Case No: CO/4217/2016

Neutral Citation Number: [2017] EWHC 947 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2017

Before :

MR JUSTICE HOLGATE

- -

Between :

GOODMAN LOGISTICS DEVELOPMENTS (UK) LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) SLOUGH BOROUGH COUNCIL**	**Defendants**

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- -

Christopher Katkowski QC and Guy Williams (instructed by **Gowling WLG**) for the **Claimant**
Tim Buley (instructed by **the Government Legal Department**) for the **1st Defendant**
The 2nd Defendant did not appear and was not represented

Hearing dates: 28th and 29th March 2017

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Judgment

Mr Justice Holgate:

Introduction

1. The Claimant, Goodman Logistics Development (UK) Limited ("Goodman"), applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant, the Secretary of State for Communities and Local Government ("the SSCLG"), dismissing its appeal against the refusal by the Second Defendant, Slough Borough Council ("SBC"), of permission for the construction of a strategic rail freight interchange ("SRFI") on land north of the A4 Colnbrook bypass.

2. The appeal was considered at a public inquiry which began on 8 September 2015 and sat for 10 days over a three week period. The Inspector produced a report to the SSCLG dated 26 January 2016 in which she recommended that planning permission be refused. The SSCLG accepted that recommendation in his decision letter dated 12 July 2016.[1]

3. A strategic rail freight interchange enables freight to be transferred from the railway system to transportation by road and vice versa and provides substantial warehousing space.

4. The appeal site occupies some 58.7 hectares of land. It is located to the south east of Slough and to the north of Colnbrook and Poyle. It lies between the M4 to the north and the A4 Colnbrook by-pass to the south. The M25 motorway lies 500m to the east of the site and beyond that to the south-east is Heathrow Airport. The Great Western Main Line ("GWML") runs east west on the far side of the M4. Between the eastern boundary of the appeal site and the M25 the Colnbrook Branch Freight Line runs from south west to north east. The line passes under the junction of the M4 and M25 and continues to West Drayton where it connects with the GWML.

5. The proposed development would provide a rail connection to the Colnbrook branch line, two sidings alongside that line, four internal reception sidings, an intermodal terminal with rail links to warehousing units and gantry cranes 25m high for the transfer of container units. The Colnbrook branch line would be upgraded. Vehicular access would be via the A4. The proposal included B8 warehousing development of up to 194,836 sqm on 3 areas of land comprising respectively 9.73 hectares, 10.58 hectares and 10.67 hectares. The scheme also included a Landscape and Green Infrastructure Strategy, both for the appeal site and adjacent lands, covering a combined area of 78.8 hectares (IR 3.10).

6. The appeal site was used for gravel extraction between the 1950s and 1970s and then for landfill until the 1980s. It was the subject of restoration to pasture in the 1990s. It "now forms a broad low mound rising towards the centre and is used for horse grazing" (IR 2.2). The Colne Valley Trail follows the east/south eastern boundary of the site.

[1] In this judgment DL and IR followed by numbers are used to identify paragraphs in the decision letter and the Inspector's report respectively.

7. The appeal site lies within the Green Belt. As Goodman points out, the Green Belt north and south of the M4 serves in part to separate the built up areas of Slough and the western part of Greater London. However, the Borough of Slough does not cover the whole of that part of the Green Belt. Instead, it covers an area which, broadly speaking, lies to the south of the M4 and to the west of the M25. Core Policy 1 of the Slough Core Strategy 2006-2026 (adopted in 2008) designates that area as a Strategic Gap. It is common ground in these proceedings that Core Policy 2 ("CP2") applies a layer of restraint within the Strategic Gap in addition to that provided by Green Belt policy. This is the subject of ground 2 in this challenge. Goodman points out that the protection of the gap between Slough and west London to the north of the M4, and hence beyond the administrative area of SBC, is dealt with by Green Belt policy and not by any additional Strategic Gap policy.

8. Proposals for the development of a SRFI at Colnbrook have a long history. In 1999 there was a much larger proposal by Argent Group plc for the London International Freight Exchange ("LIFE") which included the appeal site but extended to some 182 hectares of land. An appeal against refusal of permission was dismissed by the Secretary of State in August 2002 (IR 4.1).

9. Goodman's application for permission was made on 27 September 2010. The inquiry into the planning appeal was due to begin in October 2012. However, the inquiry was postponed because the SSCLG considered that his decision on a proposal for a SRFI in the Green Belt at Radlett Aerodrome, Hertfordshire might have significant implications for that inquiry (IR 1.2). The Radlett proposal involved a substantially larger development of about 146 hectares of land linked to the Midland Main Line. In October 2008 the Secretary of State had issued a decision letter dismissing the appeal on the Radlett site because the assessment of alternative sites had been flawed. In July 2010 the Secretary of State dismissed a second appeal proposal on the Radlett site because he considered that an SRFI at Colnbrook could be less harmful, and so the very special circumstances needed to justify the grant of permission for the Radlett scheme in the Green Belt had not been demonstrated. The developers of the Radlett SRFI, Helioslough Limited ("Helioslough"), brought a successful challenge in the High Court to that decision, which on 1 July 2011 was quashed by HHJ Milwyn Jarman QC (Helioslough Limited v SSCLG [2011] EWHC 2054 (Admin)). He held that the SSCLG had misconstrued CP2 in SBC's Core Strategy and had consequently failed to treat the Strategic Gap policy as an additional restraint applicable to the site for the Colnbrook SRFI over and above Green Belt policy. The Radlett appeal then had to be redetermined. Initially, the SSCLG considered that the Colnbrook and Radlett appeals should be conjoined. He later decided against that course and the redetermination of the Radlett appeal was dealt with through a lengthy process of written representations. Eventually a second and final decision letter was issued on 14 July 2014 in which he granted planning permission for the Radlett SRFI. That in turn was challenged in the High Court by the local planning authority. The claim was dismissed on 13 March 2015 (St. Albans City and District Council v SSCLG [2015] EWHC 6551 (Admin)).

10. Once the SSCLG had issued his decision granting planning permission for the Radlett SRFI the appeal process for the Colnbrook proposal was revived. Updated documentation was prepared, leading to the inquiry in 2015 and the decision now the subject of this claim.

Summary of the Grounds of Challenge

11. The Claimant advances three grounds of challenge:

    (1) The National Policy Statement for National Networks ("NPS") establishes that there is a "compelling need for an expanded network of SRFIs" "to serve regional, sub-regional and cross-regional markets". The SSCLG found that the Colnbrook proposal would contribute to meeting this need and that there was no alternative site capable of fulfilling the same purpose, namely contributing to a network of SRFI in London and the South East and dealing with the gap in provision on the west side of London. The SSCLG stated that, like the Inspector, he gave "no weight" to Goodman's argument that it was inevitable that a Green Belt location is essential for meeting that need, because this was a matter he had considered in relation to need and alternative sites in DL 24-26 and DL 31 (see DL 32). It is submitted that the SSCLG failed to give adequate reasons for that conclusion and/or misunderstood Goodman's case on this issue so that he failed to take it into account as a material consideration;

    (2) The SSCLG failed to interpret correctly and apply CP2 of SBC's Core Strategy in relation to development within the Strategic Gap and the Colne Valley Regional Park and/or failed to give adequate reasoning to explain how he had treated the appeal proposals against that policy;

    (3) The SSCLG failed to interpret correctly and apply policy in the National Planning Policy Framework ("NPPF") concerning the openness of the Green Belt and/or failed to take into account a material consideration in that he treated visual matters as having no relevance to that issue.

12. On 1 November 2016 Dove J granted permission for Goodman to bring this claim, observing that ground 3 is clearly arguable, while grounds 1 and 2 were less strong.

13. The principles upon which the Court may be asked to intervene in a challenge under section 288 are well-established and were summarised in Bloor Homes East Midlands Ltd v SSCLG [2014] EWHC 754 (Admin) at paragraph 19. They need not be repeated here.

14. I will deal with key provisions of national policy and summarise the Inspector's report and the Secretary of State's decision letter before going on to address the three grounds of challenge in the order set out above. I wish to express my gratitude for the considerable assistance I received from all counsel in their written and oral submissions.

National Policy

The National Policy Statement for National Networks

15. On 14 January 2015 the Minister of State at the Department for Transport designated the NPS as a national policy statement under section 5(4) of the Planning Act 2008 following the statutory consultation and parliamentary debate provided for in that statute. The statement is given a special status in the determination of applications for development consent in respect of nationally significant infrastructure projects

(section 104(3)). The present scheme fell below the 60 hectare threshold for qualification as such a project and so was outside the scope of the development consent procedure under the 2008 Act. Nonetheless, it was common ground between the parties that the NPS was "a very significant material consideration" in the determination of the appeal (IR 6.5), a statement with which the Inspector and the SSCLG agreed (IR 12.6 and DL 11).

16. Paragraph 2.42 referred to the importance to the national economy of the logistics industry and the increasingly significant role played by rail freight. Users of distribution services are increasingly looking to integrate rail freight options into their operations, so that there is a need to develop facilities alongside major rail routes and trunk roads, and near to conurbations (paragraph 2.45). Paragraphs 2.46 to 2.50 deal with the drivers for growth leading to forecasts of growth in national rail freight to 2023 and 2033. Paragraph 2.50 states that the forecasts confirm the need for "an expanded network of large SRFIs across the regions to accommodate the long-term growth in rail freight", although it adds that the forecasts "do not provide sufficient granularity to allow site-specific need cases to be demonstrated".

17. Paragraphs 2.53 to 2.58 set out the Government's policy for addressing this need. To facilitate modal transfer of freight from road to rail, "a network of SRFIs is needed across the regions, to serve regional, sub-regional and cross-regional markets" (paragraph 2.54). Simply perpetuating the existing status quo is not a viable option (paragraph 2.55). There is therefore a "compelling need for an expanded network of SRFIs". Given their locational requirements, the number of locations suitable for SRFIs will be limited, which will restrict the scope for viable alternative sites to be identified (paragraph 2.56). In London and the South East most existing facilities are small scale and/or poorly located in relation to the main urban areas (paragraph 2.57) and there is a particular challenge in expanding rail freight interchanges serving that region (paragraph 2.58). Paragraphs 5.170, 5.172 and 5.178 make it plain that the policies for controlling development in the Green Belt apply without any modification to a proposal to develop a SRFI on such land. In particular, there is the usual presumption against inappropriate development unless "very special circumstances" are demonstrated which clearly outweigh the potential harm to the Green Belt and any other harm.

The National Planning Policy Framework

18. Part 9 of the NPPF deals with the protection of Green Belt land. The paragraphs relevant to the determination of Goodman's appeal were:-

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 80. Green Belt serves five purposes:
>
> 1) to check the unrestricted sprawl of large built-up areas;
>
> 2) to prevent neighbouring towns merging into one another;

3) to assist in safeguarding the countryside from encroachment;

4) to preserve the setting and special character of historic towns; and

5) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

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.

89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt".

19. Plainly the proposed SRFI constituted "inappropriate development" and so Goodman accepted that under Green Belt policy planning permission would not be granted for the SRFI at Colnbrook unless it demonstrated very special circumstances which clearly outweighed harm to the Green Belt and any other harm. The phrase "any other harm" refers to any planning detriment that would result from the proposed development (Redhill Aerodrome Limited v SSCLG [2015] PTSR 274). The harm to the Green Belt may comprise "generic" harm by reason of the inappropriateness of the development and site-specific harm resulting from the effect of the development on the openness of the Green Belt (paragraph 79 of the NPPF) and on any of the five purposes of the Green Belt (set out in paragraph 80 of the NPPF) in that locality. In the present case the "very special circumstances" relied upon by Goodman included the contribution made by the proposal to meeting the need for a network of SRFIs serving (inter alia) London and the South East and the absence of any alternative sites.

A summary of the Inspector's report and the decision letter

20. The Inspector's report is an impressive document. It provided a comprehensive summary of the parties' cases and detailed, careful conclusions on a wide range of issues, which clearly set out the weight given to each point and how those matters were drawn together in the overall balancing exercise.

The Inspector's Report

21. The Inspector's conclusions were set out in chapter 12 of her report and occupy nearly 40 pages. I will merely summarise the structure and key conclusions of the Inspector's reasoning. Paragraphs of particular relevance will be left to the discussion of the grounds of challenge.

Green Belt

(i) Openness and permanence are the essential characteristics of Green Belts. Openness is the major asset of the appeal site. There is nothing of any note that detracts from its openness. The proposed development would result in a severe loss of openness, which is very much linked to the purposes of the Green Belt (IR 12.9 to 12.12). The proposal would conflict with the first three purposes of Green Belt policy, namely checking the unrestricted sprawl of large built-up areas, preventing neighbouring towns from merging with one another, and safeguarding the countryside from encroachment. These conflicts have "substantial weight" (IR 12.13 to 12.15 and 12.18).

Strategic Gap

(ii) The Strategic Gap is particularly important. It is a fragmented and vulnerable part of the Green Belt. The very high bar set by CP2 is merited because of the need to distinguish this particularly sensitive area of the Green Belt. The policy should be given full weight as a key component of the development plan for Slough. The SRFI would be located within the heart of the Strategic Gap. It would involve a dominant group of large scale buildings and infrastructure, have a very strong influence on the area and cause irreparable harm to the Gap (IR 12.20 to 12.28).

Colne Valley Park

(iii) The Park is of regional importance. The appeal site is located at the narrowest section which links the southern area of the Park to the more extensive central and northern areas. The appeal site is at a fairly pivotal location. Within Slough Borough the area of the Park coincides with the Strategic Gap and CP2 applies to both designations. The open, countryside character of the appeal site is its greatest quality. The proposals for accessibility would do much to avoid severance. Although there would be certain benefits (eg. the high quality landscape scheme and improvements to rights of way), the loss of the countryside feel and amenity could not adequately be replaced. Leaving to one side CP2, which was addressed towards the end of the report, the effects on the Park added moderate weight against the proposal (IR 12.29 to 12.40).

Landscape character and visual effect

(iv) In the broader landscape context the effect on character would be negligible, but at a local level the effect would be more significant. Overall the harm to landscape character had a small amount of weight. Harmful visual impact would be restricted primarily to the immediate surroundings and would affect those living in the area. Visual harm had a greater amount of weight (IR 12.41 to 12.48).

Highways and Traffic

(v) Improvements to the transport network would be undertaken which would effectively limit significant impacts. Safe and suitable access could be achieved (IR 12.49 to 12.57).

Air Quality

(vi) With appropriate mitigation the development complied with policy. The slight adverse effect on air quality had only limited weight (IR 12.58 to 12.64).

Biodiversity, flood risk and water resources

(vii) The effect of the proposed development on these factors would be acceptable (IR 12.65 to 12.82).

Need

(viii) There is a compelling need for an expanded network of SRFIs at a wide range of locations throughout the country, including a network of SRFIs in and around London. The NPS does not give any indication as to the number of SRFIs to be provided in the network as a whole or within a region. There is no quantitative target or limit for meeting the need for SRFIs in London and the South East. Instead the emphasis in the NPS is on proposals meeting locational criteria. However, the number of locations suitable for SRFIs is likely to be limited, particularly for London and the South East. The Colnbrook SRFI would be located in a region deficient in SRFI capacity. The Radlett SRFI would be significantly larger and would improve the position in the South East region, but it would not satisfy the policy need in the NPS for a regional network and should be seen as a complementary facility forming part of that wider network. There are grounds for optimism that the current position will change for London and the South East. In addition to Radlett, the London Gateway port development is capable of fulfilling the function of a SRFI and there is a prospect of Howbury Park being implemented. But because there is a noticeable gap in provision on the west side of London, the Colnbrook proposal would contribute to the development of a regional and wider national network in accordance with the NPS (IR 12.88 to 12.107).

Requirements for transport links and location

(ix) The Colnbrook proposal would fulfil these requirements of the NPS to a very good standard (IR 12.108 to 12.137).

Transfer of freight from road to rail

(x) The proposal would provide a high level of rail service. The risk of not achieving a high level of rail use is low (IR 12.138 to 12.148).

Carbon emissions

(xi) The scheme would achieve a reduction in carbon emissions, a positive factor carrying some weight (IR 12.149 to 12.150).

Economy and jobs

(xii) The scheme would promote national policy objectives to secure economic growth and significant benefits for the local economy (IR 12.151 to 12.152).

Alternative sites

(xiii) The Radlett facility is not an alternative to Colnbrook; it is complementary. There is no identified alternative site to Colnbrook, capable of fulfilling the same purpose, serving the same markets and being geographically similar so as to achieve the desired distribution of SRFIs around London. This is a matter of "considerable weight" in favour of the proposal (IR 12.153 to 12.157).

The balance under Green Belt policy

(xiv) Because the development is "inappropriate," it is by definition harmful to the Green Belt. Furthermore, it would result in a severe loss of openness and conflict with three purposes of Green Belt policy. "The totality of the harm to the Green Belt has very substantial weight". The Strategic Gap designation highlights "the critical importance of the Green Belt in this part of Slough and that some parts of the Green Belt are more valuable than others". The irreparable damage to the Gap adds "significant weight" against the proposal. The harm to the Colne Valley Park has "moderate weight". The harm to landscape character has small weight and the harmful local visual impact has slightly greater weight. The slight adverse effect on air quality and harmful social effects each have a small amount of weight. Other effects are neutral. The overall weight of all factors telling against the development is "very strong and compelling" (IR 12.187 to 12.193). On the other hand, the contribution to satisfying unmet need for SRFIs is "considerable". Compliance with the criteria for site selection attracts significant weight. The lack of an alternative site has considerable weight. The economic benefits, reduction in carbon emissions and improvements each attract a lower degree of weight, "some weight", in favour of the proposal (IR 12.194 to 12.197). Consequently, the harm that would be caused by the scheme is not "clearly outweighed" by its beneficial effects (IR 12.198).

Strategic Gap

(xv) Notwithstanding the contribution that would be made by the proposal to the need for a network of SRFIs and the absence of another site on the west side of London, it had not been shown that the scheme "is essential within the Strategic Gap" when account is taken of the complementary SRFIs that have been identified and will probably be developed to serve the region. Accordingly, the proposal is contrary to CP2 (IR 12.199).

The development plan

(xvi) Because there are not very special circumstances sufficient to overcome Green Belt and other strategic objectives, the balance lies against the proposal (IR 12.200).

The NPPF and sustainable development

(xvii) Balancing its economic, social and environmental consequences, the proposal does not represent a sustainable form of development and is therefore contrary to the NPPF. This conclusion took into account (inter alia) the conflict with the

spatial strategy for Slough, the loss of a highly protected area of Green Belt and the irreparable harm to the Green Belt east of Slough, amounting to a "major environmental loss" (IR 12.201 to 12.204).

22. The Inspector's overall conclusion was set out in IR 12.206 in the following terms:-

> "I have 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 I have attached to this consideration. The benefits of the scheme do not clearly overcome the harm. Planning conditions would not be able to overcome the fundamental harms caused to the Green Belt, Strategic Gap and Colne Valley Park and the open environment enjoyed by the local community. However, weight is a matter for the decision maker. In the event the Appellant'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".

I do not accept the suggestion made by Mr. Katkowski QC on behalf of Goodman that this paragraph indicates that the Inspector regarded the decision as "finely balanced". The test laid down by Green Belt policy is that planning permission should not be granted for the SRFI unless the benefits of the scheme *clearly* outweigh the harm. She plainly concluded that the scheme did not meet that test, taking into account the high level of harm she had identified. The Inspector then went on to acknowledge that the SSCLG might attach different weights to the various factors needing to be balanced. If so, she recognised that the outcome of striking the balance might be different. In that event, the Inspector added that the outline proposals would provide the basis for a well-designed scheme at the detailed stage. Nothing more can be read into her remarks. At all events, it is plain from his decision letter that the SSCLG did not regard the outcome as finely balanced.

The decision letter

23. The structure of the SSCLG's decision letter and his conclusions were essentially the same as those of the Inspector. However, I should set out the SSCLG's assessment of the planning balance and his overall conclusions which he expressed in his own language, rather than as a brief summary of the Inspector's conclusions:-

> "39. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise. For the reasons set out in this letter, the Secretary of State concludes that the proposal is inappropriate development and by definition harmful to the Green Belt. He found that the development is contrary to Core Policy 1 of the CS and national policy in the Framework. The Secretary of State finds that the totality of the harm to the Green Belt has very substantial weight. In addition, he finds that the damage to the Strategic Gap would be irreparable, which adds significant weight against the proposal. In addition he has found that there

is localised harm to Colne Valley Park to which he adds moderate weight against the proposal. He gives limited weight to the slight adverse impact on air quality, and a small degree of weight to the harmful social effect and erosion of quality of life of local communities. He affords, subject to conditions, no weight to potential harms to biodiversity, water quality or through flood risk. The Secretary of State has then gone on to consider whether there are any material considerations justifying determining the case other than in accordance with the development plan.

40. The Secretary of State accepts that the most important benefit of the proposal is the potential contribution to building up a network of SRFIs in the London and South East region, reducing the unmet need and delivering national policy objectives. In addition, there is the prospect of SIFE being complementary to Radlett and other smaller SRFI developments and improving the geographical spread of these facilities round Greater London. In this context, the Secretary of State accepts that the contribution it would make to meeting unmet need is considerable.

41. He accepts too that SIFE would comply with the transport and location requirements for SRFIs to an overall very good standard. He acknowledges that sites suitable for SRFIs are scarce and the difficulty in finding sites in the London and South East region. On account of this factor, and the standard of compliance achieved, he affords meeting the site selection criteria significant weight. No less harmful alternative site has been identified in the West London market area, a factor which he affords considerable weight. Attracting less but nevertheless moderate weight are the economic benefits, the reduction in carbon emissions and improvements.

42. 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. Consequently, very special circumstances do not exist to justify the development. Furthermore, he finds that planning conditions would not be able to overcome the fundamental harms caused to the Green Belt, Strategic Gap and Colne Valley Park and the open environment enjoyed by the local community. In addition, he has concluded that the proposal does not have the support of the NPS because very special circumstances have not been demonstrated."

Ground 1

24. Part of Goodman's case at the public inquiry, as set out, for example, in paragraphs 10, 14 and 25 of their closing submissions, was that a further SRFI to serve London and the South East as part of the network promoted by the NPS would inevitably have to be located in the Green Belt and therefore it was inevitable that harm to the Green Belt would have to be accepted if that need was going to be met. This was described as putting that harm "into its proper context". Indeed, at one point Goodman even went so far as to argue that however the harm to the Green Belt might be characterised (whether "significant" or "very significant"), that degree of harm was the inevitable consequence of building development of this scale on open land.

25. It is accepted by Goodman that the Inspector fairly summarised its case on this point in paragraphs 7.5 and 7.10 of her report. Cross-referring to those passages, at IR 12.19 the Inspector said:-

> "The inevitability of SRFI development having to be located in the Green Belt is a common thread through the Appellant's case on Green Belt ….. *In my view this does not reduce the actual harm that would occur from this particular scheme*" (emphasis added).

Goodman makes no criticism of IR 12.19. Indeed, in paragraph 25 of their closing submissions at the inquiry and in their oral submissions in these proceedings, they accepted the very point in IR 12.19 emphasised above.

26. The Inspector returned to Goodman's "inevitability" point after having set out her detailed conclusions on need, the various impacts of the scheme (whether positive or negative) and the absence of alternative sites to meet the identified need. She then said at IR 12.157:-

> "As shown by the Alternative Sites Assessments finding a suitable site for a SRFI to serve London and the South East is very difficult. The focus of the area of search on the Metropolitan Green Belt responds to the NPS requirement for new facilities alongside the major rail routes, close to major trunk roads as well as near to the conurbations that consume the goods. However, the Framework makes no exception for SRFIs to be located in the Green Belt. The NPS, whilst acknowledging promoters may find the only viable sites are on Green Belt land, draws attention to the special protection given to Green Belt land. I attach no weight to 'the development being essential on Green Belt land', being a matter that is adequately covered through the other considerations of need and alternative sites".

Ground 1 challenges the legality of the last sentence of the passage quoted.

27. The Inspector repeated her conclusion that no weight should be attached to Goodman's "inevitability" point in IR 197. The SSCLG agreed with the Inspector's conclusion. In DL 32 he said:-

> "Like the Inspector, he attaches no weight to "the development being essential on Green Belt land" (IR 12.157) being a matter that he has considered in relation to need and alternative sites in the above-numbered paragraphs 24-36 and 31".

28. Goodman accepts that the Inspector and the SSCLG did address their "inevitability" point, that the decision-maker's conclusion that no weight be given to the point cannot be challenged save on the grounds of irrationality (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 F-H and 784 B-C), and that irrationality is not raised in this case. Instead, Mr. Katkowski QC submits that the challenge is based primarily on the legal inadequacy of the reasoning given. Either the SSCLG has failed to grapple with the essential point being made by the claimant, or the reasoning supplied gives rise to a substantial doubt as to whether he made an error of law. That alternative formulation leads to the second aspect of ground 1, in which Mr. Katkowski QC submits that the SSCLG failed to take into account as a material consideration the necessity to face up to the consequences of refusing permission for the Colnbrook SRFI, namely a failure to meet the identified need in the London and South East region (including the filling of a gap in the distribution of SRFIs to the west of London) and to contribute to the need for the extended network referred to in the NPS. In response to questions from the Court Mr. Katkowski QC explained that for the purposes of the claimant's "reasons challenge", this was the point with which the Inspector and the SSCLG had failed to grapple. He added that their reliance upon the prior assessment of need and alternative sites betrayed their failure to understand this part of the claimant's case in the planning appeal and hence why they had not taken this material consideration into account.

29. The principles upon which the Court assesses the adequacy of reasons in a decision on a planning appeal were laid down in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153 and restated in South Bucks DC v Porter (No. 2) [2004] 1 WLR 1953 (at paragraphs 24 to 36). They do not need to be repeated here.

30. Mr. Katkowski QC accepted on behalf of the claimant that:-

(i) The policy in the NPS on the need for a network of SRFIs does not modify or water down the application of Green Belt policy for proposals located in the Green Belt;

(ii) The harm that may be caused by proposals located in the Green Belt is not a constant. It depends on the circumstances of each case;

(iii) In the present case the inevitability of a Green Belt location and some harm to the Green Belt should not be treated as factors reducing the harm to the Green Belt that would actually be caused by the proposal.

31. In my judgment ground 1 is unsustainable. It should be noted that Goodman did not advance the extreme argument that the need for another SRFI to serve London and the South East was such that it was inevitable that a a Green Belt site would have to be released for that purpose. There is no policy support for any such proposition. The NPS does not suggest that the need for a network of SFRIs, or for any particular SFRI, is a need to be met come what may, irrespective of the degree of harm which may be caused, or indeed the degree of need for an SRFI in a particular region.

Instead, Goodman relied upon an "inevitability" which was *qualified*. The claimant argued that it is inevitable that another SRFI to serve the London and South East region will be located on a Green Belt site and harm to the Green Belt will occur, *if the need for such a SRFI is to be met.* The merits of the "inevitability" argument put forward by Goodman were therefore dependent upon the decision-maker's assessment as to what importance or weight should be attributed to that need and whether that need should indeed be met after taking into account all the harm that would result.

32. Thus, the "need" relied upon by Goodman is a relative rather than an absolute concept. That is confirmed by the clear recognition in the NPS that proposals in Green Belt locations will not be approved unless very special circumstances are shown to clearly outweigh harm. Where the relative need for a particular proposal together with any other factors telling in favour of the grant of permission (including the absence of any alternative site), are insufficient to outweigh the overall harm, then the obvious consequence is that that planning permission will not be granted and the need will not be met. The seriousness of that consequence will be apparent from the assessment already made by the decision-maker of the nature or extent of the need for the proposal. It is intrinsic to the very balancing exercise which Green Belt policy requires. Accordingly, the point advanced by Goodman that a location in the Green Belt is inevitable *if the need is to be met*, adds nothing to the process of assessment of need and alternative sites which I have described and which, the claimant accepts, was carried out in this case. This is precisely the point made in IR 12.157 and 12.197 and also in DL 32.

33. The reverse side of Goodman's "inevitability" point, namely that if planning permission is not granted for the proposed Green Belt location, the need identified for the Colnbrook SRFI will not be met, is therefore self-evident. In any event, it was acknowledged in the Inspector's report and in the decision letter.

34. The Inspector correctly interpreted the NPS as not laying down or indicating the level of need for any particular SRFI proposed (IR 12.92). Between IR 12.93 and IR 12.106 she assessed in some detail the relative need for the Colnbrook proposal. She stated, as she was entitled to do, that the relative importance of the Colnbrook proposal was informed by the availability of SRFI capacity at the national and regional level to meet the need described by the NPS (IR 12.93). At the national level she regarded the Colnbrook proposal as one of a number of relatively small proposals, making a limited contribution to the forecast total of rail connected warehousing (IR 8.37 and 12.94). At the regional level there is currently no operational SRFI (IR 12.95). The Colnbrook proposal is the only scheme identified for "the GWML eastern area intermodal regional cluster". Radlett is complementary. It serves "wholly independent primary distribution traffic" and is situated on a different trunk rail route (IR 12.103). Although Radlett is significantly larger than Colnbrook, it does not exhaust the need for a regional network (IR 12.104). The London Gateway, Barking and Howbury Park sites contribute to the regional network but are not well located to meet the markets that would be served by a SRFI at Colnbrook (IR 12.105 to 12.106). The appeal proposal would fill the gap on the west side of London (IR 12.107).

35. The Inspector expressly stated that if the appeal proposal were to be refused on site specific grounds, it was unlikely that the forecast increase in *national* rail traffic contained in the NPS would be undermined. But she recognised that a refusal would be of increased significance in terms of the contribution which Colnbrook would

otherwise make to the *regional* cluster (IR 12.94). In IR 12.156 the Inspector acknowledged that there was no alternative site which could fulfil the same purpose as the Colnbrook SRFI "in order to achieve the desired spread of SRFIs round Greater London". In IR 12.195 the Inspector acknowledged the scarcity of sites suitable for SRFIs and the particular challenge in finding sites in the London and South East region. If that regional need was not going to be met, the corollary was obvious. Taking into account the function of the proposed SRFI, the Inspector concluded that its contribution to meeting unmet need would be "considerable", but was not prepared to attach any greater degree of importance to the need for the project than that (IR 12.194). This assessment by the Inspector of the relative importance of the Colnbrook facility also influenced her application of CP2 in relation to the Strategic Gap (IR 12.199 and see paragraph 21(xv) above).

36. The SSCLG took the same approach as the Inspector (DL 24 to 26, 31-32 and 40-41). Accordingly, there is no basis for contending that his reasoning was legally inadequate. It did grapple with the issue raised by the claimant and it gives rise to no doubt at all as to whether the SSCLG misunderstood Goodman's case. There is no basis for saying that either the Inspector or the SSCLG failed to take into account a material consideration.

37. The claimant's reply under ground 1 returned to a point which I summarised at the end of paragraph 24 above and which appeared in one part of its closing submissions at the inquiry (paragraph 14). It was suggested that the SSCLG and the Inspector had failed to grapple with "the inconvenient truth that some degree of harm in the Green Belt is inevitable", indeed the very level of harm involved in the Colnbrook proposal. But here again the claimant's closing submissions rightly qualified this "inevitability" argument as depending upon *whether the need is to be met.* Therefore, this argument also begs the very questions which it is the object of Green Belt policy to test, namely (i) how much harm would result from meeting the need for the proposed development and (ii) whether the meeting of that need (together with any other benefits) has sufficient weight as to "clearly outweigh" that harm. The degree of harm that would result from the appeal proposal is only *inevitable* (in one sense) *if* the decision-maker concludes that the need for the SRFI and any other benefits flowing from the proposal are of such weight that the balance comes down in favour of granting planning permission. It is not in fact inevitable that the balance will be struck in that way.

38. The claimant's argument is also inconsistent with its acceptance that (i) the need policy in the NPS in relation to SRFIs does not weaken or modify Green Belt policy and (ii) the inevitability of the "need for Colnbrook" having to be met on a Green Belt site does not reduce the weight to be given to the actual harm that would be caused by this proposal. It would also be entirely inconsistent with that position and illogical to suggest instead that this "inevitable harm" somehow enhanced the weight to be given to the claimant's case on need and lack of any alternative site, or could otherwise affect the striking of the balance between benefit and disbenefit. Thus, this variation of Goodman's argument adds nothing to the matters which the SSCLG had to consider.

39. For these reasons ground 1 of the challenge must be rejected.

Ground 2

40. Policy CP1 of SBC's Core Strategy addresses the spatial strategy for the Borough by stating (inter alia):-

> "All development will have to comply with the Spatial Strategy set out in this document.
>
> All development will take place within the built up area, predominantly on previously developed land, unless there are very special circumstances that would justify the use of Green Belt land. A strategic gap will be maintained between Slough and Greater London."

41. The relevant part of CP2 provides:-

> "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."

42. The claimant submits, and the SSCLG agrees, that the subject of the phrase in CP2, "it is essential to be in that location", is the proposed development (referred to by the use of the word "it"). I agree. Goodman goes on to submit that, on a proper interpretation, the only matter which CP2 requires to be "essential" is the location proposed for the development in question. It is submitted that the Inspector and the SSCLG erred in law by interpreting CP2 as requiring not only the location to be essential for the development proposed, but also the development itself (see IR 12.26 and DL 15). The claimant also submits that the Inspector's conclusions in IR 12.199, where she applied CP2, are vitiated by that misinterpretation and she therefore erred in finding that the proposal breached CP2.

43. In paragraph 78 of their skeleton, counsel for Goodman submitted that if the Inspector's interpretation is correct, on the findings that she made on the need for the Colnbrook SRFI, the Inspector ought to have found that not only the proposed location but also the development was essential, and therefore that the proposal complied with CP2. That contention was not pursued at the hearing, rightly so in my judgment. The Inspector accepted that the need for an expanded *network* of SRFIs in accordance with the NPS is compelling (IR 12.89) but not, as the skeleton asserted, the need for the development itself. She concluded that "considerable" weight should be given to the claimant's case on the need for the proposed SRFI and did not accept that that need was "compelling" (IR 12.194 and 12.206). The SSCLG reached the same conclusions (DL 24 to 26 and 40). Those findings did not amount to an acceptance that the proposed development was "essential", not even if that word is taken to mean (as some dictionaries suggest) something which is important or necessary *to a high degree*, rather than something which is *absolutely* necessary.

44. Moreover, in IR 12.199 the Inspector made it plain that she did not consider the Colnbrook SRFI to be "essential within the Strategic Gap, when account is taken of the complementary SRFIs that have been identified and which probably will be developed to serve the region". That was entirely consistent with her earlier findings on *relative* need, referred to above under ground 1. Significantly, she also had regard

in IR 12.199 to "limits on the benefits achievable in terms of carbon emissions and the *amount of freight transported by rail*" (emphasis added). Plainly, the Inspector did not consider that the Colnbrook proposal was "essential", given her findings on the relative importance or value of the scheme to the objectives of the NPS.

45. Instead of pursuing the argument in paragraph 78 of their skeleton, counsel for Goodman submitted that if their construction of CP2 should be accepted by the Court, then because there is no alternative site to meet the need identified, the "essential" criterion as to *location* must have been met. On that basis the claimant submits that the proposal complied with, rather than breached, CP2 which would have affected the application of Section 38(6) of the Planning and Compulsory Purchase Act 2004 which provides:-

> "…. the determination must be made in accordance with the [development] plan unless material considerations indicate otherwise."

But it should be remembered that when applying the presumption in section 38(6), the decision-maker has to decide whether a proposal accords with the development plan *taken as a whole*, albeit that some policies point in favour of granting permission and others against (City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1458-9).

46. Mr. Tim Buley submitted on behalf of the SSCLG firstly, that the Inspector did not misconstrue CP2 and so there was no error in IR 12.199 and secondly, that even if the claimant's construction of CP2 is correct, there was no need for the SSCLG to go beyond DL 41 and DL 42 which did take into account the absence of any alternative sites for the proposed development.

47. In accordance with the principles laid down by Lord Bridge in the Save case (at [1991] 1WLR 162G-164F), Mr. Katkowski QC contended that the SSCLG adopted the reasoning of the Inspector with regard to the interpretation and application of CP2. I will proceed on that basis.

48. An issue concerning the correct interpretation of a policy in the development plan is an objective question of law for the Court to determine. The key principles were laid down by the Supreme Court in Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 at paragraphs 17 to 19. The submissions of Mr. Katkowski QC focused very much on the language used in the Core Strategy, particularly the language of CP2 itself. But although the Supreme Court stated that development plan policies are to be "interpreted objectively in accordance with the language used," they also emphasised that such policies "should not be construed as if they were statutory or contractual provisions". Development plan policies are not analogous in their nature or purpose to a statute or contract. Furthermore, they should always be read "in their proper context." In my judgment, and consistent with that approach, regard may be had to the objectives of a policy and to the consequences of adopting, or not adopting, a particular interpretation of that policy. The fact that development plan policies are to be applied in the context of section 38(6) of the 2004 Act may also be relevant.

49. In the present case it is common ground that CP2 should be interpreted alongside Green Belt policy. In part this is because paragraph 7.26 of the Explanatory Memorandum of the Core Strategy states that:-

> "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…."

But also at paragraphs 79 to 88 of the Helioslough case the High Court decided ([2011] EWHC 2054 (Admin)) that CP2 applies an additional policy restraint to the Strategic Gap (and the Colne Valley Park) over and above Green Belt designation, and which sets "a very high bar" (paragraph 86), because of the special sensitivity of the tightly defined area to which it applies.

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.

51. Policy CP2 does not state that the planning permission will *only* be granted if a location within the Strategic Gap is *essential for the proposed development*, or, in other words, if that development cannot be located outside the Gap. CP2 does not confine itself to that single issue. Rather the language used in the policy is broader. The test to be applied is whether *the development* "is essential to be" in the Strategic Gap. As a matter of ordinary language it is possible to answer the question posed by that test by saying:-

(i) the development is essential, but its location within the Strategic Gap is not; or

(ii) the development is not essential, albeit that if it is to take place, its location within the Strategic Gap is essential in the sense that no site outside the Gap is available; or

(iii) the development is not essential and in any event it could be located outside the Strategic Gap; or

(iv) the development and its location within the Strategic Gap are both essential.

In my judgment, on a proper interpretation of the policy, scenario (iv) complies with CP2 but scenarios (i) to (iii) do not. It is insufficient that the development itself is essential without any regard to whether it has to be located in the Gap, or that a location in the Gap is essential without any regard to the need for the development. Instead CP2 is only satisfied if the development is essential and it cannot take place outside the Gap. On the claimant's interpretation, any situation falling within scenario (ii) would comply with CP2. For example, if there was no alternative site outside the

Strategic Gap upon which a proposed development could be located, the proposal would comply with CP2 even if there was no need for it *at all*. The claimant's interpretation is simply inconsistent with the language used. It cannot properly be said that it is essential for such a development to be located in the Gap.

52. Read in this way there is no conflict between paragraph 7.26 of the Explanatory Memorandum of the Core Strategy and CP2. The former explains that "the additional restraint," which will apply in the Strategic Gap over and above Green Belt policy (see paragraph 49 above):-

> "will mean that only essential development that cannot take place elsewhere will be permitted in this location."

Likewise, this passage does not fall to be disregarded because it conflicts with, or sets out an additional criterion not contained in, CP2 (see the principle in paragraph 16 of R (Cherkley Campaign Ltd) v Mole Valley District Council [2014] EWCA Civ 567). I should add that I see no conflict between paragraphs 7.26 and 2.30. The latter requires the demonstration of a "regional" or "national" need for the development, but that is not inconsistent with the requirement in CP2 that the development should also be essential.

53. The Inspector's interpretation of CP2 accords with the objective of that policy. Because the Strategic Gap needs to be maintained as a gap for separating Slough and West London, and is so fragmented and vulnerable, a very high bar is set as compared with Green Belt policy. But on the claimant's argument, a developer would only have to show that a location within the Strategic Gap is "essential" for the development to take place; and whether that development is necessary and if so the extent of that need, would be irrelevant considerations in the application of CP2. Mr. Katkowski QC submitted that this is not a cause for concern because those matters would be taken into account under Green Belt policy in the determination of whether there are very special circumstances sufficient to "clearly outweigh" harm.

54. I do not accept that the claimant's interpretation gives effect to the natural meaning of the language used in CP2 or accords with the objectives of that policy. It is plain that CP2 proceeds on the basis that the "very special circumstances" test in Green Belt policy is insufficiently strong to protect the vulnerable Strategic Gap and one of its purposes of preventing coalescence. Thus, CP2 requires a strict approach to be taken to the grant of planning permission for development in the Gap and it achieves this through the use of only one test, namely whether it is "essential" for the development proposed to be in the Gap. It makes no real sense to apply that criterion simply to the locational requirement but not to the development itself. Given the vulnerability and the designated purpose of the Strategic Gap, CP2 only allows the Gap to be used for development that cannot be located elsewhere, because it is essential for that development to take place. That degree of need has to be shown by an applicant, because it would be wholly artificial to divorce the development's requirement for the location from the requirement for the development.

55. This connection between the need for a particular development and the need to locate it on a particular site is well established as a matter of planning law and practice. Ordinarily, the availability or otherwise of alternative sites upon which a proposed development could be located is immaterial to the planning merits of that proposal.

But where the proposal would have substantial adverse effects which are said to be outweighed by the need for the development, then the availability of alternative sites upon which that need could be met with less harm may well be relevant (see eg. GLC v Secretary of State for the Environment and LDDC (1986) 52 P & CR 158; Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) P & CR 293; Secretary of State for the Environment v Edwards (1995) 69 P & CR 607).

56. Where need is a relevant consideration, for example, in order to overcome a Green Belt objection, the suitability of alternative sites will typically be linked to, or even dependent upon, the nature of the need case. The economic needs or market which the development is intended to serve may well affect or constrain the area within which alternative sites may be found. The development proposed may have site requirements (eg. size, shape, topography) which constrain the area of search and suitability of alternatives. There may be locational requirements (eg. proximity to railway lines and trunk roads) which are determined by the market needs which the development has to satisfy. Plainly, matters of that kind may also be directly related to the economic importance of those needs and the weight to be given to them in planning terms. These examples serve to show how unrealistic or artificial it would be to restrict the ambit of the control in CP2 simply to asking whether the site is essential for the location of the proposed development. The issue of whether there is any alternative location is interwoven with the needs which a site has to meet in order to be suitable for the development. Even if no other site is available for that purpose, it would not be a natural use of language to say "it is essential for a development to be in the Strategic Gap" if the development itself is not essential.

57. I should add that, even if I had accepted the Claimant's interpretation of CP2, I agree with Mr. Buley's submission that no error of law has been demonstrated under ground 2, because DL 41 and 42 of the SSCLG's decision letter adequately dealt with the application of CP2 on that basis. The SSCLG plainly took into account the lack of any alternative site and gave that factor considerable weight. Assuming the claimant's interpretation of CP2 to be correct, these conclusions on the part of the Secretary of State would also address the proposal's compliance with CP2. Moreover, Mr Katkowski QC accepted that it is Green Belt policy rather than CP2 which addresses the degree of harm that would be caused to the Gap. The SSCLG concluded that this factor attracted "a high level of weight" because the scheme would cause "irreparable" and "fundamental" harm to the Strategic Gap, being a very sensitive part of the Green Belt (DL 32). The SSCLG struck the overall planning balance so firmly against the proposal that it followed that the development did not accord with the development plan taken as a whole (see eg (IR 12.200 and DL 39 - 42). Therefore, to have said that the proposal complied with CP2 *merely because no other site was available*, could not possibly have altered the application of section 38(6) to the development plan overall or the outcome of the appeal. Even assuming the claimant's construction of CP2 to be correct, I am certain that on the SSCLG's overall conclusions his decision would inevitably have been the same; the appeal would have been dismissed (Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306; R (Smith) v North East Derbyshire PCT [2006] 1WLR 3315).

Ground 3

Introduction

58. This ground is concerned with the legality of the manner in which the SSCLG assessed the effect of the proposed development on the openness of the Green Belt. Paragraph 79 of the NPPF states that "the essential characteristics of Green Belts are their openness and their permanence". In this case, both the Inspector and the SSCLG concluded that the major asset of the appeal site is its openness (IR 12.9 and DL 13).

59. At the public inquiry Mr. Tim Jackson gave evidence on behalf of Goodman dealing with this issue (paragraphs 8.16 to 8.21 and 11.28 of his proof). In summary, he said:-

    (i) Development on this scale on 42 hectares of land would have a direct impact upon the openness of this Green Belt location, but this had been minimised by the compact footprint and layout of the built development area. Within the surrounding area of 30.6 hectares most of the existing mature trees would be conserved and future landscaping added;

    (ii) The scheme would occupy a visually enclosed site with limited visibility between it and surrounding areas, so that the *perceived* effect of the development upon openness would be fairly limited. This was supported by the assessment of the "zone of visual influence";

    (iii) The maximum heights of the proposed buildings were modest for that type of structure and would not project beyond the immediately surrounding framework of trees. They would be screened visually from many surrounding locations;

    (iv) The perceived effect upon openness would therefore be notably less than the plan form might suggest. The development would have a limited effect upon people's perception of openness from beyond the boundary of the site and it would not visibly stretch along the M4 or A4, or be seen as filling an area of open space, save from a limited number of surrounding positions.

60. The Inspector accurately summarised Goodman's case on this point in IR 7.8. She summarised the response of SBC in IR 8.5. They relied upon the SSCLG's decision on the LIFE scheme (see paragraph 8 above) for the proposition that it is inappropriate to concentrate on the perception of the development when assessing its effect upon openness. Goodman's case was that visual impact and perception are relevant to assessing impact upon openness which, if taken into account, may ameliorate the assessment of the degree of harm to the openness of the Green Belt. If that approach is legally permissible and the decision-maker attributes weight to the point, then the claimant submits that the overall amount of harm having to be "clearly outweighed" by "very special circumstances" may be less than would otherwise be the case. In this way the claimant submits that the striking of the balance between benefits and harm may be affected.

61. The Inspector concluded that the approach relied upon by Goodman was legally irrelevant in the following unequivocal terms (IR 12.11):-

> "In principle it is incorrect to reach a specific conclusion on openness by reference to visual impact. Therefore matters such as visibility, the effect of landscaping and perception have no relevance and do not reduce the significance of the effect of the SRFI on the openness of the site. The effects on visual amenity, character and appearance are separate considerations."

She then immediately went on to conclude in IR 12.12:-

> "In conclusion, the proposed development would result in a severe loss of openness. The impact this would have on this area of the Metropolitan Green Belt is very much linked to the purposes of the Green Belt."

It seems likely that the Inspector's approach was influenced by the decision of the High Court in Timmins v Gelding Borough Council [2014] EWHC 654 (Admin) in which it had been held that (paragraph 78):-

(i) There is a clear conceptual distinction between openness and visual impact;

(ii) It is *therefore* wrong in principle to arrive at a specific conclusion as to the effect of a development on openness by reference to visual impact;

(iii) The visual impact from the development may be taken into account as part of the very special circumstances in the overall weighing exercise.

62. After the Inspector produced her report, but before the decision letter was issued, the Court of Appeal decided that propositions (i) and (ii) above taken from Timmins were incorrect and should not be followed (see Turner v SSCLG [2016] EWCA Civ 466 at paragraph 17). However, the SSCLG expressly agreed with the approach taken by the Inspector in IR 12.11 to 12.12 (see DL 13).

63. In paragraph 74 of its Details of Claim, Goodman contended that the SSCLG's conclusion on this matter was directly contrary to the decision in Turner. In paragraph 46 of his Summary Grounds of Resistance the SSCLG accepted that that error of law had been committed. He simply submitted that "it is highly likely that the outcome for the Claimant would not have been substantially different if the Turner judgment was [sic] reflected in the Secretary of State's DL". Counsel then acting for the SSCLG appeared to have in mind the test in section 31(2A) of the Senior Courts Act 1981, which restricts the circumstances in which relief may be granted. But it is now common ground between the parties that whereas section 31(2A) applies to judicial review, it does not apply to statutory review under section 288 of TCPA 1990. Therefore, in the present claim, if an error of law is made out, the Court may refuse to make an order quashing the SSCLG's decision, but only if satisfied that absent that error, his decision would *necessarily* or *inevitably* have been the same (the "Simplex" test).

64. Subsequently, the SSCLG has been represented by Mr. Buley. In his skeleton argument he accepts that the first sentence of IR 12.11 was too broadly stated, in so far as it relied upon a general principle that visual impact could *never* be relevant to assessing the impact of development on the openness of the Green Belt. But he

submits for the first time that that misstatement of the law was not material here, because the case law indicates that although visual impact may be relied upon as *increasing* harm from a development to openness, it may not be relied upon as *reducing* that harm.

65. Consequently, there are now three issues which I have to resolve:-

(i) Whether the authorities establish the legal principle that visual impact may or may not be taken into account as a factor reducing the harm to the openness of the Green Belt that would result from a proposed development;

(ii) If the answer to (i) is yes, whether that factor was an "obviously material" consideration in this case, and therefore the SSCLG erred in law by failing to take it into account;

(iii) If the answer to (ii) is yes, whether nonetheless the Court should refuse to quash the decision of the SSCLG because it is inevitable that if the factor in (i) above had been taken into account, the decision would still have been to refuse planning permission for the SRFI and dismiss the appeal ("the Simplex" issue).

66. I should say straight away, that if I should decide issue (i) against the SSCLG, because I am not persuaded that the existing case law supports the proposition for which Mr Buley contends, I have not been asked to uphold that principle on some other basis. During argument, the Court asked for assistance from the SSCLG as to why, given the broad nature of the language used in the NPPF (eg. paragraph 79), it was appropriate to treat visual impact (or perception thereof) as being either relevant or irrelevant according to whether it respectively increases or decreases the harm caused to the openness of the Green Belt by a proposed development. The justification for the distinction is all the more difficult to appreciate when it is remembered that visual perception is taken into account when assessing whether or not a proposal would cause harm to at least some of the five purposes of Green Belt designation, such as whether the development would contribute to the merging or coalescence of towns or to urban sprawl, or whether it would encroach into the countryside. Indeed, this can be seen in the present case in paragraphs 12.13 and 12.14 of the Inspector's report and also in the decision letter.

67. Mr. Buley said that he had received no instructions which would enable him to assist on these issues, although they are potentially of great importance to the application of Green Belt policy across the country. This lack of assistance would tend to suggest that those responsible within the Department for overseeing national policy have had no input to the SSCLG's case. Given that there has been a *volte face* from the defendant's earlier acceptance that the term "openness" had been misinterpreted in a decision letter by the SSCLG, this is very regrettable. If this has been essentially a forensic exercise to support what the decision letter says about the meaning of Green Belt policy in order to "save" this particular decision letter, without proper regard to the respective merits of competing interpretations of that policy for planning more generally, that is unfortunate.

68. In these circumstances, if it had been necessary for me to venture any further into the interpretation of national policy, I would have been unwilling to do so without proper

assistance. This is an area where the Court needs to tread carefully, because its decision on the interpretation of a national policy may well have wide repercussions across the planning system as a whole.

69. Clearly evidence from the Department as to what was *intended* by the drafting of the policy would be of no relevance (see the reference to "the world of Humpty Dumpty" in Tesco Stores at paragraph 19). But ordinarily the SSCLG is likely to be able to provide valuable assistance to the court on the range of circumstances to which a national policy may apply and the range of practical issues which may need to be considered when comparing the merits of rival interpretations. Assistance of this kind may help the Court to guard against the risk of adopting an interpretation of policy which might be too heavily influenced by arguments from the parties or advocates taking part in the case before the Court, who perhaps for understandable reasons may focus on the circumstances with which they are particularly involved rather than the broader picture. These observations simply reflect the statements made by Lord Nolan and Lord Clyde in R (Alconbury Ltd) v Secretary of State for the Environment [2003] 2 AC 295 on the functions of the Secretary of State in our planning system (at paragraphs 60 and 140). The Secretary of State is a "central authority" who brings some degree of coherence and consistency in the development of land. National guidance contains objectives and policies setting a framework within which local planning authorities draw up their statutory development plans, and in accordance with which planning decisions are made.

70. Accordingly, some thought needs to be given as to how the Court can receive adequate assistance where a judicial or statutory review raises an important issue on the interpretation of national policy and which truly *needs* to be determined by the Court in that particular case. Perhaps the Court could consider appointing an advocate as a "friend of the court", especially where the SSCLG is not a party. But that would also raise the question how would such an advocate have access to relevant sources of information? Where an important issue of interpretation arises in a judicial review of a planning decision by a local authority, another possibility might be for the Court to give permission for the SSCLG to intervene by making written representations solely on the point of interpretation. Assistance of this kind may also be necessary where a judge in the High Court is being asked to depart from an interpretation of national policy which has previously been decided by another judge of the same Court. He or she should generally follow an earlier decision of the High Court unless there is a powerful reason not to do so (see the Supreme Court in Willers v Joyce (No. 2) [2016] 3 WLR 534 at para 9). How assistance might be provided in situations of this kind is a matter upon which further thought is required. This does not arise for decision here because Mr Buley has made it plain that the SSCLG's case on interpretation stands or falls solely upon his analysis of the existing case law in this area. It also follows that any future reference to this judgment on issue (i) below should have regard to the narrow basis upon which the parties' cases, particularly that of the SSCLG, have been argued.

(i) The relevance or irrelevance of visual impact or perception

71. I should say at the outset that counsel accepted that the issue between the parties under ground 3 did not arise for decision in any of the cases cited and so by definition, none of them can be treated as a binding authority on this particular point.

Nonetheless, the issue is whether any of the cases contain any sufficiently persuasive observations to support the argument for either party in this case.

72. Mr. Buley submitted that the four cases cited fall in two broad categories, first cases where it is said that there was some discussion as to whether a finding of harm to openness could be diminished by reason of lack of visual harm (R (Heath and Hampstead Society) v Camden LBC [2007] 2 P & CR 19 and Timmins). Second, there are cases where the issue was whether harm to openness can be established by visual impact where the decision-maker considers that harm to openness is not made out on spatial grounds, or by a combination of the two types of harm, (see Turner v SSCLG; R (Samuel Smith Old Brewery) v North Yorkshire County Council [2017] EWHC 442 (Admin)). Mr Buley then subjected these decisions to fine, sometimes interstitial, analysis. Despite the considerable forensic skill he deployed, I have reached the clear conclusion that none of the decisions lends support to his argument.

73. In the Hampstead case the Court quashed a planning permission for the replacement of a building in an area designated as Metropolitan Open Land, an area to which the same level of protection is applied as in the Green Belt. Paragraph 3.16 of the then national policy on Green Belts, PPG2, provided that the replacement of an existing building would be regarded as "appropriate development", and therefore by definition not harmful, provided that the new building was not "materially larger" than the one it replaced. The planning authority granted permission on the basis that they did not consider the proposed development to be materially larger, notwithstanding that the proposed development represented a doubling of the footprint, a three or four-fold increase in floor space and a four-fold increase in volume.

74. Sullivan J (as he then was) rejected the claimant's argument that the assessment of whether the building was "materially larger" should only consider a mathematical comparison of relevant dimensions (paragraph 19). But he did accept that that exercise should *primarily* be an objective one by reference to size (paragraph 20). He went on to quash the decision because the authority had erred in law by effectively *substituting* the test of whether the replacement building was *not more visually intrusive* than the one it would be replacing for the correct test of whether the new building would be *materially larger* (paragraphs 20 and 44). It was plain on the facts of that case that the proposed building was materially larger than the existing one (paragraphs 24 to 25).

75. In my judgment the decision in the Hampstead case lends no support to the SSCLG's argument on the interpretation of "openness" in the Green Belt policy in the NPPF because:-

    (i) The case was essentially dealing with the correct approach to the threshold question whether the proposal represented "appropriate" or "inappropriate" development; and so the question of harm to openness and "very special circumstances" would only have arisen if the decision-maker had reached a different conclusion and treated the development as "inappropriate";

    (ii) The threshold test for appropriateness simply depended on whether the new building was "materially larger" and not on whether there would be harm to "openness";

(iii) In any event, the Court accepted that visual impact or perception could be relevant as offsetting to some degree an increase in the size of built development (paragraphs 20 and 44).

76. Paragraphs 21 and 22 of the judgment in the Hampstead case contain dicta which might appear to suggest that visual impact and perception are irrelevant to the assessment of harm to "openness" that would be caused by "inappropriate" development, and were relied upon at first instance in Timmins. But that issue did not arise for decision in the Hampstead case and in any event these dicta have since been overtaken by the decision of the Court of Appeal in Turner.

77. In Timmins the High Court considered the approach to assessing the effect of a proposed new building, a crematorium, on the openness of the Green Belt. Green J relied upon the dicta of Sullivan J in paragraphs 21 and 22 of the Hampstead decision (see [2014] EWHC 654 (Admin) at paragraphs 71 to 72). Basing himself on those dicta he laid down three principles at paragraph 78 which I have already set out in paragraph 61 above. The Judge then went on to conclude that the local planning authority's decision in that case had not infringed any of those three principles. A subsequent appeal concerned another part of his judgment dealing with an entirely different issue and so the Court of Appeal did not have to consider on that occasion the passages upon which Mr. Buley relies ([2015] EWCA Civ 10; [2015] PTSR 837).

78. In Turner the Court of Appeal upheld the High Court's refusal to quash an Inspector's dismissal of an appeal against the refusal of planning permission to replace a mobile home and a yard for the storage of lorries with a three bedroom bungalow. The Inspector concluded that the proposed redevelopment did not fall within the sixth exception in paragraph 89 of the NPPF by which a new building may be treated as "appropriate" development because the proposal would have a greater impact on the openness of the Green Belt than the existing development. The challenge was to the Inspector's conclusions (a) that the comparison between the existing and proposed development could not be made solely on a volumetric basis and (b) that, although there might only be a marginal, or no, increase in volume, differences in visual impact would have a considerably greater impact on openness.

79. The Court of Appeal held that the concept of harm to the openness of the Green Belt is not limited to a volumetric approach, or size. The word "openness" is open-textured and a number of factors are capable of being relevant. Prominent considerations *include* those relevant to how built up the Green Belt is currently and how built up it would become if the redevelopment were to take place (to which a volumetric assessment may be material), as well as factors relevant to the visual impact of the development "on the aspect of openness which the Green Belt presents" (paragraph 14). As a matter of language the question of visual impact is implicitly part of the concept of the "openness of the Green Belt". The Court supported this conclusion by reference to the first four purposes of including land in the Green Belt (paragraph 15).

80. As I have noted in paragraph 62 above, the Court of Appeal rejected the first two of the principles laid down in paragraph 78 of the High Court's decision in Timmins because (i) that judgment had failed to focus sufficiently on the language of section 9 of the NPPF, (ii) reliance upon the Hampstead case was misplaced because it had been concerned with a different test from "openness", namely the "materially larger" criterion, and (iii) even so the Hampstead case did not support the conclusions drawn

in Timmins (paragraphs 17 to 26). At paragraph 22 the Court of Appeal held that paragraphs 19 to 22 of the judgment in Hampstead should not be treated as authoritative on the meaning of "openness" in paragraph 89 of the NPPF. The SSCLG did not suggest in the hearing before me that "openness" in paragraph 79 of the Framework has any different meaning. At paragraph 23 of his judgment Sales LJ accepted that although Sullivan J had been correct to state in the Hampstead case (at paragraph 22) that the loss of openness is of itself harmful to the objective of Green Belt policy, this was only on the basis that openness has a spatial (or physical) aspect as well as a visual aspect and that openness is *not* confined to the spatial issue. The Court of Appeal then pointed out (paragraph 23) that Turner, unlike the Hampstead case, was concerned with the relevance of visual impact or intrusion in addition to, or instead of, spatial, physical or volumetric intrusion.

81. In paragraph 25 of Turner the Court of Appeal reiterated that "the openness of the Green Belt has a spatial aspect as well as a visual impact and added that the absence of visual intrusion does not *in itself* mean that there is *no* impact on the openness of the Green Belt as a result of the location of a new ….. building there. But ….. it does not follow that openness of the Green Belt has no visual dimension" (emphasis added). The Court stated that Sullivan J had not said anything to the contrary in the Hampstead case and so Timmins had been incorrect to suggest otherwise (paragraph 26).

82. It is plain from Turner, which is binding on this court, that visual impact, as well as spatial impact, is relevant to the assessment of the effect of a development on openness. The *absence* of visual impact is insufficient to found a conclusion that there is *no* impact on the openness of the Green Belt, but there is nothing in Turner to support the SSCLG's proposition that on a correct interpretation of the NPPF, an assessment of the visual impact of a development cannot *ameliorate* the harm to openness attributable to the spatial impact of that development. Instead, I consider that the broad observations in paragraph 14 of the judgment, together with the Court's rejection of principles (i) and (ii) in paragraph 78 of Timmins, plainly support Goodman's interpretation of Green Belt policy. That view is further supported by the reasoning in paragraph 25 of Turner. Taking into account also paragraphs 66 – 67 above, this is sufficient for the Court to determine the question of interpretation under ground 3 in this case in the claimant's favour.

83. For completeness, I return to the third of the three principles stated in paragraph 78 of Timmins, namely that visual impact, or the lack of such impact, may instead be taken into account in the assessment of "very special circumstances". Given the reliance by Green J upon paragraph 22 of the Hampstead decision, the implication is that he considered that lack of visual impact may *only* be taken into account in that balancing exercise, and not in the assessment of the degree of harm to the openness of the Green Belt. But in any event the reasoning of the Court of Appeal in Turner (paragraph 22) plainly rejected the use of paragraphs 19 to 22 of the Hampstead case to interpret the concept of "openness", because these paragraphs were essentially concerned with the completely different "materially larger" criterion. On that basis I am unable to accept that any part of paragraph 78 of Timmins can be relied upon to support Mr. Buley's interpretation of Green Belt policy in the NPPF.

84. In the Samuel Smith case Hickinbottom J (as he then was) refused to quash a planning permission for an extension to a mineral extraction operation on the grounds that no

consideration had been given to visual impact as well as spatial impact when assessing harm to the openness of the Green Belt. I do not see any of the Judge's reasoning in that case as lending any support to Mr. Buley's interpretation of the NPPF.

85. I conclude that there is nothing in Mr Buley's analysis of the case law to justify the proposition that on a true interpretation of Green Belt policy, the visual effect of a development cannot be taken into account as *reducing* the spatial or physical harm that a development would cause to the openness of the Green Belt. Instead, I agree with Goodman that the principles on Green Belt policy laid down in Turner support their contention that it is relevant to take into account visual perception as a factor which may reduce the spatial harm from the effect of a development on the openness of the Green Belt.

86. Before leaving issue (i), I should briefly deal with two fallback arguments relied upon by Mr. Buley in this part of the case. First, he submitted that even if Goodman's interpretation of the NPPF is correct, no material error of law had been made because in IR 12.10 the Inspector had reached conclusions on harm to openness which were premised on the development having no visual impact. I am unable to accept this argument. First, it does not address Goodman's evidence and submission to the Inspector that the visual impact or perception of the scheme would *reduce* the impact on openness which would otherwise be attributable to development of the type and scale proposed. Furthermore, the argument does not deal with the effect of IR 12.11, which treated this part of Goodman's case as legally irrelevant.

87. Second, Mr. Buley submitted that when the Inspector subsequently went on to assess the visual impact of the proposed development, she concluded that there would be some harm which she assessed as having a "slightly greater than small" amount of weight. Mr. Buley said that, however small this effect, it was nonetheless a *negative* impact and so, if it had been taken into account as an additional factor in the assessment of harm to the openness of the Green Belt, it could not have had the effect of *reducing* harm to that openness. I do not accept this submission. I agree with Mr. Katkowski QC that it improperly elides the separate assessment of how much visual impact would the development cause (which considered as a separate factor was judged to be relatively small) with the issue whether the visual perception of the development and its context *ameliorates* the assessment of the severity of the harm to the *openness* of the Green Belt resulting from the purely spatial or physical aspect of the development itself. Goodman's case asked that these two aspects be taken together when the assessment of the effect upon *openness* was made. Plainly that was not done in the decision on the appeal because of the legal approach taken by the SSCLG.

88. For the reasons set out above, I agree that the claimant succeeds on issue (i) under ground 3. The SSCLG had been right to concede the point in paragraph 46 of the Summary Grounds of Defence.

(ii) Was the visual harm an "obviously material" consideration in the determination of the claimant's appeal

89. In paragraphs 57-59 of Samuel Smith Hickinbottom J decided that, in accordance with the line of authority that includes In re Findlay [1985] AC 318 and CREEDNZ

Inc v Governor – General [1981] 1 NZLR 172, a failure to take into account visual impact in the assessment of harm to the openness of the Green Belt does not amount to an error of law unless it was irrational for the decision-maker not to do so. In this context, such a failure will be treated as irrational if visual harm and/or perception was an "obviously material" consideration. That was the test to which Hickinbottom J referred at paragraph 67. It is well established according to the case law cited in R (Plant) v London Borough of Lambeth [2016] EWHC 3324 (Admin) at paragraphs 62-3. In this context "materiality" refers to relevance rather than weight.

90. It was common ground at the hearing that the Court should adopt the legal approach to visual impact in paragraphs 57-9 of Samuel Smith. I agree. However, the application of the "obviously material" test will depend on the circumstances of the case.

91. In Samuel Smith the officer's report to the local authority's planning committee advised that the scale of the proposed extension to the quarry would not be of such a scale, in the context of the existing operations, as would conflict with the aim of preserving the openness of the Green Belt (see paragraph 28). No legal challenge was made to that conclusion. Instead, the challenge by a landowner objecting to the proposal was to the failure in the report to refer to the *additional* effect of the *visual impact* of the proposed development on the openness of the Green Belt. As a matter of fact the report made no reference to that aspect when dealing with the openness of the Green Belt. But at this point it is necessary to bear in mind the differences between the function of an officer's report in the decision-making process of a local planning authority and a decision letter determining a planning appeal and the consequential differences in the review undertaken by the Court of those two different types of document. For example, whereas a decision-maker on a planning appeal is obliged to deal with the principal important controversial issues, it is a matter for the judgment of a planning officer as to what matters to include in his report, the purpose of which is not to decide the issues raised by a planning application. Ordinarily the reporting by an officer on the issues will not be criticised by the Court unless it significantly misled the members (see eg. R (Leckhampton Green Land Action Group Ltd) v Tewkesbury Borough Council [2017] EWHC 198 (Admin) at paragraphs 24-25 and 50-51).

92. In Samuel Smith other parts of the officer's report had assessed the visual impact from the development to be, as the Judge put it, "clearly limited" (see paragraphs 25-26 and 61-62). He added that the members would have been familiar with the likely visual impact of the proposal and that that visual impact had never been considered to be a major issue in relation to openness. The main relevant factors when assessing the effect on openness was the spatial effect and, given that the proposal was for mineral extraction, the duration of the development and the reversibility of its effects, all of which were explicitly addressed in the report. In the circumstances, it is hardly surprising that the Judge concluded that the limited visual impact involved was not an "obviously material" consideration which also had to be addressed in the Green Belt section of the report (paragraphs 65-66).

93. The present case is rather different. The visual impact or perception point 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. The fact that the Inspector and the SSCLG assessed

the visual impact as an entirely separate consideration and came to the conclusion that only a relatively small degree of harm would be caused is irrelevant to the present argument (see paragraph 87 above). The present case is quite unlike those situations where the question is whether the decision-maker ought to have taken into account a freestanding issue such as the availability of alternative sites (see Derbyshire Dales DC v SSCLG (2010) 1 P & CR 19). Here the visual issues raised by the claimant formed an intrinsic part of the assessment of the severity of the harm that the SRFI would cause to the openness of the Green Belt, in so far as it might ameliorate or reduce that severity.

94. For these reasons, I am persuaded that in the present case the visual impact or perception issue was an "obviously relevant" consideration which ought to have been taken into account by the decision-maker, but was wrongly disregarded because of the error of law in IR 12.11 and DL 13. Accordingly, Goodman succeeds on issue (ii) under ground 3.

(iii) The "Simplex" test and the exercise of the Court's discretion

95. The burden lies on the SSCLG to show that if the legal error identified had not occurred, the decision to refuse planning permission would inevitably have been the same. Here:-

> "the Court must not stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision"

(see the North Eastern Derbyshire PCT case at paragraph 10).

96. Similarly in SSCLG v South Gloucestershire Council [2016] EWCA Civ 74 Lindblom LJ held (at paragraph 25):-

> "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. That is, of course, a stringent test. It is not enough for the court to be persuaded that the decision probably would have been the same but for the decision-maker's error, or very likely would have been the same, or almost certainly would have been the same. It must be persuaded that the decision necessarily would have been the same. The authorities are clear on that proposition. 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 (see the classic statement to this effect in the speech of Lord Hoffman in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780E-H)."

Nonetheless, the Court of Appeal held that the judge in that case should have exercised his discretion against quashing the decision by reference to findings made by the Inspector which were untainted by the legal error.

97. The South Gloucestershire case thus illustrates a particular feature of cases involving the review of planning appeal decisions which are required to be expressed through a formal and detailed statement of the reasons upon which they are based. The Court may more readily be able to see whether the error *might* have made a difference to the outcome or whether, the Court can be satisfied, for example from reasoning untainted by the error, that the outcome would inevitably have been the same.

98. As in the South Gloucestershire case, it is necessary to begin with those findings of the SSCLG which on any view could not have been any different if the relevant legal error had not been committed. In the present case this would apply to all of the findings other than the conclusion on the degree of harm to the openness of the Green Belt and the overall striking of the balance under Green Belt policy. The Simplex exercise does not involve the Court imagining that the decision under challenge is quashed and then second-guessing what might happen on a redetermination. Indeed, that would beg the very question as to whether or not the decision should be quashed. Mr Katkowski QC did not present any argument to the contrary.

99. On the "openness" issue the legal error does not taint IR 12.8 (which summarised the effect of Green Belt and NPS policy) or IR 12.9 (which explained why openness is the major asset of the appeal site). The same applies to SSCLG's acceptance of these findings (DL 13). I do not think that the legal error affects the conclusions in IR 12.10 on the layout of the development relative to the site, its footprint, form and bulk, along with the proportion of the site to be used as open spaces and their distribution.

100. What is missing from IR 12.10, by virtue of IR 12.11, is an assessment of the visual perception of the development within the gap, including such matters as the evidence on the visual containment of the site, the limited zone of visual influence, and the visual impact and perception of the proposed change in the state of the land from relevant viewpoints, taking into account the effect of woodland and trees. The assessment also did not address whether, and if so to what extent, these matters ameliorate the degree of seriousness of the loss of openness attributable to the development, and therefore whether the loss of openness would still have been described as "severe" (as set out in IR 12.12 and in DL 13).

101. On the other hand, the error in DL 12.11 did not taint the Inspector's conclusions in IR 12.13 to 12.15 on the harm that the development would cause to three out of the five purposes of Green Belt policy and that these "conflicts have substantial weight" (IR 12.18), matters with which the SSCLG agreed in DL 14.

102. Plainly the legal error does not taint any of the detailed conclusions set out in IR 12.20 to 12.186, occupying about 30 pages of analysis, nor the weights attached to these matters (see the summary in paragraph 21(ii) to (xiii) above). The same applies to DL 15 to DL 37.

103. When it came to striking the overall planning balance under Green Belt policy the Inspector and the SSCLG had to decide whether the positive effects of the proposal, or "very special circumstances", clearly outweighed all the harm it would cause. The legal error did not affect the test which had to be applied. This was not simply a balancing exercise which would be satisfied if the benefits simply outweighed the harm, even if only marginally. The word "clearly" indicates that a clear degree of

benefit was required over and above the overall degree of harm, the assessment of these matters being for the judgment of the decision-maker.

104. The single legal error which has been identified does not affect the SSCLG's assessment of the benefits of the proposal. Thus, the position is that SSCLG attached considerable weight to the contribution to satisfying unmet need for SRFIs and to the lack of an alternative site, significant weight to the compliance of the appeal site with site selection criteria, and moderate weight to other positive factors (DL 40-41).

105. In IR 12.188 the Inspector referred to the principle that "other harm" (in paragraph 88 of the NPPF) indicates any other harm apart from harm to the Green Belt that is relevant for planning purposes. The "other harm" in this case included harm to the Strategic Gap, but because there is some similarity in the objectives of CP2 and Green Belt policy, the Inspector stated that that affected the weight to be given to this factor, so as to avoid double counting. That explains why the Inspector attributed only "significant weight" to something as serious as the "irreparable harm" that would be caused to the Strategic Gap. She had already concluded that "very substantial weight" should be given to the overall harm to the Green Belt, blending both the severe loss of openness and the conflict with three purposes of Green Belt policy. The clear implication is that the harm to the Strategic Gap would have been expressed more strongly if that factor had stood apart from Green Belt policy. Applying the principles laid down by Lord Bridge in the Save case, upon which Mr. Katkowski QC relied under ground 2, (see paragraph 47 above), the SSCLG can be taken to have agreed with IR 12.188 as forming part of the basis for his conclusions in DL 39.

106. In addition, the SSCLG gave moderate weight to the effect on the Colne Valley Park, and either limited weight or a small degree of weight to each of a range of other negative factors. The Inspector reached the conclusion in IR 12.193 that the overall weight against the proposal was "very strong and compelling". The SSCLG did not disagree in any way with that view and can be taken to have adopted it. Thus it is plain that on the findings reached by the SSCLG, not only did the benefits of the proposal fail to outweigh *clearly* the overall harm that would be caused, those benefits did not even attract the same degree of weight as that overall harm. In this context, it has to be remembered that, as the claimant accepts, the legal error made under ground 3 affected only one contribution to the overall harm resulting from the scheme, the assessment of harm to openness and did not affect the assessment of harm to the purposes of the Green Belt. Furthermore, the level of harm to the openness of the Green Belt was found to be "severe". The issue therefore is whether, if visual impact and perception had also been taken into account in assessing the effect on openness, the finding of a "severe" impact in that respect *might* have been reduced to such an extent, and consequentially the finding on total harm, that the benefits of the scheme *might* have been regarded as not merely outweighing, but *clearly* outweighing, that total harm. For this to have happened the scales would have needed to tip substantially in the opposite direction in favour of the proposal, notwithstanding that the findings on other key points, notably the substantial weight attached to harm to the purposes of the Green Belt and the irreparable harm to the Strategic Gap along with the benefits of the proposal, would not have changed.

107. I have reached the firm conclusion that if the SSCLG had not erroneously excluded from his consideration of the effect of the proposal on the openness of the Green Belt matters of visual impact and perception relied upon by Goodman (accurately

summarised in IR 7.8), his decision to refuse planning permission would inevitably have been the same. In summary, I reach this conclusion for the following reasons, drawing upon the analysis set out above:-

(i) The extent to which the findings for and against the development were unaffected by the single error under ground 3;

(ii) The policy hurdles which this proposal had to overcome, notably the "very special circumstances" test and CP2;

(iii) The SSCLG's conclusion that the overall benefits of the proposal were not as great as the overall harm it would cause;

(iv) The error relates solely to one aspect of Green Belt policy, the effect on openness, and not to the harm caused to the purposes of the Green Belt or to the Strategic Gap and CP2;

(v) It was necessary for the decision-maker to bear in mind that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. The essential characteristics of the Green Belt are its openness and permanence (NPPF paragraph 79, IR 12.9 and DL 13);

(vi) Consequently, when assessing the effects of a development on openness, the primary focus is likely to be on the extent of the "spatial impact" rather than on visual perception as a mitigating factor (Turner at paragraphs 23 to 25; Samuel Smith at paragraph 52). Self-evidently this approach is all the more relevant when it is proposed that a very large scale built development, such as the SRFI, will occupy a large proportion of an undeveloped open site in a strategic part of the Green Belt. The SSCLG considered that the major asset of this site in its existing state is its openness (IR 12.9 and DL 13), despite any limitations on the visibility of the site (this links to Goodman's case in point (vii) below);

(vii) Goodman's case on visual impact and perception essentially depended upon the site being visually enclosed with limited visibility between the site and the surrounding area, and thus limited opportunities to view the development. In fact, both the Inspector and the SSCLG did have regard elsewhere in their conclusions to the contained nature of the site. These conclusions included their consideration of the effect of the development on the purposes of the Green Belt (see eg. IR 12.13, 12.14, 12.44 and 12.47 and DL 14 and 18).

(viii) The earlier adverse findings on the spatial impact of the development on that openness are unimpeachable. The developed areas would occupy the greater proportion of the 58.7 hectare site. The spaces left over would be confined to the edges and would have no effect on the loss of openness resulting from the bulk and mass of the buildings and intensively used vehicle and storage areas. The very large buildings and the height of stacked containers would accentuate the loss of openness (IR 12.10 and DL 13);

(ix) No challenge is made by Goodman to the assessment by the Inspector and the SSCLG of the effects of the SRFI scheme on the Strategic Gap, which did take

into account landscaping and the perception of the development (see eg. IR 12.28 and DL 15). It was decided that this part of the Green Belt is "particularly important." It is fragmented and vulnerable (IR 12.20). The development would be a "dominant group of large scale buildings and infrastructure" "located in the heart of the Strategic Gap" and would generate a large volume of traffic and activity. It would be perceived as having a very strong influence on the area. Even with a high quality landscape scheme, its presence would cause "irreparable harm" to the Strategic Gap and threaten the open role of land within that part of the Green Belt (IR 12.28). These findings in relation to the Strategic Gap, where visual harm and perception were taken into account, reinforce the conclusion that if these matters had also been taken into consideration in the assessment of the effect of the development on the openness of the Green Belt, the findings that there would be a "severe loss" of openness and that the totality of harm to the Green Belt attracted "very substantial weight" could not have been materially altered. Bearing in mind also those findings of the Inspector and the SSCLG which were not tainted, it is in any event certain that the assessment of the overall harm from the proposal could not have been reduced by the SSCG to such an extent that his findings on the benefits from the scheme would "clearly" have outweighed that harm;

(x) The position of the SSCLG is also made plain by DL 42 in which he attaches particular importance to the qualities of the Strategic Gap and the harm that the scheme would cause to it :-

> "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. Consequently, very special circumstances do not exist to justify the development."

108. For these reasons, the defendant succeeds on issue (iii) and it follows that I must reject the challenge under ground 3.

Conclusion

109. For the above reasons the challenge to the decision of the SSCLG fails and the claim is dismissed.