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

BETWEEN:

FAIRFAX (READING) LIMITED

Claimant

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL GOVERNMENT
(2) SOUTH OXFORDSHIRE DISTRICT COUNCIL
(3) READING BOROUGH COUNCIL
(4) OXFORDSHIRE COUNTY COUNCIL
(5) KIDMORE END PARISH COUNCIL
(6) CAVERSHAM AND DISTRICT RESIDENTS' ASSOCIATION

Defendants

STATEMENT OF FACTS AND GROUNDS OF PLANNING STATUTORY REVIEW

- **CB/x/y:** References to 'x' are to the tab in the Claim Bundle and 'y' to the page.
- **AB/x/y:** References to 'x' are to the tab in the Authorities Bundle and 'y' to the page.
- **DL,x:** References are to paragraph *x* in the Inspector's decision letter at [CB/4].
- **Essential reading:**
- The DL [CB/4].
- First witness statement of Philip Allin [CB/5] and its exhibits.

INTRODUCTION

1. The Claimant seeks leave to pursue a planning statutory review against the decision of D1, taken by one of his Inspectors, to dismiss appeals which sought planning permission in outline for up to 70 homes on land west of Kidmore End Road, Oxfordshire RG4 8SG ("**the Decision**").

2. The Decision was given by way of a Decision Letter ("**DL**") dated 11 June 2026, under the references APP/Q3115/A/25/3377313 (Appeal A) and APP/E0345/W/25/3377314 (Appeal B).[1]

3. The Decision was the adjudication on the Claimant's appeals under s.78 Town and Country Planning Act 1990 against the decision of D2 to refuse permission and the failure of D3 to give notice within the prescribed period. D4 participated in the inquiry in respect of the planning obligations and conditions session but did not resist the appeal.

4. As the Claimant's planning scheme straddled the administrative areas of D2 and D3, identical applications were made to both authorities. In the event, D3 resolved not to resist the appeal, whereas D2 did resist the appeal and participated in the inquiry by calling two witnesses.

5. The Decision followed a public local inquiry held on 6-8, 12-13 and 15 May 2026. In addition to D2 and D3, D5 and D6 appeared as "Rule 6" parties, calling their own witnesses.

6. The Claimant submits that the Decision was not within the powers of the Act for the following reasons:

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[1] [**CB/4**]

a. **Ground 1:** the Inspector (i) misunderstood material considerations to be legally irrelevant when applying paragraph 14 NPPF alternatively (ii), failed to supply legally adequate reasons to distinguish earlier decisions which had treated those considerations as relevant.

b. **Ground 2:** the Inspector (i) misunderstood paragraph 187(a) NPPF to mean that recognition of a landscape as locally valued within a neighbourhood plan foreclosed any further consideration as to whether the site fell within paragraph 187(a) NPPF, thereby (ii) excluding obviously material considerations before concluding the site was within a valued landscape alternatively (iii), failed to supply legally adequate reasons for that conclusion.

c. **Ground 3:** the Inspector (i) took into account a legally irrelevant consideration alternatively (ii) acted irrationally when taking into account unauthorised public access to the land.

d. **Ground 4:** the Inspector failed to supply legally adequate reasons for excluding obviously material considerations (namely off-site biodiversity net gain and public open space).

e. **Ground 5**: the Inspector acted in breach of the rules of procedural fairness by concluding that it was "unclear" whether the site would deliver an efficient use of land or mix of housing, without notifying the Claimant those matters were live and/or providing an adequate opportunity to adduce evidence in response.

f. **Ground 6:** the Decision was (i) internally inconsistent and thereby irrational on the question of weight to the provision of housing, alternatively (ii) his reasons gave rise to a substantial doubt what weight was taken into the planning balance.

ESSENTIAL FACTS

7. **3 December 2025**: D2 refused planning permission (against the advice of its officers).[2]

8. **December 2025**: the Claimant appealed to D1 under s.78 Town and Country Planning Act 1990 against the refusal of planning permission by D2 and the failure to give notice within the prescribed time by D3.

9. **February 2026**: D3 resolved not to resist the appeal.

10. **March 2026**: D2 filed a Statement of Case setting out that it resisted the appeal on two substantive grounds (i) breach of the settlement limits and (ii) landscape effects. It did not contend that the landscape is valued within the meaning of paragraph 187(a) NPPF and expressly confirmed as such during the inquiry.

11. **March 2026**: D5 and D6 filed Statements of Case. D5 maintained that the landscape did fall within paragraph 187(a) NPPF.

12. **6 May 2026**: the Inspector opened the inquiry.

13. **28 May 2026**: the Claimant filed a completed planning obligation made under s.106 Town and Country Planning Act 1990.[3] The obligation bound the Claimant

[2] [**CB/8**]
[3] [**CB/11**]

(and its successors in title) to provide and maintain the off-site open space and biodiversity net gain ("BNG").

14. **11 June 2026**: the Inspector gave his decision dismissing both appeals.[4]

15. **15 June 2026**: the Claimant wrote to the Defendants pursuant to the Practice Direction on Pre-Action Conduct.[5]

16. **29 June 2026**: D1 and D2 responded resisting the proposed claim.[6]

GROUNDS

<u>Ground 1: the Inspector (i) mistook material considerations as legally irrelevant when applying paragraph 14 NPPF alternatively (ii), failed to supply legally adequate reasons to distinguish earlier decisions which had treated those considerations are relevant.</u>

17. The parties agreed that paragraph 14 NPPF was engaged. The Claimant advanced the case in evidence and closing submissions that, nevertheless, the weight to attach to the policy presumption at paragraph 14 NPPF was limited given the context and extent of shortfall in housing land supply and the change in circumstances (namely a materially higher housing requirement) since the making of the Kidmore End Neighbourhood Plan.

18. At DL,34-38, the Inspector addressed that argument and concluded at DL,40, against the Claimant finding instead that the conflict with the neighbourhood plan should carry substantial weight.

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[4] [**CB/4**]
[5] [**CB/17**]
[6] [**CB/18**] [**CB/19**]

19. In arriving at the conclusion, the Inspector directed himself at DL,38 that the following considerations were not matters *"which can logically be held to cancel out or diminish the weight to the protection conferred by paragraph 14"*:

    a. The level of five year housing land supply.
    b. Past performance in delivery.
    c. The outdatedness of policies.

20. Whether a consideration is legally capable of being a material planning consideration is a question of law, see ***Tesco Stores Ltd v. Secretary of State for the Environment*** [1995] 1 WLR 759, 780.[7] If a decision taker proceeds on the misapprehension that a consideration is not capable of being a material consideration, which he was invited to take into account, that may form the basis to quash the decision, see: ***R(Copeland) v. London Borough of Tower Hamlets*** [2010] EWHC 1845 (Admin).[8]

21. It is well-established that any consideration relating to the use and development of land, or which serves a planning purpose in that it relates to the character of the use of land, is legally capable of being a relevant planning consideration, see: ***Westminster City Council v. Great Portland Estates Plc*** [1985] AC 661, 670;[9] ***Stringer v. Minister of Housing and Local Government*** (1971) 22 P. C.R. 255, 269.[10]

22. Applying those principles, the considerations which the Inspector was expressly invited to take into account (and summarised by him at DL,38) were plainly considerations relevant to the weight to attach to the presumption at paragraph 14

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7 [**AB/6**]
8 [**AB/9**]
9 [**AB/2/32**]
10 [**AB/1/17**]

NPPF. Indeed, they were so obviously material that it was irrational for him to have excluded them when applying paragraph 14 NPPF.

23. DL,37 reveals that the Inspector understood paragraph 14 NPPF to be only ever capable of being engaged with equal weight. That was plainly wrong. The application of paragraph 14 NPPF is not a binary exercise, it establishes a presumption which is capable of being outweighed. Critical to undertaking that exercise is the weight to attach to the presumption in light of other material considerations. It is well established that the context and extent of the shortfall in housing land supply are relevant considerations which bear on striking such a planning balance, see ***Suffolk Coastal DC v. SSCLG*** [2016] EWCA Civ 168 at [47][11] and ***Hallam Land v. SSCLG*** [2018] EWCA Civ 1808 at [51].[12]

24. By treating those considerations listed at DL,38 as not being relevant to the application of paragraph NPPF, especially in circumstances where he had been expressly invited to take them into account, the Inspector erred in law.

25. There is seemingly no dispute with D1 or D2 that those considerations **<u>were</u>** capable of being considerations relevant to the application of paragraph 14 NPPF. It must follow that if the Inspector treated them as being legally irrelevant that he erred in law.

26. There can be little doubt however, that is precisely what the Inspector did. At DL,38 the Inspector said that expressly that the level of land supply, past performance and outdatedness were *"not … matters which can logically be held to cancel out or dimmish the weight of the protection conferred by paragraph 14"*. A straightforward reading of the paragraph, in the context of the decision as a whole

[11] [**AB/13/271**]
[12] [**AB/16/329**]

and the submissions made to him, is that he did not consider those matters to be relevant to the application of paragraph 14 NPPF.

27. D1 and D2 place emphasis on the opening words of DL,38 where the Inspector prefaces his finding by the words "[a]bsent other considerations", which, they say, should be read with DL,39. Even assuming by those words that the Inspector considered the land supply, past performance and outdatedness of policies were only relevant to the application of paragraph 14 NPPF where there was evidence that the shortfall would be made up in the neighbourhood plan area by the same type and scale as the development proposed, he plainly still erred in law. Those considerations are legally relevant to the application of paragraph 14 NPPF irrespective of whether the shortfall would be made up within the neighbourhood plan area by development of the type and scale proposed.

28. In the alternative, if the Inspector understood those consideration to be legally capable of being relevant but, in his judgment, decided to excluded them on the facts of this appeal, he erred in law by failing to supply legally adequate reasons for distinguishing other decisions which had taken those factors into account in the application of paragraph 14 NPPF in materially the same circumstances.

29. When developing the argument that the weight to attach to the presumption at paragraph 14 NPPF varied according to the factors identified at DL,38, the Clamant drew to the Inspector's attention other appeal decisions where that had been the finding of those Inspectors in closing submissions,[13] including one decided very recently in the same planning authority area.

[13] [**CB/14/293-295**], [**CB/12**], [**CB/13**]

30. Those other appeal decisions were material considerations to which the Inspector was obliged to have regard. He was not bound to follow the conclusions of the Inspectors but, before disagreeing with a critical aspect of their reasoning, he was obliged to have regard to the principle of consistency and supply reasons for taking a different view, see: ***DLA Delivery Ltd v. Baroness Cumberlege of Newick*** [2018] PTSR 2063 at [29][14] and ***North Wiltshire DC v. SSE*** (1992) 65 P & CR 137, 145.[15]

31. The Inspector acknowledged those other decisions had been drawn to his attention at DL,34 however made no attempt to grapple their reasoning, let alone supply reasons for distinguishing his inconsistent conclusion. All that is said is that the reasoning in those decisions *"are open to speculation and the sample far too small to identify any trend" and "[t]hese previous decisions do not therefore bind my approach in the current case in relation to which I shall have primary regard to national policy"*.

32. By concluding at he did at DL,38, the Inspector was necessarily disagreeing with critical aspects of the reasoning of those Inspectors. To take the two most acute examples:

    a. In the **Chalgrove**[16] decision at DL,173 (decided in the same District as D1 only four months earlier) the Inspector took into account the following considerations as being relevant to the application of paragraph 14 NPPF:

    > "… the Council's up-to-date housing requirement for decision making purposes is significantly higher than was previously the case. The CNDP clearly does not therefore address that change in circumstances"

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[14] [**AB/15/302**]
[15] [**AB/5**]
[16] [**CB/12/233**]

b. In the **Fontwell**[17] decision at DL,74 the Inspector took into account the following as being relevant to the application of paragraph 14 NPPF:

> "… the significant and persistent shortfall in the five-year housing land supply and the substantial past under delivery demonstrate the spatial strategy at a district level has failed and will likely continue to fail for the time being. The acute shortfall in the number of homes in the area has had real-world impacts on the availability and affordability of housing. A rigorous application of the spatial strategy would undermine attempts to remedy this situation. Moreover, it is unclear how the Council intends to address the housing land supply shortfall as the Non-Strategic Sites Allocation Plan has not progressed and a new LP seems some way off."

33. By proceeding at DL,38 to treat the housing delivery and requirement context as being irrelevant to the application of paragraph 14 NPPF in the circumstances of this case, the Inspector was necessarily disagreeing with critical aspects of the reasoning of those decisions.

34. In particular, he was disagreeing with the conclusion of those previous Inspectors that the following matters <u>**could**</u> *"logically be held to cancel out of diminish the weight of the protection conferred by paragraph 14":*

    a. The level of five year housing land supply;
    b. Past performance in delivery; and
    c. The outdatedness of policies.

35. The Inspector supplied no reasons for that stark disagreement.

36. Notably, in both the **Chalgrove** and the **Fontwell** decisions, there was no evidence that *"it [was] likely that [the relevant authority] [would] seek to address its shortfall by directing development of the type and scale proposed towards the Parish"*. It follows that

17 [**CB/13/267**]

<u>that</u> consideration cannot have been a relevant point of distinction between the cases.

37. It follows that, even if the Inspector had understood the matters at DL,38 to be capable of being relevant considerations but decided to treat them as not relevant in the circumstances of the case (which is denied), his reasons give rise to a substantial doubt whether he understood the ***North Wiltshire*** duty because he failed to (i) have regard to the principle of consistency and (ii) failed to supply any reasons for distinguishing his inconsistent conclusion.

38. The number of other decisions or the lack of a "trend" did not excuse compliance with the ***North Wiltshire*** duty. As Dove J held in ***Gladman Developments Ltd v. SSHCLG*** [2019] PTSR 1302 at [28]

> "Simply because by the time this inspector came to determine the point there were a significant number of previous decisions falling on both sides of the line in the debate over policy DM4 was not a reason for not applying the principle."[18]

39. Ground 1 is (at the very least) arguable.

<u>Ground 2: the Inspector (i) misunderstood paragraph 187(a) NPPF to mean that recognition of a landscape as locally valued within a neighbourhood plan, foreclosed any further consideration whether the site fell within paragraph 187(a) NPPF, thereby (ii) excluding obviously material considerations before concluding the site was within a valued landscape and/or (iii) the Inspector failed to supply legally adequate reasons for his conclusion that the site was a valued landscape.</u>

[18] [**AB/17/351-352**]

40. The Claimant and D2 agreed that the land was not a valued landscape to which paragraph 187(a) NPPF applied. Nevertheless, at DL,18 the Inspector concluded that the site ***was*** a valued landscape falling with paragraph 187(a) NPPF.

41. That finding had the consequence of a stricter policy test applying to the Claimant's appeal and, in the Inspector's own words at DL,29 "amplified" the adverse effects which he had identified the landscape and visual appearance of the area arising from the scheme.

42. The reason for the conclusion at DL,18 was simply that the site fell within a locally valued landscape in the Kidmore End Neighbourhood Plan. The Inspector found that given that designation in the Neighbouhrood Plan *"… leaves no room for doubt I am content to proceed on the basis that it is unnecessary for the status of the LVL* [locally valued landscape] *to be subject of any further consideration".*

43. A fair reading of that paragraph in context is that the Inspector treated the inclusion of the landscape as "locally valued" in the Neighbourhood Plan as determinative as to whether the site fell within a landscape to which paragraph 187(a) NPPF applied; as he says, further consideration of that question was, in his own words, "unnecessary".

44. That was a misunderstanding of the policy at paragraph 187(a) NPPF which, in turn, led him to ignore material considerations to which he was bound to have regard in determining whether paragraph 187(a) NPPF applied.

45. Whether a site comprises a valued landscape within the meaning of paragraph 187(a) NPPF is a planning judgment for the decision maker. The relevant question to ask is whether the site has *"physical attributes which took it out of the ordinary"*, see

Forest of Dean DC v. SSCLG [2016] EWHC 2429 at [29].[19] The Courts have held that is a mandatory material consideration which arises by implication of the policy wording (at now) paragraph 187(a) NPPF. The relevant case law was drawn to the Inspector's attention in Closing Submissions.[20]

46. By treating the inclusion of the site within the locally valued designation in the Neighbourhood Plan as foreclosing consideration of evidence that it did not, nevertheless, fall within paragraph 187(a) NPPF he erred in law. As Lieven J held in ***Nixon v. East Hertfordshire DC*** [2020] EWHC 3036 (Admin) at [54] it was an error of law to consider that:

> "… the only relevant matters in determining whether this was a valued landscape were any statutory status or what was specifically identified in the Development Plan."[21]

47. Furthermore, the Inspector's misunderstanding of paragraph 187(a) NPPF led him to fail to engage with the evidence from the Claimant's landscape witness, Andrew Smith,[22] to the effect that the site did not reveal the necessary physical attributes which took it out of the ordinary. Those were material considerations to which he was bound to have regard.

48. Finally, at the very least, the Inspector's reasons at DL,18 give rise to a substantial doubt whether he appreciated that inclusion of a locally valued landscape in a Neighbourhood Plan did not foreclose consideration of whether the site revealed the necessary demonstrable physical attributes to take it out of the ordinary such as to fall within paragraph 187(a) NPPF.

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[19] [**AB/14/285**]
[20] [**CB/14/280**]
[21] [**AB/18/372**]
[22] [**CB/15**]

49. Neither D1 nor D2 submit that the neighbourhood plan designation was determinative and foreclosed consideration of evidence disputing that the site fell within paragraph 187(a) NPPF. Indeed, that submission would be hopeless in light of ***Nixon*** (above). It follows that if that is what the Inspector did at DL,18, he unarguably erred in law.

50. Instead, both Defendants submit that the Inspector did not treat designation in the neighbourhood plan as determinative merely relevant and did take into account and the Claimant's evidence, before coming to a judgment that the landscape did fall within paragraph 187(a) NPPF. However, that is not a fair or sensible reading of the decision letter. The Inspector clearly says at DL,18 that *"it is unnecessary for the status of the LVL to be subject of any further consideration".* The paragraphs which follows are, by definition, not therefore exploring whether the landscape falls within paragraph 187(a) NPPF but proceed on the assumption that issue has been dealt conclusively determined. Indeed, the paragraphs which follow are an analysis of the effects on the landscape features which he has found to fall within paragraph 187(a) NPPF, rather than an enquiry whether those features justify inclusion within paragraph 187(a) NPPF in the first place. There is no engagement with the Claimant's evidence that the site did not meet the threshold of a valued landscape. That is unsurprising, as it follows from the Inspector's bold conclusion at DL,18 that further consider of that topic (and by implication, evidence before him going to that topic) would be "unnecessary".

51. Ground 2 is (at the very least) arguable.

<u>Ground 3: the Inspector (i) took into account a legally irrelevant consideration alternatively (ii), acted irrationally in taking into account unauthorised public access to the land</u>

52. At DL,23 the Inspector took into account the unauthorised public access onto the land. That consideration had a significant bearing on the Inspector's reasoning. Not only did the Inspector rely on that existing public use to expand substantially the range of visual effects (at DL,23), he also relied upon it to diminish the benefit of authorised public access to the land which was secured by the planning obligation (at DL,55).

53. It was expressly drawn to the Inspector's attention that the present public use was (i) unauthorised and (ii) had been objected to by the landowner in the form of notices on the land, which had been torn-down or removed. That was set out in Closing Submissions[23] and in the oral evidence of Mr Philip Allin.[24] Accordingly, the Claimant invited the Inspector to place no weight on the present public use of the land.

54. To be on land without permission of the person entitled to possession is to be on land unlawfully, as a trespasser, see ***R(Barkas) v. North Yorkshire County Council*** [2015] AC 195 at [27].[25] There was no evidence of any permission to use the land and, indeed, there was positive evidence from Mr Allin that the use had been objected to by the express actions of the landowner since the golf club ceased operating in 2020.

23 [**CB/14/279**]
24 [**CB/5/57**]
25 [**AB/12/245**]

55. The Inspector should have treated unlawful public access to the land as an immaterial consideration and afforded it no weight.

56. That is because whilst it may be part of the character of the use of the land, it is an unlawful component and therefore is by implication outside the scope of s.70(2)(c) Town and Country Planning Act 1990.

57. The ambit of s.70(2)(c) of the 1990 Act falls to be interpreted in line with the *in bonam partem* principle. That is the presumption that the law should serve the public interest such that, as a principle of statutory interpretation, one should presume against the construction of a statutory provision so as to reward an unlawful action with a benefit, unless a contrary Parliamentary intention is revealed. Absent, a clear indication to the contrary, Parliament is not to be taken to have intended unlawful conduct to be rewarded, see *Halsbury's Laws of England* (vol. 96, para.717) and *Bennion on Statutory Interpretation* (8th ed. §§ 26.2 and 26.6).

58. It is well established that the *in bonam partem* principle applies to the construction of the 1990 Act, see ***Welwyn Hatfield Borough Council v. Secretary of State for Communities and Local Government*** [2011] 2 AC 304 at [54]-[58], [73] and [80]-[81].[26] That is unsurprising, given that the development control scheme is *"… an imposition in the public interest of restrictions upon private rights of ownership of land"* see, ***Pioneer Aggregates (UK) Ltd v. Secretary of State for the Environment*** [1985] AC 132 p.140H.

59. There is no indication that Parliament intended s.70(2)(c) of the 1990 Act to permit unlawful use of land to be taken into account in the determination of a planning application as an "other material consideration".

[26] [**AB/10/202-203,206,209**]

60. D2 relies upon the definition of "open space" at s.336(1) of the 1990 Act, which includes within its definition *"any land … used for the purposes of public recreation"*. However, that only serves to illuminate the strength of the claim, given that definition been interpreted as only applying to land ***lawfully*** used for that purpose, see ***R v. Doncaster MBC, ex parte Braim*** (1989) 57 P & CR 1, 15:[27]

> " Section 123(2A) appears to have been enacted to protect the interests of those **lawfully** using open spaces" [emphasis added]

61. Whilst ***Braim*** concerned a claim concerning s.123(2A) Local Government Act 1972, the definition of "open space" in that Act is tied (by virtue of s.270(1)) to the meaning ascribed by s.336(1) of the 1990 Act. ***Braim*** is therefore authority for the proposition that "open space" in the 1990 Act does not extend to land in unlawful use for public recreation.

62. For the foregoing reasons, the Inspector took into account a legally irrelevant consideration at DL,23 and 55, namely the unlawful trespassory use of the land.

63. In the alternative, if the unlawful use of the land by the public was capable of being a relevant consideration, the Inspector acted irrationality by placing significant weight upon that consideration and treating that use as the baseline against which to judge the predicted visual effects and the benefit of new public open space without at least making further enquiries. There was no evidence before the Inspector to gainsay the submission that the landowner could restrict public access at will and the oral evidence that the landowner had previously sought to restrict access by notice.

[27] [**AB/4/68**]

64. Finally, it was irrational to assume that public access would continue in those circumstances without, at the very least, asking the Appellant whether (and if so, what) steps may be taken to restrict public access in the future in the event the appeal were to be dismissed. That information was a necessary before resolving to apply material weight to the unauthorised use of the land in the assessment of effects of the appeal scheme.

65. Ground 3 is (at the very least) arguable.

Ground 4: the Inspector failed to supply legally adequate reasons for excluding obviously material considerations (namely off-site biodiversity net gain and public open space)

66. Before the Inspector was an executed planning obligation dated 28 May 2026,[28] which secured land adjacent to the appeal site as open space and land for the realisation of biodiversity net gain.

67. It was common ground with the other parties to the appeal that those were benefits which could lawfully and properly be taken into account and were compliant with Regulation 122 Community Infrastructure Levy Regulations 2010.

68. At DL,54 however, the Inspector concluded that *"[a]s its relationship with and relevance to the development would be at best tenuous, I am not convinced that its provisions could be properly secured"*.

69. Those reasons give rise to a substantial doubt whether the Inspector understood that the planning obligation *"properly secured"* the delivery of the benefit of public open space and biodiversity net gain.

[28] [**CB/11**]

70. D1 does not offer any explanation what the Inspector meant by the observation at DL,54 that the benefits could not be "secured" and it must therefore follow that, with the benefit of instructions, D1 is unable to advance any lawful explanation.

71. D2 (but notably not D1) submits that the reason it could not be secured is because *"its relationship with and relevance to the development would be at best tenuous".* That does not supply an answer as to why that benefit could not be *"properly secured".* In any event, it is impossible to understand why the biodiversity net gain area (comprising the ancient woodland) and public open space, provided adjacent to the site, were *"tenuous"* in their relationship to the scheme. That is especially the case given at DL,24 the Inspector places reliance on the ancient woodland which he found the site "directly adjoins and contributes to the appreciation of". At the very least, the Inspector's reasons for excluding the off-site benefits at DL,54 give rise to a substantial doubt whether the reached that conclusion on relevant and rational grounds.

72. Accordingly, the only proper conclusion is that the Inspector has failed to supply lawfully adequate reasons which has substantially prejudiced the Claimant in the preparation of a future scheme.

73. Instead, D1 and D2 seek to rely on the Inspector's reasons at DL,55. However, those reasons are themselves tainted by the error which is the subject the Ground 3. It follows that if Ground 3 succeeds, there is no defence to Ground 4 and Ground 4 must succeed.

74. Ground 4 is (at the very least) arguable.

<u>Ground 5: the Inspector acted in breach of the rules of procedural fairness by concluding that it was "unclear" whether the site would deliver an efficient use of land and/or mix of housing, without notifying the Claimant those matters were live and/or providing an adequate opportunity to adduce evidence in response.</u>

75. A party to a planning appeal is entitled to know the case they have to meet and have an adequate opportunity to make submissions and/or adduce evidence in response, see: ***Hopkins Developments Ltd v. SSCLG*** [2014] EWCA Civ 470 at [47].[29]

76. It is well established that if an Inspector wishes to depart from the common ground of the parties, he ought to expressly raise that prospect and afford the parties an opportunity to comment, see: ***Castleford Homes Ltd v. Secretary of State for Environment, Transport and the Regions*** [2001] PLCR 29 at [53] and [65].[30]

77. At DL,52 the Inspector noted the provision of open space and biodiversity net gain on-site would exceed the policy requirements on the site and therefore *"would offer benefits over and above those required as standard"*. However, the Inspector reduced the weight he would otherwise attach to those benefits because it was "unclear" to him whether *"it would constitute an efficient use of the land, or optimise the potential of the site to accommodate and sustain an appropriate amount and mix of development".*

78. The following facts are set out in the Witness Statement of Mr Allin:[31]

    a. It was expressly common ground with D2 that the development would deliver an efficient use of land and deliver an appropriate mix.

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29 [**AB/11/221**]
30 [**AB/7/127-128,130**]
31 [**CB/5/56-57**]

b. The Inspector asked Mr Allin whether he considered the development would represent an efficient use of land, to which he said it would. He was not asked why he was of that view and he was not asked whether the scheme would deliver an appropriate mix.

c. The Inspector did not suggest that having heard the evidence from Mr Allin and Ms Smith for D2 that he was "unclear" about whether the development would deliver an efficient use of land or an appropriate mix.

79. That is to be contrasted to the Inspector's other lines of enquiry. On ecology, the Inspector where he set out, both in writing and orally over several days of the inquiry, several rounds of questions on which he required a response. In respect of ecology, the Claimant was put on notice of the point and afforded an opportunity to adduce evidence from its ecologist which, presumably, was satisfactory to the Inspector given it does not feature in his Decision.

80. Given that context of the approach of the Tribunal to lines of enquiry, and the common ground with D2 (and indeed lack of dispute from other parties), the Claimant was entitled to assume the Inspector had sufficient information at the end of the inquiry to ensure he was not "unclear" whether the scheme would deliver an efficient use of land and would deliver an appropriate mix.

81. The Claimant could not have known those were matters which remained "unclear". Indeed, is all the more the case, given the Inspector's style of raising questions in detail and in writing for areas on which he sought further material.

82. Had the Inspector suggested that he had inadequate information to determine those points, in spite of the common ground between the parties, the Claimant would have been able to respond to that concern with further evidence. The

Claimant has been prejudiced by being denied an opportunity to adduce evidence to address these points.

83. D1 principal answer to this claim is to say that the Inspector asked Mr Allin whether the overprovision on site of open space would constitute an efficient use of land. D1 does not say that the Inspector asked whether there would be an appropriate mix of land, neither does D1 suggest the Inspector asked Mr Allin why he considered the scheme would make an appropriate use of land.

84. The Inspector's question was insufficient to ensure the rules of procedural fairness were observed in that:

    a. It was raised **after** D2 had already conceded the site would make an efficient use of land.

    b. It was a single question whether Mr Allin considered that it would make an efficient use of land. There was no follow-up question or enquiry why Mr Allin was of that view. It was impossible to know that behind that single question lay a separate question, which was *how* it would make an efficient use land.

    c. It was raised at the end of the inquiry, when all the evidence had concluded and the timetable was for closing submissions the next day.

    d. It was raised against a pattern of the Inspector raising detailed questions on areas on which he was concerned in writing via his case officer, which put the Claimant on notice it had to address those matters.

85. Applying the law in ***Hopkins***: (i) the Claimant was not on notice that it needed to meet a case that it was "unclear" how the scheme would make an efficient use of land or deliver an appropriate mix and in any event and/or (ii), the Claimant was deprived of an adequate opportunity to adduce evidence to respond to that point.

86. Ground 5 is (at the very least) arguable.

Ground 6: the Decision was internally inconsistent and thereby irrational on the question of weight to the provision of housing and/or his reasons gave rise to a substantial doubt what weight was taken into the planning balance.

87. Whilst the weight to attach to a material consideration is a matter for the decision maker, it must be rational, ***Tesco Stores Ltd v. Secretary of State for the Environment*** [1995] 1 WLR 759, 780.

88. Inconsistency, otherwise than where a good reason is offered, will be irrational, see e.g. ***Middlebrook Mushrooms Ltd v. Agricultural Wages Board of England and Wales*** [2004] EWHC 1477 at [74].[32]

89. Both the Claimant and D2 agreed the provision of market and affordable housing should carry at least significant weight.[33]

90. The Inspector appeared to accept that common ground at DL,49 however at DL,51 then takes a different view and finds that the benefit of market and affordable housing should attract "no more than limited weight". Those two findings were flatly inconsistent and, it follows, that the Inspector has acted irrationally in the

32 [**AB/8/154**]
33 [**CB/14/290-291**]

ascription of weight to a material consideration, cf. ***Tesco*** (above) and ***Middlebrook*** (above).

91. Both D1 and D2 submit that DL,49 and 51 are dealing with different benefits; the former dealing with the "numerical contribution and related economic benefits" and the latter dealing with the "social benefits of the delivery of housing".

92. However, that rather begs the question what weight did the Inspector ultimately attach to the benefit of housing. That was the principal benefit advanced for the scheme and one to which C and D2 agreed at least significant weight should be attached.

93. At the very least, the Inspector's reasons give rise to a substantial doubt whether he ascribed weight to the benefit of housing for relevant and rational reasons. That has prejudiced the Claimant in the preparation of future proposals on the site.

94. Ground 6 (is at the very least) arguable.

CONCLUSION

95. The Claimant submits that D1 (at the very least arguably) acted outside the powers of the Act in the six ways alleged above. Accordingly, the Claimant seeks leave to proceed with its planning statutory review.

96. Within that claim, the Claimant seeks an order:

    a. Quashing the Decision dated 11 June 2026 and remission of the appeals to D1 to be re-determined by a separate inspector; and

b. An order that D1 pay the costs of the Claimant of bringing the claim for planning statutory review.

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