# England and Wales High Court (Administrative Court) Decisions



**Neutral Citation Number: [2014] EWHC 15 (Admin)**
Case No: CO/10476/2013

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Manchester Civil Justice Centre
17/01/2014

B e f o r e :

**THE HON MR JUSTICE BLAKE**

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**Between:**

**FOX LAND AND PROPERTY LIMITED** **Claimant**

**- and -**

**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**

**-and-**

**CASTLE POINT BOROUGH COUNCIL** **Defendants**

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**Peter Goatley (instructed by Irwin Mitchell) for the Claimant**
**Stephen Whale (instructed by Treasury Solicitors) for the First Defendant**
**Hearing dates: 2 and 3 December**

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**HTML VERSION OF JUDGMENT**

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**BLAKE J :**

Introduction:

1. This is an application made under s. 288 Town and Country Planning Act 1990 (TCPA) to quash a decision of the Secretary of State for Communities and Local Government dated 26 June 2013 rejecting the recommendation of his inspector John Felgate that planning permission be granted for residential development of a piece of open land, known as the land off **Glebelands**, Thundersely, Essex (the appeal site).

2. The appeal site is 7.4 hectares of agricultural land adjacent to the A130 on the north western edge of Castle Point Borough Council. Castle Point is a borough on the north bank of the Thames between the towns of Basildon and Leigh on Sea and contains the urban settlements of Benfleet, Hadleigh and Canvey Island as well as open land.

3. The application was issued in Manchester as the claimant company is located in Cheshire. An application was made by the second defendant, the Borough Council to have the matter transferred to London which was the court centre closest to the land in question. This was rejected as the application could be heard much more promptly in Manchester. It is a tribute to the state of the lists this court centre that the matter has been heard four months after it was lodged. The second defendant has taken no part in the hearing of this application.

4. The claimant company applied to the second defendant for planning permission for a substantial residential development of 165 dwellings. Planning permission was refused and jurisdiction over the appeal was recovered by the first defendant Secretary of State in June 2012 because the proposed development was of a size that would significantly impact on the Government's objective to secure a better balance between housing demand and supply and the proposal was for significant development in the Green Belt.

5. In November 1998 the second defendant adopted its local plan formulating the authority's detailed policies for the development and use of land in their area and the plan contained a map (the proposals map) as required by s.36 of TCPA 1990. The proposals map clearly designates the appeal site as part of the Green Belt (GB). In Chapter Two of the local plan there is an explanation of policies relating to the development of the Green Belt and seven specific policies are adopted. Policy GB 1 provides:

> "Within the Green Belt identified on the proposals map permission will not be given, except in very special circumstances, for the construction of new buildings or for the change of use of land or for the extension of existing buildings…."

6. There were some exceptions to this policy that are immaterial for present purposes. Policies GB 2 to GB 6 all dealt with re-use, re-building or replacement of existing buildings within the GB and extensions to them.

7. The Planning and Compulsory Purchase Act 2004 Schedule 8 provided for a transitional period of three years for preserving a local plan that was a development plan. This transitional period came to an end as of September 2007, save in so far as the Borough Council had applied to the Secretary of State for a direction saving parts of the old plan until a new plan was adopted. Policies GB 2 to 6 had been saved by such direction, but no application had been made in respect of policy GB 1, that had accordingly lapsed in September 2007.

8. There were considerable delays in the second defendant producing a replacement local plan, and in particular identifying areas for housing development. In 2010 it published the Castle Point Green Belt Functions Assessment. According to this assessment the appeal site is within Parcel 10, itself part of a continuous zone of GB land on the western edge of the Borough, and whose functions are stated to be prevention of urban sprawl, merging of urban

communities and encroachment on the countryside. Following an exchange of correspondence with a planning inspector who had given some critical guidance on the process of developing policies, the second defendant decided in September 2011 to withdraw its core strategy from the planning inspectorate:

> "to await the outcome of the National Planning Policy Framework and to understand how this will work with the new Localism Act. This Council, with the help of the local community, resolves to protect the Green Belt where possible, and to start the work forthwith to prepare a Local Plan based on neighbourhood projections."

9. In March 2012 the National Planning Policy Framework (NPPF) came into being, supplementing and in certain cases replacing local plans. Section 9 of the NPPF concerned the GB and paragraphs 79 to 88 are relevant to the present application:

> Protecting Green Belt land
>
> 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.
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> 80. Green Belt serves five purposes:
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> - to check the unrestricted sprawl of large built-up areas;
> - to prevent neighbouring towns merging into one another;
> - to assist in safeguarding the countryside from encroachment;
> - to preserve the setting and special character of historic towns; and
> - to assist in urban regeneration, by encouraging the recycling of derelict and other land.
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> 81. Once Green Belts have been defined, local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land.
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> 82. The general extent of Green Belts across the country is already established. New Green Belts should only be established in exceptional circumstances, for example when planning for larger scale development such as new settlements or major urban extensions. If proposing a new Green Belt, local planning authorities should:
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> - demonstrate why normal planning and development management policies would not be adequate;
> - set out whether any major changes in circumstances have made the adoption of this exceptional measure necessary;
> - show what the consequences of the proposal would be for sustainable development;
> - demonstrate the necessity for the Green Belt and its consistency with Local Plans for adjoining areas; and
> - show how the Green Belt would meet the other objectives of the Framework.
>
> 83. Local planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. Once established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period.

84. When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development. They should consider the consequences for sustainable development of channelling development towards urban areas inside the Green Belt boundary, towards towns and villages inset within the Green Belt or towards locations beyond the outer Green Belt boundary.

85. When defining boundaries, local planning authorities should:

- ensure consistency with the Local Plan strategy for meeting identified requirements for sustainable development;
- not include land which it is unnecessary to keep permanently open;
- where necessary, identify in their plans areas of 'safeguarded land' between the urban area and the Green Belt, in order to meet longer-term development needs stretching well beyond the plan period;
- make clear that the safeguarded land is not allocated for development at the present time. Planning permission for the permanent development of safeguarded land should only be granted following a Local Plan review which proposes the development;
- satisfy themselves that Green Belt boundaries will not need to be altered at the end of the development plan period; and
- define boundaries clearly, using physical features that are readily recognisable and likely to be permanent.

86. If it is necessary to prevent development in a village primarily because of the important contribution which the open character of the village makes to the openness of the Green Belt, the village should be included in the Green Belt. If however, the character of the village needs to be protected from other reasons, other means should be used, such as conservation area or normal development management policies, and the village should be excluded from the Green Belt.

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."

The Planning Decision

10. It was against this background that the claimant's application for planning permission was made and refused by the Borough Council, the appeal was recovered by the Secretary of State and the matter proceeded to a planning inquiry conducted in December 2012.

11. Before the inspector the claimant contended that:-

i) As a result of policy GB1 lapsing there was no GB policy for the appeal site.

ii) The development was not inconsistent with any other policy.

iii) If there was a GB policy for the appeal site, there were 'very special circumstances' within the meaning of paragraphs 87 and 88 of the NPPF because the potential harm to the GB by reason of inappropriateness was clearly outweighed by other considerations.

iv) The other considerations were the valuable contribution the development would make to the provision of housing in the area of Castle Point, with 35% of the development designated as affordable housing. This was of particular importance as the Borough Council had failed to adopt a new local plan identifying land for housing development, and were substantially in default of its targets for housing development and many of its proposals for housing development were not deliverable within the meaning of paragraph 47 of the NPPF.

v) In any event delivery would require GB land to be developed for housing and Parcel 10 and the part of parcel 10 formed by the appeal site was considered less significant in the 2010 Green Belt Function Assessment than other proposed areas of GB development.

vi) Further in a briefing paper prepared for members in 2011 by Ms Raffaelli, a Planning Officer of the Borough Council, the appeal site was considered to be a deliverable site for housing and it was assessed that the GB boundary could be shifted to the A130 itself without impacting on the functions of the GB in this location. Ms Raffaelli gave evidence at the Inquiry and accepted that unrestricted sprawl would be contained by the A130 as a boundary, and this would also prevent merger or coalescence with urban settlements.

12. The inspector accepted propositions iii) to v) and reached a similar conclusion as in vi). He recognised the literal force of i) but concluded that the appeal site was still within the GB for the purposes of the NPPF. Proposition ii) was uncontroversial. He therefore recommended that planning permission be granted.

13. Following the conclusion of the inquiry, the local MP Rebecca Harris wrote to both the Secretary of State and the Parliamentary Under Secretary of State for Planning voicing her opposition to the development. She had given evidence at the inquiry to the effect that if the GB boundary was eroded the continued separation of Benfleet from Basildon would depend on the adjacent planning authority and there was a fear that Basildon would allow building up to the Borough boundary. In January 2013 she wrote to the Secretary of State with information about the developing policies of Basildon said to support this fear. On 19 February she wrote to the Parliamentary Under Secretary of State copying him in to the earlier letter and stating:

> "I am enclosing copies of my last ditch attempt to persuade Eric to reject it.… We are trying in Castle Point and an approval could cause havoc at this stage."

14. In June 2013 the Secretary of State rejected the inspector's recommendation. He concluded that other considerations did not clearly outweigh the harm to the Green Belt, and was more optimistic than the inspector had been about the ability of the Borough Council to bring a local plan to fruition that would identify land for housing development. The decision letter disclosed the communications received from the MP and concluded that the inclusion of a site for potential development by Basildon on GB land directly opposite the appeal site attracted little weight. Any application for development of such GB land would have to be go through the planning process.

15. The Secretary of State nevertheless concluded that :-

i) The preservation of policies GB 2 to 7 ensured that the GB was preserved in Castle Point.

ii) In addition to the 'in principle' harm caused by any development of the GB, there was moderate additional harm by way of urban sprawl, encroachment of the countryside, merger with neighbouring settlements, and the effect on the character and appearance of the GB in the location of the appeal site. Cumulatively applying NPPF substantial weight was attached to the harm to the GB.

iii) In the circumstances the benefits of the development did not clearly outweigh the harm to the GB.

The Appeal

16. In this application Mr Goatley for the claimant makes four core submissions that I have distilled from his nine grounds of appeal.

    i) The loss of Policy GB1 means that there is no present policy for a GB in Castle Point whatever the second defendant's intentions may have been;

    ii) The Secretary of State failed to act in accordance with regulation 17 (5) (b) or the principles of natural justice as he did not disseminate Ms Harris's letters that were received after the end of the inquiry to the claimant for comment and response.

    iii) There was no or no sufficient factual basis for the Secretary of State's disagreement with the inspector on the issues of harm to the GB, the Borough Council's preferred GB sites for housing development, and the likelihood of it undertaking a prompt development review.

    iv) The Secretary of State took irrelevant considerations into account when considering whether planning permission would set a precedent and in confusing a development plan review with special circumstances to justify development within the GB.

Ground 1: Did the saved plan include a GB Policy?

17. The Secretary of State agreed with the inspector that the saved policies GB2-7 resulted in the GB being saved in Castle Point. The meaning of a planning policy is for the court to determine objectively, having regard to the language used and the context and purpose; although plans are not to be construed as if they were a statute or contract and may refer to matters of planning judgment: see Tesco Stores v Dundee City Council [2012] UKSC 13; [2013] PTSR 983 per Lord Reed at [18] and [19].

18. The saved policies refer to the continuation of the GB and deal with the circumstances when existing buildings can be modified. The meaning and the existence of the policies depends on there being a GB to which they can apply. Mr Goatley recognised this and did not shrink from the submission that by permitting policy GB1 to lapse that asserted the existence of the GB as defined in the proposals map the second defendant had by inadvertence permitted all GB related policies to lapse including the ones that had been purportedly saved.

19. I cannot accept this submission. Although it would have been neater and simpler for a modified GB1 to remain in existence and bring the proposals map directly into play as an element of the policy, I conclude that this has been achieved indirectly because the saved policies refer to the GB and there are therefore policies in existence to which the proposals map can attach and form part of the policies (see TPCA 1990 s.36 (6) and s 54 (1)(c)) .

20. A related issue arose in the case of R (Cherkley Campaign Ltd) v Mole Valley DC [2013] EWHC 2582 (Admin) where Haddon-Cave J said at [87]

    "In my judgment, the direction of the Secretary of State made on 25 September 2007 *"saving"* certain listed *"policies"* contained in the Mole Valley Local Plan, had the effect, in law, of preserving all the *"supporting text"* to policy REC12, including *"reasoned justification"* for the policy and the explanation of *"how [REC12] will be implemented by the Council"* contained in paragraphs 12.71 and 12.72, together with the *"illustrative map",* so that appropriate resort could be made to these materials when interpreting and applying the policy."

21. Accordingly, the Secretary of State was correct to conclude that there remained a GB within Castle Point and as matter of planning policy.

Ground 2: Unfairness

22. The Secretary of State considered the relevance of Ms Harris's representations at the outset of the decision letter and concluded that they carried little weight. He made no further reference to them in the decision letter and although he disagreed with the inspector [DL 13] about the risk of merger of neighbouring settlements, he reached this conclusion not because he thought Basildon was likely to expand out into the intervening GB but that Parcel 10 in which the appeal site was situated had the GB function of keeping neighbouring settlements separate.

23. Rule 17(5) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 provides:

> "If, after the close of an inquiry, the Secretary of State-
>
> a) differs from the inspector on any matter of fact mentioned in , or appearing to him to be material to, a conclusion reached by the inspector; or
>
> b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),
>
> and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with that recommendation without first notifying in writing the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the reopening of the inquiry."

24. I shall assume that the Secretary of State took Ms Harris's representations into account, despite not assigning much weight to them, and although there was no obligation to do so rule 17(4). However, rule 17(5) only required the Secretary of State to afford the claimant an opportunity to make representations on them if he 'is *for that reason* disposed to disagree with a recommendation made by the inspector'. It is apparent from the decision letter read as a whole and in good faith that Ms Harris's representations were not the reason why the Secretary of State disagreed with the inspector.

25. Even if common law principles of fairness apply a less exacting test there is no reason to believe that there is no reason to believe either that the representations made any difference to the decision or that the claimant has been unfairly deprived of the opportunity to make any particular response to them. The MPs views were known at the inquiry and the claimant was able to address them then. Consequently, this ground also fails.

Ground 3: Factual Disagreements

26. The Secretary of State is not entitled to disagree with the inspector's assessments of facts unless there is proper evidential basis for doing so. The relevant principles were stated in Coleen Properties Ltd v Minister of Housing and Local Government [1971] 1 All ER 1049 per Lord Denning MR at 437 H

> "I can see no possible justification for the Minister in overruling the inspector. There was no material whatever on which he could do so. I know that on matters of planning policy the Minister can overrule the inspector, and need not send it back to him, as happened in Luke v Minister of Housing and Local Government [1968] 1 Q.B. 172. But the question of what is "reasonably necessary" is not planning policy. It is an

inference of fact on which the Minister should not overrule the inspector's recommendation us less there is material sufficient for the purpose. There was none here"

Sachs LJ at 439 F said:

"The Minister, therefore, cannot come to a conclusion of fact contrary to that which the inspector found in this case unless there was evidence before the latter on which he (the Minister) could form that contrary conclusion. Upon the inquiry, an inspector is, of course, entitled to use the evidence of his own eyes, evidence which he is an expert, in this case he was an architect, can accept. The Minister, on the other hand, can only look at what is on the record. He cannot, as against the subject, avail himself of other expert evidence from within the Ministry-at any rate, without informing the subject and giving him an opportunity to deal with that evidence on the lines which are set out in regard to a parallel matter in the Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962".

27. The hearing of this application took the form of a detailed analysis of the inspector's reasons for particular propositions and the distinct conclusions of the Secretary of State. The question is whether there has been an impermissible substitution of conclusions on questions of primary fact by a decision-maker who has not had the benefit either of a site view or detailed submissions on the evidence as it developed at the inquiry.

28. I am satisfied that in the decision letter the Secretary of State did respect the factual findings of the inspector and the areas of disagreement were related to the planning policy conclusions to be drawn from them. Certainly, there was in each case some evidential material to support the Secretary of State's conclusions.

29. *Urban sprawl*: Mr Goatley placed particular emphasis on the evidence of Ms Raffaelli but this was not the only evidence from the second defendant on the issues. Mr Zammit was a Planning Officer employed by the second defendant who was called to deal with impact of the development on the GB. He acknowledged that the appeal site was once viewed with more favour as a potential site for housing development under the draft core strategy that was withdrawn in 2011, but a different view was subsequently taken as to the function of this piece of open land in separating the residential settlements of Benfleet and Basildon.

30. The inspector accurately reflected the council's case at the inquiry at [55]

'the GB is particularly vulnerable here and piecemeal incursions would be especially damaging to its functions in keeping the neighbouring settlements separate'.

31. The inspector's own conclusions recognised that the proposed development would have some impact on this function:

"254. The prevention of urban sprawl is one of the GB's main purposes. In the present case, development at the appeal site would extend the built up area of Thundersley beyond its existing boundaries.

255. However, the appeal site comprises a relatively narrow strip of land, between the existing built-up area and the dual-carriageway A130 which runs close to the urban edge. The latter, with its expanse of new slip roads, embankments, bridges, signs, lighting and associated works, has effectively urbanised the wide swathe of land that it occupies, so that the appeal site is cut off from the larger area of countryside beyond. The Glenwood School site to the north, although largely open, is essentially an urban land use, and thus adds to the strong sense of containment.

256. In this context, the appeal site appears as a relatively small, isolated pocket of undeveloped land, surrounded by urban structures and uses. It does not project

outwards, but hugs the edge of the urban area. In these circumstances, it seems to me that the proposed development would appear as a natural logical extension to the settlement, or the filling of a gap. It would therefore not constitute urban sprawl of the kind that Green Belt policy is intended to prevent."

33. In the decision letter the Secretary of State accepted at paragraphs 11 and 12 of his decision the inspector's description of the land at [256] above but attached weight to the Council's view that the land checked urban sprawl from Benfleet and that moderate harm to the GB would arise in that it would remove one of the purposes of the GB of checking unrestricted sprawl in accordance with paragraph 80 of the NPPF (see [9] above).

34. In my judgment, there was both an evidential and planning policy foundation for this assessment and despite the absence of the advantage of a visual inspection, the Secretary of State was entitled to allocate moderate weight to this factor, which was, therefore, a rational consideration in the overall conclusion.

35. *Open countryside and rural character*: The inspector at [266] to [269] accepted the claimant's case that the close presence of the dual carriageway and other factors already served to give the impression that the appeal site was urban fringe rather than rural.

36. The Secretary of State disagreed with this assessment and preferred the Council's argument that the A130 runs through open countryside with fields on either side, whereas if the site was developed it would skirt buildings and an urban environment on one side. Undoubtedly the inspector enjoyed an advantage that the Secretary of State did not, but the Council's assessment is evidenced by the proposals map and the other plans adduced at the inquiry and so the Secretary of State's conclusion was not wholly unsupported by evidence. This was an issue on which a range of conclusions might be possible. If so the Secretary of State's view, that took into account the assessment made by the Inspector with the advantage of a site visit is not irrational. It is also the case that Parcel 10 as a whole was assessed in 2010 as medium landscape sensitivity with medium to high visual sensitivity.

37. I accept the claimant's point that the particular part of Parcel 10 that consists of the appeal site, was north of the more sensitive areas and could not itself be considered a landscape of high visual sensitivity. It had, at one stage been considered suitable for development; but equally the claimant had accepted at the planning inquiry that there was a debate whether the appeal site read as open country. If the issue was capable of debate, and the final view of the local Council was the sense of bi-lateral openness was of importance to the local community, I cannot conclude that the Secretary of State reached an irrational conclusion. Accordingly, the decision to assign moderate level of harm to this part of the GB was open to him.

Ground 4: Irrelevant /Irrational considerations:

38. The Secretary of State's overall conclusions were expressed as follows:

"30. The Secretary of State concludes that the appeal proposals are inappropriate development in the Green Belt. Additionally he had identified harm to the GB's openness and harm to the GB's purposes of preventing urban sprawl, preventing encroachment on the countryside and preventing the merger of neighbouring settlements and, furthermore, harm to GB's character and appearance. He considers that, together, this represents considerable harm, to which he attributes substantial weight. The Secretary of State has found that there are factors in favour of the appeal including a severe lack of a forward housing land supply and that setting aside GB considerations, development of the appeal site would not cause demonstrable harm. He also wishes to emphasise that national policy is very clear that GB reviews should be undertaken as part of the Local Plan process. In light of all material considerations in this case the Secretary of State is concerned that a decision to allow this appeal for housing in the GB risks setting an undesirable precedent for similar developments which would seriously undermine national GB policy."

39. This reasoning is attacked for two reasons: precedent and primacy being given to the Local Plan.

40. *Precedent:* In my judgment the defendant is right to conclude that the reference to 'undesirable precedent for similar developments which would seriously undermine national policy' does not amount to an irrational procedurally unfair conclusion imported at a late stage into the debate. I accept that the question of setting precedents is normally not an issue for planning inquiries that turn on the application of particular policies to particular sites and case by case justification for the development.

41. Read as a whole and in context in my judgment the Secretary of State was indicating the importance of GB protection in the NPPF and the cumulative harm identified in the decision letter was not outweighed by the admittedly significant benefit of housing including affordable housing.

42. *Justified exception or planning review*: Under this head the claimant contends that the Secretary of State has conflated the desirability of housing allocation being based on a completed local plan with the question of whether a sufficiently compelling exception had been made out to justify building on the GB.

43. I accept that a decision maker who refused to contemplate an exception until a revised plan was in place allocating the appeal site for housing development would be misdirecting themselves, but again the decision letter has to be read as a whole and in good faith. The detailed consideration of harm and benefit in the decision letter reflects the debate before the inspector and would make little sense if the absence of a local plan for housing allocation to the appeal site was considered determinative.

44. In my judgment, there was no legal error displayed in paragraph 30. The DL was merely assigning weight to the preservation of the GB from harm by piecemeal development. The better approach was to address where best to permit housing need in a local plan in urgent need of being progressed. In those circumstances this particular development was not of sufficient weight to clearly outweigh the harm to the GB.

45. This brings consideration of the final factor relied on by the claimant, namely the Secretary of State's greater optimism than the inspector that the Borough would progress the search for sites where housing allocation is identified.

46. At [359] the inspector concluded:

> "In Castle Point there have clearly been difficulties for many years in planning for sufficient housing. The LP failed to plan far enough ahead. The long-term reserve sites all turned out to be poor choices, because none came forward to fill the gap. The CS (Core Strategy) took too long to prepare and in the end failed because the housing provisions were inadequate. In the light of this history it cannot be assumed that the task of preparing a new local plan will be accomplished easily or quickly. Although it is right that planning decisions should be plan led where possible the Council's own action in announcing a list of preferred housing sites, in advance of having any kind of draft plan seems to acknowledge that some decisions will not be able to wait for the new plan to be in place."

47. By contrast whilst the Secretary of State the Secretary of State recognised the strength of these observations, he concluded that the Council had in 2012 come up with alternative sites for housing development for sound planning decisions (at DL paragraph 26) and earlier part of the Dl at paragraph observed:

> "In the Secretary of State's view when the now withdrawn CS was in preparation there were no real drivers to ensure that the Council pressed ahead. With the

publication of the NPPF he is more positive than the Inspector that the Council can achieve its programme for LP adoption, especially given the drivers within it".

48. The Inspector was right to observe that progress in identifying sites for housing development in the Borough had been lamentable. The conclusion that things would be different with the NPPF might be considered a leap of faith based on the merits of the Secretary of State's new policy, or possibly an act of political faith based on the assurance of the local MP that Castle Point was trying. It cannot be said that there was no evidence the NPPF might not make a difference. Indeed the very reasons given for abandoning the CS was the fact that the Council were waiting of the NPPF (see above at [10]). This is a matter of judgment for the decision-maker, rather than a factual conclusion binding on him. No challenge is made to the good faith in which that judgment is reached. I cannot conclude that the defendant's assessment is perverse. This ground also fails.

49. However, I would add this observation. The justification for building much needed housing on this GB strip is narrowly balanced. Whatever its qualities as open land, the site does not have high landscape value and may still prove to be the least worst option for housing development. If the Secretary of State's optimism proves unjustified and other GB or open land is not released for housing development by a new Local Plan, the balance may tip in favour of this development on future consideration. In the absence of concerted effort and effective progress, the outcome of the present process may prove to be more of a temporary reprieve than a durable future for the appeal site.

Conclusion

50. This court on appeal from a decision of this kind does not substitute itself for the decision maker. Planning policy and the weight to be given to factors that may be narrowly balanced on either side are for the decision maker. The court will scrutinise the decision with an appropriate degree of intensity according to the subject matter to see that the right legal issues have been considered, that relevant factors are taken into account and irrelevant ones excluded and that the decision maker has acted fairly in reaching a determination on the issue. If all these tests are met, then the final outcome can only be challenged by the final limb of what is known as the *Wednesbury* test: namely whether this was a decision that was within the range of decisions open to a rational decision maker properly and fairly directing themselves. Despite the sustained challenges made I have concluded that the present decision is sufficiently reasoned and survives this challenges. This application is accordingly dismissed.