judgment was wrong.

66. In summary the Judgment wrongly:

(a) Re-evaluates the weight that would have been given to the harm to the Strategic Gap (in paragraph 105), which is impermissibly entering into a matter of planning judgment and seeking to pre-empt the redetermination;

(b) Re-balances the factors in favour and against without recognising that the harm on one side of the balance has to be reassessed in light of the legal error made. Thus in paragraph 106 the judgment continues to rely on the weight against the proposal being "very strong and compelling (IR 12.193). But that is a conclusion founded on the legal error;

(c) Second-guesses how close the harm was to being clearly outweighed (106). The Inspector and Secretary of State were aware of the test in paragraph 88 of the NPPF that the harm had to be clearly outweighed. The conclusion reached was that the harm (assessed including a material error of law) was not clearly outweighed by the benefits. There is no finding as to how close it was to doing so. A reassessment of harm to openness, which was the largest harm found against the development, *might* lead to impacts that were previously finely balanced (and so fail the clearly outweighed test) being now clearly in favour of the development. To

conclude otherwise is wrongly to enter the exercise of planning judgment, which is for the Secretary of State on re-determination;

(d) These errors are carried into the exercise of discretion at paragraph 107 which, with respect, amounts to a reconsideration of the planning judgment inherent in the planning balance rather than focusing on whether on the basis of the conclusions lawfully reached the decision must necessarily have been the same if the material legal error had not occurred.

67. It is also apparent from 107(ii) that grounds 2 and 3 are related to the exercise of discretion in that the Judge relies on the Secretary of State's (the Claimant says, legally erroneous) interpretation of policy CP2 to hold against the development.

68. For the above reasons, it is respectfully submitted that permission to appeal on grounds 2 and 3 should be granted.

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14th May 2017