

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

AC-2026-LON-003203

BETWEEN:

FAIRFAX (READING) LIMITED

Claimant

-and-

**(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES & LOCAL
GOVERNMENT**

(2) SOUTH OXFORDSHIRE DISTRICT COUNCIL

Defendants

REPLY

1. Pursuant to CPR 54.8A and paragraph 4.19 PD54D, it is necessary to file this Reply to address the submissions made by D1 and D2 in their Summary Grounds of Resistance.

Ground 1

2. Neither D1 nor D2 dispute that the level of land supply, the past performance in delivery of new homes or the outdatedness of policies for delivering a supply of new homes are material considerations relevant to the application of paragraph 14 NPPF. Indeed, such a submission would have been unsustainable in light of *Suffolk Coastal* and *Hallam Land*.¹
3. Instead, they say the Inspector found those considerations did not, on the facts of the case, affect the application of paragraph 14 NPPF.
4. That is not however a straightforward reading of the Decision Letter. At DL,34-38,² the Inspector sets out his understanding of paragraph 14 NPPF, before

¹ Cited in full at paragraph 23 SFGs, CB/16.

² CB/47.

applying that understanding to the facts (which comes later at DL,40). A fair reading of DL,37-38 is that, as a matter of principle, the Inspector considered the level of land supply, past performance and outdatedness to be irrelevant to the application of paragraph 14 NPPF (“absent other considerations”) because they are not relevant to whether the policy is engaged in the first place. That is a plain misunderstanding of the policy, which led the Inspector to exclude what are accepted to be material considerations. The Inspector does not say via his Witness Statement that he took those matters into account and the only sensible conclusion is that he excluded them on principle.

5. In so doing, he took a starkly contrasting view to the application of paragraph 14 NPPF to the Chalgrove or Fontwell decisions, where those matters were treated as relevant, in spite of no proposal to make-up the undersupply in the relevant Parish. Whilst those are obviously different sites, one was in the same District as the Claimant’s scheme and both concerned the range of considerations relevant to the application of paragraph 14 NPPF and engage the principle of consistency. By deciding the case as he did, the Inspector was necessarily disagreeing with those earlier Inspectors to the effect that housing supply and delivery considerations were relevant to the application of paragraph 14 NPPF.

Ground 2

6. Neither D1 nor D2 dispute that designation of a landscape within a neighbourhood plan as a locally valued landscape is not **determinative** of whether it falls within paragraph 187(a) NPPF. Indeed, such a submission could not have stood in the face of *Nixon*.³
7. Instead, they suggest the Inspector came to his own judgment that the landscape fell within paragraph 187(a) NPPF, taking into account a range of evidence.
8. Again, that is not a fair reading of the Decision Letter. The Inspector could not have been clearer at DL,18.⁴ In the Inspector’s mind the designation in the neighbourhood plan was **determinative** to whether the land fell within paragraph 187(a) NPPF.

³ Cited in full at paragraph 46 SFGs, CB/22.

⁴ CB/43.

9. D1's submission that the Inspector relied on his analysis at DL,18-25 in concluding the land fell within paragraph 187(a) NPPF is irreconcilable with the Inspector's language at DL,18 that the inclusion in the neighbourhood plan "*leaves no room for doubt*" such that "*it is unnecessary for the status of the LVL to be subject to any further consideration*". It is therefore quite impossible to say that what follows is an analysis of the **status** of the land.
10. The Inspector's error led him to exclude the obviously material consideration of Mr Smith's detailed evidence,⁵ which set out in detail why the site fell outside paragraph 187(a) NPPF. Tellingly, the Inspector does not say in his Witness Statement that he took that material into account, which supports the Claimant's interpretation that he thought it was "*unnecessary*" because the designation in the neighbourhood plan "*leaves no room for doubt*".

Ground 3

11. D1's principal response to this Ground is to suggest the point was not taken before the Inspector and therefore cannot be raised now. That is factually wrong and wrong in principle.
12. The Claimant expressly submitted that no weight should be attached to the existing use of land as it was unauthorised and could be terminated at will.⁶ In any event, there is "no procedural" bar to raising a legal point in a planning statutory review not raised at the merits stage, see *Keep Chiswell Green v. SSHCLG* [2026] PTSR 492 at [47]. Moreover, even applying the understanding prior to *Keep Chiswell Green*, Ground 3 would not have been precluded because no further fact-finding is required in order for the Court to resolve the complaint. There was no dispute that the public access to the land was unauthorised and that attempts to restrict use had been attempted. The Inspector understood that evidence, as he explains in his Witness Statement at paragraphs 9-13.
13. The only substantive answer D1 and D2 have to the Ground is to say that trespassory use must be a relevant consideration within the scope of s.70 of the 1990 Act because it is relevant to the acquisition of rights in land (e.g. village green rights). However, that is no answer; a consideration may be relevant in one statutory context and irrelevant in another. Indeed, the instances relied upon by

⁵ CB/314-318.

⁶ CB/281 para.19(a).

D1 are plainly distinguishable because the acquisition of the statutory right in question (e.g. a village green under s.15 Commons Act 2006) is contingent on the use being trespassory (i.e. it must be “as of right”, i.e. without permission); it is therefore implicit that unlawful access is relevant in such cases.

14. If D1’s point is to suggest that the theoretical future crystallisation of informal public access into a legal right is capable of being a material consideration that, too, must be wrong. A hypothetical future right, which had no guarantee of coming to fruition, would not have fairly and reasonably related to the character of the use of the land or been rational to take into account on the facts of the case, cf. *R(Wright) v. Forest of Dean* [2019] 1 WLR 6562 at [32] (approving the *Newbury* criteria to whether a consideration is material).
15. It is at the very least an arguable point of law whether an unauthorised recreational use of land is capable of being a material planning consideration, especially in light of the manner in which the 1990 Act has been interpreted to only protect “lawful” recreational uses of land, see *ex parte Braim*.⁷

Ground 4

16. D1 offers no defence to the allegation under this Ground. Instead D1 suggests the point is overtaken by what is said at DL,55. However, DL,55 is infected by the error of law explained above at Ground 3. It therefore follows that if Ground 3 is successful, there is no defence to Ground 4.

Ground 5

17. As the Inspector explains in his Witness Statement, it was common ground between the experts for the Claimant and D2 that the scheme made an efficient use of land.⁸ Whilst D2 submitted that it did not in Closing Submissions, that was in respect of the harm to the landscape arising from the scheme in principle, and not the balance of the development and open space per se, which had been expressly agreed by its expert witness. However, at DL,52, the Inspector recorded that he was “unclear” how the balance of development and open space was “efficient” or “appropriate”. It follows that the Inspector was necessarily disagreeing with a point of common ground between the parties at DL,52.

⁷ As cited in full at paragraph 60 of the SFGs, CB/26.

⁸ See paragraph 24.

18. Clearly the assessment of procedural fairness in such cases is acutely fact sensitive. The issue here is whether a single question of the Claimant's witness, at the very end of the inquiry, was sufficient to put the Claimant on notice that the Inspector was proposing to depart from the common ground of the parties on a point of significance. It stands in contrast to the approach the Inspector took to other, more obscure, aspects of the case (including ecology) where he set out in detail the questions to which he required an answer and afforded the opportunity to the Claimant to supply further evidence from its ecologist.
19. The Claimant submits the Inspector's single question to Mr Allin whether the scheme made an efficient use of land, was insufficient to alert the Claimant to the fact that the Inspector was unclear how the scheme would make an efficient use of land by virtue of the balance of built development and open space.

Ground 6

20. The short point here is that the Inspector applied different weight to a single issue (i.e. the benefit of market housing). D1 says that was to different aspects of the same issue but that begs the question what weight he gave the benefit overall. Indeed, it is impossible to decipher how the "numerical contribution to supply" differed from the "social benefits of the delivery of housing". That gives rise to a substantial doubt whether the Inspector reached his conclusion on relevant and rational grounds.

Disclosure

21. In spite relying on the Inspector's notes, D1 has not disclosed that material, limiting the ability of the Court to interrogate what is said about it by D1 and the Inspector himself. The Claimant has written to D1 seeking disclosure of the Inspector's notes pursuant to D1's duty of candour.

ASHLEY BOWES

LANDMARK CHAMBERS

180 FLEET STREET

LONDON, EC4A 2HG

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