

COPAS v. THE ROYAL BOROUGH OF WINDSOR AND MAIDENHEAD

COURT OF APPEAL (CIVIL DIVISION) (The Master of the Rolls, Simon
Brown L.J. and Longmore L.J.): February 7, 2001¹

[2001] EWCA Civ 180; [2002] 1 P. & C.R. 16

H1 *Town and Country Planning—PPG 2—Green Belts—Development plan—Boundary revision—Exceptional circumstances—Effect of previous appeal decision—Purposes and objectives of Green Belt policy*

H2 In 1991, the Secretary of State for the Environment refused planning permission for alternative schemes of residential development on a site at Poundfield, Cookham. He concluded that: the quality of openness contributed by the site would be lost and the development would create a far less satisfactory setting for the listed buildings in the vicinity; that views from the site would at least be seriously obstructed by the development; and that the congruous foreground of pasturage would disappear. In March 1994, the respondents included the site within the Green Belt in the deposit draft of their local plan, stating that given the appeal decision, and other considerations, it seemed logical so to include it. The objection of the appellant developer was heard by an Inspector in 1995. He concluded that the key factor was the appeal decision. This, in his opinion, illustrated concerns which went beyond the criticism of particular schemes and indicated that the site should be retained in its present form. He also considered that the site satisfied the aim, purposes and objectives of national Green Belt policy. He stated his belief that there were exceptional circumstances which necessitated a revision of the Green Belt boundary and recommended that no change be made to the draft plan. The appellant challenged the subsequent adoption of the plan by reference to the reasoning of the Inspector. It contended that: first, he failed to apply the very stringent test imposed by paragraph 2.7 of PPG 2, that before existing Green Belt boundaries can be revised there must be not only exceptional circumstances but exceptional circumstances such as to “necessitate” the revision; secondly, there was on the facts no sufficient basis upon which he could properly find the test of necessity satisfied; and thirdly, he wrongly took into account the objectives of designated Green Belt land, whereas paragraph 1.7 of PPG 2 expressly forbids this.

H3 **Held**, allowing the appeal, that, first, paragraph 2.7 of PPG 2 should be regarded as expressing a single composite test. Circumstances are not for that purpose exceptional unless they do necessitate a revision of the boundary. That necessity is the touchstone by which to determine whether the circumstances are exceptional or not. No point would be served by adopting a two-stage approach to the test. In any event it was plain from the report that the Inspector did think necessity as such established. Secondly, however, the 1991 decision could not of itself create the necessity for this Green Belt revision. The requisite necessity in a PPG 2 paragraph 2.7 like the present—where the revision proposed is to increase the Green Belt—cannot be adjudged to arise unless some fundamental assumption which caused the land initially to be excluded from the Green Belt is clearly and permanently falsified by a later event. The objection of the Secretary of State to development in 1991 was neither sufficiently long-term nor sufficiently clearly applicable to all possible development on all parts of the site to be capable of constituting such an event, still less when it seemed of itself to demonstrate the

¹ Paragraph numbers in this judgment are as assigned by the court.

sufficiency of planning controls to safeguard the various amenity interests identified. Thirdly, the Inspector strictly ought not to have had regard to the objectives for Green Belt land use at all. However, the decision should not be held flawed simply on that account. Reading the report as a whole, it was inconceivable that the Inspector, consistently with his other expressed views, could have found unsatisfied the condition that the site must fulfil a Green Belt purpose if he had ignored the role which the site could play in fulfilling Green Belt objectives.

- H4 **Cases referred to:**
Carpets of Worth Limited v. Wyre Forest District Council [1991] 2 P.L.R. 84.
- H5 **Appeal** by permission of Mr Lockhart-Mummery Q.C. sitting as a Deputy Judge of the High Court on March 31, 2000 dismissing their application under the Town and Country Planning Act 1990, section 247 to quash the decision of the respondent local planning authority on July 30, 1999 to adopt the Royal Borough of Windsor and Maidenhead Local Plan in so far as that relates to a site at Poundfield, Cookham.
- H6 *Peter Village* for the appellant.
Graham Stoker for the respondent.

SIMON BROWN L.J.:

- 1 Sixty-six years ago, Poundfield, Cookham, was painted by Stanley Spencer. The picture hangs in the Southampton City Art Gallery. Today, the land is the subject of a Green Belt planning dispute. The appeal now before us raises difficult and interesting questions of some importance as to the correct understanding and application of PPG 2 (the revised 1995 Government Planning Policy Guidance) in the context of a proposed revision of existing Green Belt boundaries.
- 2 The appellants are developers who appeal by permission of the judge below against the order of Mr Lockhart-Mummery Q.C. sitting as a Deputy Judge of the High Court on March 31, 2000 dismissing their application under section 287 of the Town and Country Planning Act 1990 to quash the respondent local planning authority's decision on July 30, 1999 to adopt the Royal Borough of Windsor and Maidenhead Local Plan insofar as that relates to the appeal site. The effect of the Plan is to include Poundfield for the first time within the Metropolitan Green Belt, the site having originally been expressly excluded when the boundaries of the Green Belt were first fixed. The appellants' objections to this proposed alteration of the boundary were heard by an Inspector in 1995. He, however, recommended that no modification to the draft Plan be made in response to these objections and it was the respondent's ultimate acceptance of that recommendation which led them finally to adopt the plan in 1999. It is accordingly through the reasoning set out in the Inspector's Report that the appellants seek to impugn the decision under challenge.

Poundfield

- 3 The site extends to some 6 ha, part to the west and a larger part to the east of Poundfield Lane. The part to the east itself consists of two main fields, respectively to the north and south of Englefield House, a listed building fronting Poundfield Lane. Stanley Spencer's painting pictures the view south-east from a northerly point in the north field, the view along a public footpath which crosses the field in that direction. To the north and east of the

site runs Terry's Lane, separated from the eastern boundary of the south field by a number of dwellings. To the south of the site runs The Pound, also separated from the site by a number of dwellings, some of them listed.

Planning History

- 4 Between 1967 and 1973, four planning applications for residential development of the site were refused on highway grounds alone.
- 5 In April 1985, following extensive public consultation during 1979–1982 and a Public Local Enquiry in 1983, the Berkshire County Council adopted the Green Belt Local Plan for Berkshire from which Poundfield was excluded. The County Council commented:

“The Poundfield site’s suitability for development has been established by a series of appeals (subject to the resolution of access difficulties) and thus its transfer to the GB is not considered appropriate.”
- 6 Also in 1985, the respondent Borough were preparing their draft Maidenhead and District Local Plan (which in the event was overtaken by the Berkshire Structure Plan and so never came to be formally adopted). The Council’s report with regard to Poundfield commented upon objections to its allocation for housing:

“The land in question forms part of the settlement area of Cookham Rise excluded from the Green Belt under the provisions of the Draft Green Belt Local Plan for Berkshire. In the subsequent Borough-wide survey of non-Green Belt land the site has been identified as having potential for residential development and therefore included in the Draft Local Plan proposals. Past refusals of planning permission for residential development on parts of the site have related to the previous designation of the area as ‘white land’ and specific highway objections. The County Surveyor has raised no objection to the identification of the area shown on the Proposals Map for potential housing development. He considers that a satisfactory access to the site may be provided . . . The site offers one of the few opportunities to provide for residential development within the Plan area and should therefore continue to be identified.”
- 7 In about 1989 outline planning permission was sought for two alternative schemes for the residential development of the site. One scheme proposed 88 houses, the other 66 houses, both in addition included 25 units of sheltered accommodation for elderly persons. After a Public Enquiry into the proposal, an Inspector appointed by the Secretary of State recommended in 1990 that planning permission be granted. By decision letter dated February 21, 1991, however, the Secretary of State disagreed with the Inspector’s recommendation and dismissed the appellant’s appeals against the refusal of planning permission. His reasons for doing so are central to the issues raised on this appeal and I shall shortly have to quote extensively from his decision letter. Meantime, let me complete the history.
- 8 In 1992, the draft Berkshire Structure Plan was deposited (a Plan ultimately adopted in November 1995). This required the respondents to embark on the preparation of a fresh Local Plan. The Structure Plan excluded Poundfield (as being within the settlement of Cookham Rise) from the Metropolitan Green Belt and stated:

“Adjustments to the existing Green Belt boundaries may be made only through local plans to correct minor local inconsistencies.”

- 9 It has never been suggested that the boundary alteration impugned in these proceedings could be categorised as a “minor local inconsistency”.
- 10 In April 1993, the respondents published their consultation draft for the new Local Plan. Their response to the Secretary of State’s 1991 decision was to designate the two main fields to the east of Poundfield Lane as Areas of Important Urban Open Space (Polic R1: a presumption against proposals which would result in the loss of “existing areas of important urban open land”), and to extend the Cookham Conservation Area to include the area to the west of the Lane. On consultation, however, a number of representations suggested Green Belt status for the whole site. In November 1993, Council officers reported to committee:

“The Council has received a considerable number of comments proposing that Poundfield be included in the Green Belt, particular as the Secretary of State has given no support on appeal to the use of the site for housing. In the light of this appeal decision, and other considerations, it seems logical to include the area within the Green Belt.”

- 11 Thus it was that the deposit draft of the local plan published in March 1994 identified the site within the Green Belt. The appellant’s objections to this were, as stated, heard in 1995 but rejected by the Inspector in his subsequent Report which recommended no modification to the plan. The Inspector’s Report is another document to which I shall shortly have to return at some length.
- 12 The draft of the Plan published in June 1998 following the respondent’s adoption of the Inspector’s recommendation said this:

“Poundfield, Cookham—This large open site lies adjacent to Green Belt land. Elsewhere in the Borough the Green Belt boundary has been drawn tightly around the built-up area. In the light of the 1990 appeal decision, refusing permission for residential development, it is logical and appropriate to include this area within the Green Belt.”

The Secretary of State’s 1991 decision

- 13 In his decision letter of February 21, 1991, the Secretary of State “share[d] the Inspector’s view that the site is not countryside”, agreed with the Inspector that there was “in excess of five years’ supply of housing land in Windsor and Maidenhead without recourse to the appeal site,” noted that the site “is excluded from the surrounding Metropolitan Green Belt in the 1985 Green Belt Local Plan, being within the settlement of Cookham Rise”, and “is proposed as housing land in the 1985 deposit draft of the Maidenhead and District Local Plan”, and considered that that allocation as housing land was “in accordance with the housing policies of the replacement Berkshire structure plan and create[d] an added presumption in favour of development of the house for housing”. His decision letter then continued:

“He takes the view that the main issues in these appeals are whether the site is important to local amenity and, if so, whether amenity considerations outweigh the added presumption in favour of the proposals through the allocation of the site as housing land in the draft local plan. 8. On amenity issues, the Inspector considers that the site is not entirely

rural and is not of a quality which could be called countryside. It has become semi-rural and more enclosed by buildings, gardens and trees. The basic characteristic of the site is one of open ground mainly surrounded by houses interspersed by trees. From the Moor (a National Trust property) and more distant viewpoints, the grassland of the site can be seen above and between buildings. There has long been development enclosed by the site at Englefield House which has been consolidated by a stable conversion and new dwelling next to it. The proposed development would change a semi-rural and sparsely developed space to one of more verdant and suburban character, complete with estate roads, new roundabouts and car parks. (The Secretary of State takes 'more verdant' in this context to imply a residential area landscaped with trees, shrubs and lawns). It would fundamentally change the nature and character of the site. The Inspector considers that the nearby Cookham Conservation Area is attractive though not exceptional and has buildings of mixed age. The openness of the site does not separate the conservation area from Cookham Rise. Such a large housing development near the conservation area boundary is bound to have some effect on its quality, particularly so with the older houses and listed buildings on The Pound and certainly with the view north up Terry's Lane. From the conservation area the presence of new buildings would be apparent between existing buildings and would confirm its increasingly, albeit verdant, suburban quality. It would not however make it urban. The Secretary of State agrees with these views of the Inspector on amenity issues.

9. Applying these views the Inspector concludes that the two outline schemes would not necessarily be unattractive or inconsistent with the pattern and layout of houses as has now emerged in and around the site, including the conservation area. He cites the low density of the proposed development, landscaping conditions and the grading of densities as mitigating features of the proposals. He concludes that the surroundings would not be so visually harmed as to lead to refusal.

10. Although the Secretary of State agrees with the views expressed by the Inspector on the amenity issues as summarised in paragraph 8 of this letter, he considers that there are two further matters relevant to the amenity of the locality to which he should direct his attention.

11. The first concerns the six Grade II listed buildings in the vicinity. The Secretary of State is required by section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving the setting of listed buildings. As noted in paragraph 8 of this letter, the Inspector considers that such a large development as that proposed is bound to have some effect on the quality of the conservation area, particularly so with the older houses and listed buildings on The Pound and certainly so with the view north up Terry's Lane. The Secretary of State notes that the listed Old Farm House is on the corner of that lane and The Pound, and that the listed Pound Cottage (outside the conservation area) is further up the lane with, according to the map submitted in evidence by the Cookham Society, its curtilage separated from the appeal site by a tennis court. The Inspector does not comment directly on the effect of the proposed development on the listed Englefield, although he describes the building and notes that development at the site has been consolidated

by a stable conversion and new dwelling next to it. It is argued on behalf of the Cookham Society that Englefield House would lose its open setting and be absorbed into a suburban environment. The Secretary of State agrees with that argument, subject to noting the additional development at the site which is not in his view extensive.

12. The Secretary of State considers that the openness of the appeal site is an important part of the setting of these listed buildings, which from their descriptions were originally set in a village or rural, rather than a town or suburban, environment. He notes the Inspector's views on the progressive suburbanisation of the locality, and agrees that this has occurred. However, from the evidence before him he concludes that the process has not been carried so far as to remove the desirability of preserving the remaining openness of the setting of these listed buildings, to which the appeal site contributes a large part. He considers that the quality of openness contributed by the appeal site would be lost, even with a low density development of the nature proposed. In his view the proposed development would create a far less satisfactory setting for the listed buildings than does the present setting, and in this he differs from the Inspector. The Secretary of State concludes that the proposed development would seriously detract from the setting of these six listed buildings.

13. Secondly, in addition to views into the site, the Secretary of State considers that he should weigh the significance of views from within the site, since such views can be an important asset in terms of the amenity of a site. In his conclusions the Inspector mentions that the site can be seen over and between buildings from the Moor and more distant viewpoints, but he does not take the obverse into consideration. It is argued, however, on behalf of the Cookham Society that this is a fine site with long views. It is pointed out that the site has been painted by Stanley Spencer, and claimed that views would disappear as a result of the proposed development. A photographic panorama including a view in the same direction as that in Spencer's 'Poundfield, Cookham' has been submitted in evidence by the Society. The Secretary of State recognises the development which has taken place since 1935, but considers that the main features of the view remain the same and still qualify the site as an amenity to be valued both for the Spencer connection and for itself. That this amenity can be enjoyed by the public is apparent to him by the public footpath marked on the map submitted in evidence. The Secretary of State considers that the views from the site would at least be seriously obstructed by the proposed development and that the present and, to him, congruous foreground which consists of pasturage would disappear.

14. Returning to the Inspector's conclusions on amenity issues, the Secretary of State considers that on the basis of the Inspector's comments as summarised in paragraph 8, the site is important to the amenity of the locality although, as far as the conclusions summarised in paragraph 9 only are concerned, he agrees that amenity considerations do not outweigh the added presumption in favour of the proposed development through the allocation of the site as housing land in the draft local plan.

15. However, taking into account the additional considerations set out in paragraphs 11 and 13 of this letter, in the Secretary of State's view the

draft local plan considerations and the benefits of the proposals are outweighed by the damage to local amenity which he concludes would be greater than does the Inspector. Decisions on previous planning appeals in the locality, which are either old or relate to lesser proposals, do not persuade him otherwise.”

- 14 In the result he disagreed with the Inspector’s recommendations that the appeals be allowed and instead dismissed them.

The Inspector’s report in 1997

- 15 This again I must quote at length. The Inspector’s conclusions upon the appellants’ objections to the inclusion of Poundfield within the existing Green Belt were as follows:

“2.36 The planning history of the site is crucial. It has been the subject of a variety of applications for residential development, a number of which have been dismissed on appeal. Nonetheless, until 1991, it would have been reasonable to infer for the appeal decisions that the principle of development would be acceptable, provided that problems of access could be overcome. Indeed, in responding to comments made on the draft Green Belt Local Plan, the County Council said that the site’s ‘suitability for development has been established by a series of appeals (subject to the resolution of access difficulties), and thus its transfer to the Green Belt is not considered appropriate.’ At the same time, the non-statutory Maidenhead and District Local Plan was describing the site as offering ‘the only significant opportunity for residential development within the Plan area to the north of Maidenhead.’

2.37 In 1991 however, the then Secretary of State dismissed a series of four appeals on the grounds that all other considerations were outweighed by the damage which the proposals would cause to local amenity. In particular, he identified the loss to development of the open setting and a number of listed buildings and of the openness allowing distant views from within the site which are available from the public footpath which crosses it.

2.38 The Council’s initial response, in the consultation draft of the Local Plan, was to designate the two main fields to the north and south of Englefield House on Poundfield Lane as Areas of Important Urban Open Space (Policy R1) and to extend the Cookham Conservation Area over part of the site. The decision to add the site to the Green Belt was made at the deposit stage as a result of representations received during the consultation exercise.

2.39 The current, wider policy background against which that history should be assessed is that detailed Green Belt boundaries shown in adopted local plans should be altered only exceptionally (PPG 2 para. 2.6), while the Berkshire Structure Plan expects the boundaries set out in the Green Belt Local Plan to be retained except for minor adjustments to correct local inconsistencies (Policy C3 & para. 5.12).

2.40 The Structure Plan does not indicate what it would regard as a minor adjustment, but, in the local context of Cookham Rise, I consider it unlikely that the addition of as much as 6 ha to the Green Belt would satisfy any reasonable interpretation of the term. I must therefore decide whether there are any other exceptional circumstances which support the Plan’s proposal.

2.41 On the evidence, there have been no material changes in the physical characteristics of the site or its setting since the adoption of the Green Belt Local Plan in 1985. The key factor, in my opinion, is the 1991 appeal decision and its perceived implications.

2.42 It is clear that, in deciding to exclude the site from the Green Belt in 1985, the County Council had identified access problems as the only obstacle to its development; it did not have before it an appeal decision which identified damage to local amenity as the critical issue. Whether such a decision would have resulted in a different assessment of Poundfield in 1985 can now be only a matter for conjecture, but I consider that it does at least justify the re-opening the question of the site's status by the Borough Council. I am somewhat surprised that the consultation draft of the Local Plan did not reflect its present view, but there is nothing improper in the Council amending a particular element of the Plan in the light of the representations which it received.

2.43 It is necessary to go further however, if the 1991 decision is to qualify as an exceptional circumstance which dictates that the Green Belt boundary should be revised. In my opinion, the decision must be shown to give no support to development, the site itself must fulfil a Green Belt purpose and the boundaries proposed must be appropriate.

2.44 On the first issue, I accept that the Secretary of State was considering only the particular applications which were before him, but I believe that the decision letter contains strong indications of his views about the principle of development. In addressing the question of the setting of the listed buildings within the site and on its periphery, para. 12 of the letter stresses 'the desirability of preserving the remaining openness of [their setting], to which the appeal site contributes a large part.' It goes on to say that the Secretary of State 'considers that the quality of openness contributed by the appeal site would be lost, even with a low density development of the nature proposed.' At para. 13, referring to the views from within the site, he says that they 'qualify the site as an amenity to be valued both for the [Stanley] Spencer connection and for itself' and that they 'would at least be seriously obstructed by the proposed development and that the present and to him congruous foreground which consists of pasturage would disappear.' He concluded that such considerations outweighed the then local plan's allocation of the site for housing and he was not persuaded otherwise by decisions on previous planning appeals in the locality.

2.45 In my opinion, those concerns go beyond criticism of particular schemes; they indicate that the site should be retained in substantially its present form and they effectively set aside the reason why the County Council decided that it was not appropriate to transfer the site to the Green Belt.

2.46 Furthermore, I consider that the site satisfies the aim, purposes and objectives of national Green Belt policy. It has the essential quality of openness which the Secretary of State identified and, applying PPG 2, the proposed designation would assist in the purpose of restricting sprawl. I recognise that Cookham Rise may not be a large built-up area in national terms, but, in my view, it is reasonable for the Council to apply the same test to land on the edge of any built-up area which is large enough to have been excluded from the Green Belt. In addition, the site has a positive role to play in fulfilling the PPG 2's objectives for

the use of Green Belt land. In particular, it provides an opportunity for access to the open countryside, it would retain and enhance an attractive landscape and it would retain land in agricultural and related uses. I am also not convinced of the case for safeguarding the site for long-term development needs. This will be apparent from my conclusions elsewhere in this report on housing land supply and, in any event, the 1991 appeal decision would again act to prevent Poundfield being eligible.

2.47 I should stress that, for the purpose of applying both national and local Green Belt policies, I do regard the site as being on the edge of rather than within the built-up area of Cookham Rise. There are dwellings on Poundfield Lane and, within the existing Green Belt, on the northern side of Terry's Lane, but they are removed from the main residential area of the settlement and, in my opinion, they form too tenuous a thread of development to sever the links between the site and the countryside to the north and west. That being so, I consider that the revised boundary proposed by the Council is appropriate. In terms of the criteria set out in the Green Belt Local Plan, it not only reflects the true boundary of the wholly urban area, but it is also drawn tightly against the edge of the settlement.

2.48 In summary, I believe that there are exceptional circumstances which necessitate a revision of the Green Belt boundary in this instance. I have not reached that conclusion lightly because I recognise the need for such boundaries to be permanent wherever possible. However, the most recent appeal decision justifies a very different perception of the site than that which prevailed when the present boundary was set. It also means, in my view, that the continued omission of the site from the Green Belt would be an incongruous anomaly."

PPG 2

- 16 This is the final document from which it is necessary to quote at some length before the issues raised on this appeal can properly be identified and resolved. The paragraphs most directly in point are as follows:

"Intentions of Policy

1.4 The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the most important attribute of Green Belts is their openness. Green Belts can shape patterns of urban development at sub-regional and regional scale, and help to ensure that development occurs in locations allocated in development plans. They help to protect the countryside, be it in agricultural, forestry or other use. They can assist in moving towards more sustainable patterns of urban development (see paragraph 2.10).

Purposes of including land in Green Belts

- 1.5 There are five purposes of including land in Green Belts:
- to check the unrestricted sprawl of large built-up areas;
 - to prevent neighbouring towns from 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 urban land.

The use of land in Green Belts

1.6 Once Green Belts have been defined, the use of land in them has a positive role to play in fulfilling the following objectives:

- to provide opportunities for access to the open countryside for the urban population;
- to provide opportunities for outdoor sport and outdoor recreation near urban areas;
- to retain attractive landscapes, and enhance landscapes, near to where people live;
- to improve damaged and derelict land around towns;
- to secure nature conservation interest; and
- to retain land in agricultural, forestry and related uses.

1.7 The extent to which the use of land fulfils these objectives is however not itself a material factor in the inclusion of land within a Green Belt, or in its continued protection. For example, although Green Belts often contain areas of attractive landscape, the quality of the landscape is not relevant to the inclusion of land within a Green Belt or to its continued protection. The purposes of including land in Green Belts are of paramount importance to their continued protection, and should take precedence over the land use objectives.

2. Designation of Green Belts

2.1 The essential characteristic of Green Belts is their permanence. Their protection must be maintained as far as can be seen ahead.

Defining Boundaries

2.6 Once the general extent of a Green Belt has been approved it should be altered only in exceptional circumstances. If such an alteration is proposed the Secretary of State will wish to be satisfied that the authority has considered opportunities for development within the urban areas contained by and beyond the Green Belt. Similarly, detailed Green Belt boundaries defined in adopted local plans or earlier approved development plans should be altered only exceptionally. Detailed boundaries should not be altered or development allowed merely because the land has become derelict.

2.7 Where existing local plans are being revised and updated, existing Green Belt boundaries should not be changed unless alterations to the structure plan have been approved, or other exceptional circumstances exist, which necessitate such revision.

New Green Belts

2.14 Proposals for new Green Belts should be considered through the Regional/Strategic Guidance or Structure Plan process in the first instance. If a local planning authority proposes to establish a new Green Belt, it should demonstrate why normal planning and development control policies would not be adequate, and whether any major changes in circumstances have made the adoption of this exceptional measure necessary. It should also show what the consequences of the proposal would be for sustainable development.”

The Three Grounds of Challenge

- 17 Three arguments are advanced by Mr Village for the developers in criticism of the Inspector’s approach. First, he contends that the Inspector

failed to apply the very stringent test imposed by paragraph 2.7 of PPG 2, the requirement that before existing Green Belt boundaries can be revised there must be not only exceptional circumstances but exceptional circumstances such as to “necessitate” the revision. The Inspector, submits Mr Village, failed to address the second limb of that test, the question of necessity.

18 Secondly, he contends that there was on the facts of this case no sufficient basis upon which the Inspector could properly find the test of necessity (assuming he addressed it) satisfied.

19 Thirdly, he contends that the Inspector wrongly took into account the objectives of designated Green Belt land, whereas paragraph 1.7 of PPG 2 expressly forbids this.

1. The Test of Necessity

20 I can deal with this argument very briefly. Certainly the test is a very stringent one. The terms of paragraph 2.7 are plain: unless there are approved alterations to the Structure Plan (and here there are not) there must be other exceptional circumstances which necessitate revision of an existing Green Belt boundary. And this, indeed, reflects what Purchas L.J. said in *Carpets of Worth Limited v. Wyre Forest D.C.* [1991] 2 P.L.R. 84, 94:

“As it directly prejudices land owners in the otherwise proper development of their land, an extension to the Green Belt should not be brought into effect until it can be justified directly by those purposes for which the Green Belt is designed. There must, therefore, be an inhibition in extending the Green Belt so as to avoid sterilising unnecessarily neighbouring land ... just as much as reduction in the boundaries of the Green Belt, which would prejudice the purposes of that Green Belt, must also be made only in exceptional circumstances. On this basis I think that the general concept of the advice in the circulars is that once a Green Belt has been established and approved as a result of all the normal statutory processes it must require exceptional circumstances rather than general planning concepts to justify an alteration. Whichever way the boundary is altered there must be serious prejudice one way or the other to the parties involved.”

21 To my mind, however, there is no reason to doubt that the Inspector had these considerations well in mind in deciding the present case. Mr Village fixes principally upon the sentence in paragraph 2.43 of the Report:

“It is necessary to go further, however, if the 1991 decision is to qualify as an exceptional circumstance which dictates that the Green Belt boundary should be revised.”

22 That sentence, he submits, postulates that exceptional circumstances of themselves will dictate a revision so that the Inspector never came to address the separate question of necessity.

23 I would reject this argument. Paragraph 2.7 of the Guidance should be regarded as expressing a single composite test: circumstances are not for this purpose exceptional unless they *do* necessitate a revision of the boundary. That necessity is the touchstone by which to determine whether the circumstances are exceptional or not. No point would be served by adopting a two-stage approach to the test. In any event it is surely plain from paragraph 2.48 of his Report that the Inspector here did think necessity as such established. Not only did he “believe that there are exceptional

circumstances which necessitate a revision of the Green Belt boundary in this instance”, but he expressly “recognise[d] the need for such boundaries to be permanent wherever possible”.

- 24 I would accordingly, in common with the judge below, reject this first ground of challenge.

2. Was the Inspector entitled to find the test of necessity established?

- 25 This is an altogether more difficult question and one which inevitably involves consideration of just what in this context necessity means.

- 26 As the Inspector made plain in paragraphs 2.41 and 2.43 of his Report, the critical question arising was whether the Secretary of State’s 1991 decision was of itself an exceptional circumstance necessitating the revision of the boundary to include the appeal site. True, paragraph 2.43 refers also to the need of the site to fulfil a Green Belt purpose and for the proposed boundaries to be appropriate but, as Mr Village rightly points out, these are merely pre-conditions to the inclusion of land within the Green Belt in any event; neither of them can in itself constitute an exceptional circumstance.

- 27 The relevance of the 1991 decision is addressed in paragraph 2.44 and 2.45 of the Report; it is in those two paragraphs and also, I think, the last two sentences of paragraph 2.48, that the Inspector explains why he regards the 1991 decision as requiring Poundfield henceforth to be included within the Green Belt.

- 28 In paragraph 2.44, the Inspector reminds himself that the Secretary of State was concerned only with a specific appeal in respect of two particular housing development schemes, but then identifies and emphasises two particular aspects of the Secretary of State’s reasoning which seem to militate generally against development and in favour of keeping the appeal site open. These had already been foreshadowed in paragraph 2.37 of his Report: first would be the loss through development of views into the site—the open setting of a number of listed buildings (the subject of paragraphs 11 and 12 of the 1991 decision letter); secondly, the loss of views out of the site—the openness which at present allows distant views to those using the public footpath across the north field (paragraph 13 of the decision letter).

- 29 Paragraph 2.45 then states the Inspector’s central conclusions which are, first, that these considerations in favour of openness indicate that the site should never be developed; secondly, that this in turn invalidates the original decision to exclude the site from the Green Belt, a decision based on its apparent suitability for residential development.

- 30 The end of paragraph 2.48 expresses the Inspector’s apparently consequential view that, assuming the site must now remain undeveloped, it would be “an incongruous anomaly” not to include it within the Green Belt.

- 31 Although Mr Village challenges this approach from a number of standpoints, his principal contention is simply that the Inspector has read altogether too much into the 1991 decision. This of itself, he submits, cannot legitimately be said to necessitate the inclusion of the land within the Green Belt. The Inspector had no sufficient basis to regard the decision as requiring “the site [to] be retained in substantially its present form”, at any rate if by that he meant (a) the whole site and (b) permanently, and nothing short of this could justify the decision—see, for example, paragraph 2.1 of PPG 2.

The 1991 decision letter, Mr Village submits, said little if anything about that part of the site west of Poundfield Lane; not all of north field was involved in the Spencer painting or the views from the public footpath; and only the south field fell within the Cookham Conservation Area and provided the setting for the listed buildings.

32 In short, the Secretary of State was concerned solely with the specific planning schemes on appeal before him, and the amenity considerations which in the end tipped the balance against them cannot, Mr Village argues, be translated into a decision in principle to refuse for all time any development whatever on any part of the site. True, Mr Village acknowledges, those proposed schemes were characterised as “low density development” (see paragraphs 9 and 12 of the decision letter). They were, however, recognised also to constitute “large housing development” (see paragraphs 8 and 11 of the decision letter) and at the end of paragraph 15 of the letter the Secretary of State expressed himself unpersuaded by certain planning decisions in the locality for the very reason that they “relate to lesser proposals”, *i.e.* involved smaller development schemes.

33 Similarly, I think Mr Village could argue, it is one thing to have said in 1991 that there was “in excess of 5 years’ supply of housing land in Windsor and Maidenhead without recourse to the appeal site”, clearly a factor which contributed to the Secretary of State’s decision to refuse the planning permissions then sought; quite another to suggest that there will always be sufficient housing so that the amenity considerations will invariably tip the balance the same way.

34 Another argument advanced by Mr Village is that the Secretary of State’s conclusion as to the desirability of openness was in the specific context of listed buildings settings and views out of the site. No doubt it could be prayed in aid to some extent in the very different context of determining Green Belt boundaries. There would, however, need to be other considerations too before such a boundary change could properly be adjudged necessary. Indeed, submits Mr Village, the test of necessity should not be held satisfied unless the respondent authority could “demonstrate why normal planning and development control policies would not be adequate”. If, as paragraph 2.14 of PPG 2 provides, a local planning authority have to satisfy this test before a new Green Belt is established in the first place, surely they should have to do so to justify the exceptional course of later *altering* the boundary: paragraph 2.14 is, he submits, applicable by analogy and, indeed, *a fortiori*. Not only, moreover, was there no such attempt to satisfy that test but clearly it could not be satisfied. Mr Village submits that no better example than the present case could be found of existing development policies being of themselves adequate to safeguard the land.

35 Mr Stoker for the respondent Council invites us to reject these arguments and to uphold the Inspector’s recommendation on the same basis as did the Deputy Judge below. Mr Lockhart-Mummery in paragraph 40 of his judgment identified “two essential questions” as arising “on the role of the 1991 decision” upon which the Inspector relied:

“The first is: did the Inspector reach a conclusion on the meaning or effect of the 1991 decision letter which he was not entitled to reach, as being unreasonable or perverse? The second is whether the 1991 decision letter was capable of containing material relevant to the existence of an exceptional circumstance, for the purposes of definition of Green Belt.”

- 36 As to the first question, Mr Lockhart-Mummery thought the Inspector “entirely entitled” to reach his conclusion on the effect of the 1991 decision. As to the second question he said this:

“45. As to the second question I have raised, the decision letter was, in my judgment, so capable. The Secretary of State was manifestly valuing the openness of the site in two specific contexts: that of listed buildings and their setting, and important or historic views. The conclusions were clearly directed to those specific interests of acknowledged importance at the time, and were in that context. However, they are clearly relevant, in my judgment, to the later judgment now being made as to the importance of openness in another context. In my judgment, those conclusions were capable of amounting to an exceptional circumstance, which was relevant for the purposes of the judgment to be made under paragraph 2.7 of PPG 2, and the Inspector’s conclusions thereon.”

- 37 As to Mr Village’s contention that paragraph 2.14 of PPG 2 should be applied by analogy, Mr Lockhart-Mummery said:

“I see no requirement in law—or as a matter of policy—to apply that test to the quite different circumstances arising on the adjustment of an existing Green Belt boundary.”

Conclusion on Ground 2

- 38 Although I have not found this an altogether easy point I am in the end persuaded by Mr Village’s submissions that the 1991 decision could not of itself create the necessity for this Green Belt revision.

- 39 It must, of course, be recognised that PPGs have no formal statutory force and are not to be construed and applied as if they had. The only statutory obligation on the Local Planning Authority (and in the present case, of course, on the Inspector) is to have regard to them. All this too was pointed out by Purchas L.J. in the *Carpets of Worth* case (at p. 88). That said, the Guidance must be given some reasonable meaning and be properly understood by those charged with forming the relevant planning judgment.

- 40 I would hold that the requisite necessity in a PPG 2 paragraph 2.7 case like the present—where the revision proposed is to *increase* the Green Belt—cannot be adjudged to arise unless some fundamental assumption which caused the land initially to be excluded from the Green Belt is thereafter clearly and permanently falsified by a later event. Only then could the continuing exclusion of the land from the Green Belt properly be characterised as “an incongruous anomaly”. The Secretary of State’s 1991 objection to development was neither sufficiently long-term nor sufficiently clearly applicable to all possible development on all parts of the site to be capable of constituting such an event, still less when it seemed of itself to demonstrate the sufficiency of existing planning controls to safeguard the various amenity interests identified.

3. Where the objectives of Green Belt land wrongly considered?

- 41 Mr Village’s two-stage argument under this head is (a) that when deciding whether to include land within a Green Belt only the *purposes* of such inclusion (identified in PPG paragraph 1.5) can be taken into account, not

the *objectives* of the use of such land once included (paragraph 1.6); and (b) that paragraph 2.46 of the Inspector's Report shows him nevertheless to have had regard to *both*.

- 42 Paragraph 1.7 of PPG 2 is not as clearly drafted as it might have been. Its concluding sentence, with its reference to the purposes having "paramount importance" and taking "precedence" over objectives, perhaps suggests that both may be relevant (no doubt with purposes carrying the day if there is a conflict). That, however, I am satisfied, is not what the paragraph means. As its opening sentence states, when deciding whether to include land in a Green Belt, the question whether its subsequent use would meet the specified objectives is "not itself a material factor". This, moreover, is emphasised in the very next sentence by the express example given in which the objective is stated simply to be "not relevant to the inclusion" of the land.
- 43 I would accordingly disagree with the view of the judge below expressed in paragraph 49 of his judgment:

"Whilst, as a matter of policy, paragraph 1.7 advises that fulfilment of the objectives is not 'in itself' a material factor and designation, it is another matter to say that to have regard to those matters would be legally irrelevant once—and provided—the primary judgment has been validly made by reference to the defined purposes of the land's inclusion in Green Belt. Indeed, paragraph 1.4 of PPG 2, itself, refers to those wider factors under the general heading of 'Intentions of Policy'."

- 44 That passage, it will be noted, misquotes paragraph 1.7: the position is not that the fulfilment of objectives is not "*in itself*" a material factor (for all the world as if when coupled with something else it could become so); rather it is that it "*itself*" is not material. Nor does it seem to me that paragraph 1.4 assists: the wider factors to which it refers are all to be found in paragraph 1.5 relating to "purposes"; it is not necessary to go to the subsequent "objectives" paragraph to find them.
- 45 It follows that in my judgment the Inspector strictly ought not to have had regard to the objectives for Green Belt land use at all and would have been well advised to omit the reference to "objectives" from the opening sentence of paragraph 2.46 of his Report and the passage half way down that paragraph reading:

"In addition, the site has a positive role to play in fulfilling the PPG 2's objectives for the use of Green Belt land. In particular, it provides an opportunity for access to the open countryside, it would retain and enhance an attractive landscape and it would retain land in agricultural and related uses." (These, of course, are three of the specific objectives of the use of Green Belt land identified in PPG 2 paragraph 1.6.)

- 46 For my part, however, I would not be inclined to hold the decision flawed simply on that account. Paragraph 2.6 as a whole I take to represent the Inspector's conclusion upon the second of the three conditions identified as having to be satisfied in paragraph 2.43—the condition that "the site itself must fulfil a Green Belt purpose". Reading the Report as a whole, it seems to me inconceivable that the Inspector, consistently with his other expressed views, could have found that condition unsatisfied had he ignored, as strictly he should have done, the role which the site, if and when designated Green Belt land, could play in fulfilling objectives. The reality, of course, is that the

objectives to some extent reflect the purposes of including the land in Green Belt in the first place.

- 47 Given, however, that I would quash the decision on the second ground of challenge this conclusion on the third ground becomes academic. Success upon it would in any event have been less beneficial to the appellants: it would have resulted in no more than a need to redetermine the dispute, in all likelihood to the same ultimate effect. If, however, we are now to quash the decision on Ground 2, there would appear to be no present basis for the inclusion of this site within the Green Belt.

Postscript

- 48 Even though, if my Lords agree, this site will now remain outside the Green Belt, the appellants can have small cause only to rejoice. Other rigorous planning controls will still apply to the land (that, indeed, was one of Mr Village's points) and there can be little expectation of any extensive planning permissions. The Cookham Society and others interested in this area need not be too concerned. It will, I suspect, be many years yet before Stanley Spencer's view of Poundfield becomes available only in the Southampton City Art Gallery.

- 49 I would allow this appeal and quash the Local Plan in so far as it relates to the appellants' land.

50 **LONGMORE L.J.:** I agree.

51 **THE MASTER OF THE ROLLS:** I also agree.

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H8 *Reporter*—Scott Lyness.