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Planning Statement

Replacement dwelling -

Fernlea, Buxton Road, Chinley, High Peak, SK23 6DT

for Messrs R Spicer & A Bains

17-434

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Project	: 17-434
Site address	: Fernlea, Buxton Road, Chinley, High Peak, SK23 6DT
Client	: Messrs R Spicer & A Bains
Date	: 22 November 2017
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1. Introduction

1.1 This planning statement has been prepared to accompany an application seeking full planning permission for the demolition of an existing dwelling and outbuildings and the construction of a replacement dwelling and garage at Fernlea, Buxton Road, Chinley.

1.2 This application follows the issue of a positive Certificate of Lawfulness in January 2017 for the construction of single storey rear and side extensions, rear dormer windows, porch, garage and hardstanding.

1.3 The statement will demonstrate that although the replacement dwelling would be materially larger than the existing dwelling and therefore inappropriate in the Green Belt as defined in paragraph 89 of the NPPF, there are very special circumstances to justify the grant of planning permission. These very special circumstances constitute the fallback position – the potential to complete the permitted development extensions and alterations.

1.4 It will be demonstrated that the permitted development fallback would have a greater impact on the character, appearance and openness of the Green Belt which would outweigh harm to the Green Belt through allowing the proposed replacement dwelling. In accordance with paragraph 14 of the NPPF, the presumption should be in favour of approval.

2. The application

2.1 The application seeks full planning permission for the demolition of the existing bungalow and outbuildings and its replacement with a single storey dwelling constructed partially on the footprint of the existing dwelling and that of the permitted development extensions and alterations.

2.2 The new dwelling would take advantage of the sloping site and would be set into the hill thus ensuring it is screened from the road. This would mean that the dwelling is partially underground and would be largely screened from the road frontage.

2.3 The approach to the design is set out in detail in the design and access statement. The applicants intend to create a highly sustainable building. The dwelling would incorporate the following features required to meet the Passivhaus Standard in the UK:

- Very high level of insulation.
- High performance windows with insulated frames.
- Airtight building fabric.
- 'Thermal bridge' free construction.
- Mechanical ventilation system with highly efficient heat recovery.
- Accurate design using appropriate modelling software.

2.4 Materials would be locally sourced in accordance with the following principles:

- All materials would be sourced from within the UK.
- The materials from the existing building and plot would be recycled on site where possible e.g. stone.
- For items pivotal to the look and feel of the building both internally and externally (e.g cladding, stairs, kitchen furniture, doors), both materials and artisan workers would be sourced from either within the Peak District National Park/High Peak or from within a 75 mile radius from Chinley

2.5 The applicants would like the building to be independent of the National Grid. This may not be possible due to the fewer daylight hours between November and January. However, the principle remains that, with the use of photovoltaic cells and batteries, the building shall be full energy self-sufficient for at least 9 months of the year. Detailed calculations of energy

consumption and power generation capacity allied to the latest developments in battery technology would define the final solution.

2.6 The new home incorporates green roofs and a living wall on part of the building side facing Charley Lane and also on the garage wall facing Buxton Road. The living wall would utilise plants that are highly absorbent of carbon dioxide to reflect the roadside location of the building.

2.7 Finally, the applicant intends to include rainwater harvesting whereby filtered rainwater is used for flushing toilets and for other non-consumption areas such as washing machines. Grey water would where possible be filtered for re-use in, for example, the irrigation of the garden.

2.8 In summary, the design seeks to produce a building of high architectural and construction merit using locally sourced materials and would set a benchmark for a sustainable building.

3. Context

Site location and description

3.1 The application site comprises a detached bungalow situated on the south side of the B6062 Buxton Road. The existing property is a three bedroom detached bungalow with detached outbuildings.

3.2 The site is bordered by agricultural land to the east, south and west and Buxton Road itself immediately to the north. There are no neighbouring properties which immediately adjoin the site.

Planning history

3.3 Outline planning permission was refused on 10 October 2014 for the construction of a bungalow with garage on the garden of Fernlea (HPK/2014/0445). This application was made before the applicants owned the site.

3.4 A prior notification application was submitted relating to the construction of two single-storey rear/side extensions at Fernlea. The prior notification application was submitted as required by condition A.4 of Schedule 2, Part 1, Class A of the GPDO 2015. The application was registered on 16 September 2016 under reference HNT/2016/0027. The council confirmed that prior approval was required and approved in a decision dated 28 October 2016.

3.5 A Certificate of Lawfulness of Proposed Use or Development was granted on 11 January 2017 for single-storey side/rear extensions, rear dormer window, front porch, roof lights, detached outbuilding and associated hardstanding areas (HPK/2016/0639).

Consultation and background

3.6 A pre-application enquiry regarding a replacement dwelling on the site was first made in 2016 (PAD/2016/0025). Following a negative response, the applicant explored alternative options for the site evidenced in the planning history above.

3.7 A second pre-application enquiry regarding a replacement dwelling on the site was made earlier this year (PAD/2017/0021). A response was received on 11 July 2017. The officer commented that:

> *"Notwithstanding that a replacement dwelling in the Green Belt is not necessarily inappropriate development, I would have concerns that the extent of the grassed embankment and the changes to the site contours together with the large south facing façade and projecting wings would be harmful to the openness of the Green Belt."*

3.8 The drawings have been substantially revised to take into account the comments of the planning officer and the Design Review Panel.

4. Policy context

4.1 Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires planning applications to be determined in accordance with the relevant development plan unless material considerations indicate otherwise. The National Planning Policy Framework (The Framework) and Planning Practice Guidance (PPG) are material considerations in all planning decisions.

National Planning Policy Framework (The Framework) (2012)

4.2 The emphasis of The Framework is on sustainable development, based on 3 inter-dependent roles that are economically, socially and environmentally based. Part of the social role is to provide a supply of housing required to meet the needs of present and future generations by creating a high quality built environment.

4.3 The presumption in favour of sustainable development means approving development proposals that accord with the development plan without delay.

Core Principles

4.4 Paragraph 17 sets out the core land-use planning principles that should underpin plan-making and decision-taking. Of relevance are the following:

- *"Always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings;"*
- *"Take account of the different roles and character of different areas, promoting the vitality of our main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it;"*

Requiring Good Design

4.5 Paragraph 56 states that *"The Government attaches great importance to the design of the built environment. Good design is a key aspect of sustainable development, is indivisible from good planning, and should contribute positively to making places better for people"*.

4.6 Paragraph 60 refers to planning policies and decisions that should not stifle innovation, originality or initiative through unsubstantiated requirements to conform to certain development forms or styles.

Protecting Green Belt land

4.7 Paragraph 79 states that "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".

4.8 Paragraph 87 states that "*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*".

4.9 The construction of new buildings is inappropriate development unless it falls within the exception categories as listed in paragraph 89. One of the categories is bullet point 4 that states:

> *"the replacement of a building provided the new building is in the same use and not materially larger than the one it replaces."*

Decision-taking

4.10 Paragraphs 186 and 187 require local authorities to approach decision making in a positive way to foster the delivery of sustainable development. In particular they should look for solutions rather than problems and should approve applications for sustainable development where possible. They should also work proactively with applicants to secure development that will improve the economic, social and environmental conditions of the area.

4.11 The Framework encourages early engagement in the form of pre-application discussions that have significant potential to improve the efficiency and effectiveness of the planning application system for all parties.

Determining applications

4.12 Planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise (para 196).

Development plan context

4.13 The development plan comprises the High Peak Local Plan adopted in April 2016. Relevant policies comprise:

- Policy S1 Sustainable Development principles
- Policy S1a Presumption in favour of sustainable development.
- Policy S2 Settlement Hierarchy
- Policy S6 Central Sub-area Strategy
- Policy EQ1 Climate Change
- Policy EQ2 Landscape Character
- Policy EQ3 Rural Development
- Policy EQ4 Green Belt Development
- Policy EQ5 Biodiversity
- Policy EQ6 Design and Place Making
- Policy EQ9 Trees, woodland and hedgerows
- Policy EQ10 Pollution Control and Unstable Land
- Policy EQ11 Flood Risk Management

4.14 Policies S1 to S6 are strategic policies which deal with the overall location and sustainable development principles for new development. Other policies are addressed in the planning considerations section below.

Other material considerations

Landscape Character Assessment Supplementary Planning Guidance (March 2006)

4.15 The purpose of the SPD is to provide guidance for the design of new developments and alterations to existing developments, including associated landscape design. It covers rural parts of the High Peak outside the Peak District National Park. The SPD identifies the site within the Settled Valley Pastures landscape character area.

Case law

4.16 We refer below to the interpretation of Green Belt policy within paragraph 89 of the NPPF relating to "materially larger" replacement buildings as determined in case law.

4.17 The case of *Tandridge DC v SoSCLG,* [2015] EWHC 2503 (Admin) (judgment attached at Appendix EP1) related to a challenge to an Inspector's appeal decision to grant planning permission for a replacement dwelling.

4.18 The judge stated at paragraph 56 that the case was to be determined on the basis of underlying policy.

> *"That is to allow a replacement for buildings which are constrained in their size in order to prevent greater impact on Green Belt openness"*

4.19 Paragraph 58 of the judgment states that in considering the "not materially larger" test the issue of comparative size is to be determined on the facts by reference to the objectives of Green Belt policy. It refers to the *Surrey Homes* case which states that the issue of "materially larger" does not always depend on a simple floorspace comparison but must be judged by reference to other factors which may affect openness. Paragraph 23 of *Surrey Homes* is quoted as follows:-

> *"…… the concept of whether a dwelling is materially larger can be assessed by reference to matters such as bulk, height, mass, and prominence. These are all matters going to the openness of the Green Belt. They are plainly all material considerations relevant to deciding on the meaning of the term in the context in which it arises, namely Green Belt policy".*

4.20 It was held in *Tandridge* (paragraph 65) that in determining the appeal for a replacement dwelling that would be **78% larger in terms of volume**, approximately **1m taller** but have a **22% smaller footprint** than the dwelling it would replace, the Inspector had followed due process. That is, the appeal Inspector reached a conclusion by comparing the physical dimensions, but also assessed the materiality of the size increase as per *Surrey Homes* (above).

4.21 The judge noted that the development plan did not set any volumetric or other standards for determining what is materially larger. We emphasise that the same is true of the development plan in this case. Similarly, the NPPF or NPPG does not provide detailed guidance on how "*materially larger*" should be considered.

4.22 The issue was also referred to at the end of the High Court judgment in *Feather vs SoS DCLG and Cheshire East Council* [2010] (Appendix EP2). The proposed replacement dwelling included a very large basement; as such, overall the replacement dwelling would be 230% larger in terms of floorspace than the existing. The challenge was successful because the council had been wrong to disregard the size of the basement when comparing the relative sizes of the existing and proposed dwellings. Nevertheless, in considering whether it would be perverse for anyone to conclude that such an increase in size would not be materially larger, Langstaff J's obiter comments at paragraphs 30 - 34 state:

> *"Whether it is "materially larger" has to be answered in accordance with the guidance given by the Court of Appeal; that is, primarily as a question of size. But it is not exclusively a question of size;* (paragraph 30)
>
> *"The expression "materially" invites a consideration of size in context; what is the relevant context? The relevant context necessarily has to be the object of and policies relating to establishing a Green Belt.* (paragraph 31)

4.23 The judge concluded that, in the circumstances, it would not have been perverse to conclude that the very large replacement dwelling was not materially larger than the existing.

4.24 In summary, the above establish that the issue of 'materially larger' hinges on factors that go beyond size alone. As well as purely spatial considerations such as floorspace, volume and height; perceptual considerations such as bulk, massing and prominence also form part of the assessment in determining whether the size increase would be material in the context of Green Belt policy objectives. These visual considerations will be influenced by the context in which the development would be placed.

4.25 Similarly case law, particularly the recent judgment in *John Turner v SoSCLG,* relating to the concept of Green Belt openness is also relevant to the case.

4.26 The Judgment in *John Turner v Secretary of State for Communities and Local Government and East Dorset Council*, a copy of which is attached at Appendix EP3, provides a very recent review of how to approach Green Belt matters and in particular the concept of openness.

4.27 Paragraph 14 of the Judgment addresses the concept of "*openness of the Green Belt*". It is stated that the concept of "*openness*" is not narrowly limited to a volumetric approach; it is open-textured and a number of factors are capable of being relevant when applying it to the particular facts of a specific case.

> *"Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs (in the context of which volumetric matters may be a material concern, but are by no means the only one) and factors relevant to the visual impact on the aspect of openness, which the Green Belt presents".*

4.28 The case continues in paragraph 15 that the question of visual impact is implicitly part of the concept of "*openness of the Green Belt*".

4.29 The above case law is a material consideration in assessing the current application.

5. Planning considerations

Green Belt – appropriateness of the development

5.1 The application site is situated within the Green Belt and involves the demolition of the existing dwelling and outbuildings and the construction of a replacement dwelling and garage.

5.2 Policy EQ3 of the Local Plan deals with rural development. It states that replacement dwellings will be allowed provided the replacement does not have a significantly greater impact on the existing character of the rural area than the original dwelling nor would it result in the loss of a building which is intrinsic to the character of the area. The existing house is not intrinsic to the character of the area. We address the impact on the character of the area later in the report.

5.3 Policy EQ4 of the Local Plan states that within the Green Belt, planning permission will not be granted for development unless it is in accordance with national policy.

5.4 Paragraph 89 of the Framework advises that the replacement of a building is not inappropriate providing the new building would be in the same use and not materially larger than the one it replaces. In this case there is a single dwelling and outbuildings. These would be replaced by a new dwelling and garage i.e. two new buildings in the same use as the existing.

5.5 The NPPF provides no guidance on what would be interpreted as 'materially larger'.

5.6 The table below summarises the scale and massing of the proposed new dwelling compared with the existing.

Table 5.1 – Comparison of existing and proposed

	Existing Dwelling and outbuilding (gross external)	**Proposed Dwelling (gross external)**	**% difference**
Footprint	160 sq m	310 sq m	+94%
Floorspace	160 sq m	310 sq m	+94%

5.7 In this case we consider that the proposed replacement dwelling is materially larger than the existing dwelling and it is therefore necessary to demonstrate very special circumstances.

Openness

5.8 Paragraph 79 of the NPPF states that the essential characteristics of Green Belts are their openness and permanence.

5.9 There is no definition of "openness" within the NPPF; however the issue has been considered by the courts. In the judgment in *Timmins v Gedling BC (2014 EWHC 654 (Admin))* (attached at Appendix EP4) "openness" was said simply to mean "an absence of any buildings or development" (paragraph 26). It was held (with particular reference to use of land) that:

> *"Any development constitutes an impairment of openness, at least to some degree."*

5.10 Therefore, the openness of the Green Belt is impaired by use of the land as a domestic garden and additionally by the built development within it.

5.11 This is further considered in the judgment of *Turner v Secretary of State for Communities and Local Government and East Dorset Council ([2016] EWCA Civ 466)* (see EP3). In the judgment of Turner, it is clarified that the "openness of the Green Belt" is not narrowly limited to a volumetric approach. The word "openness" is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs (in the context of which, volumetric matters may be a material concern, but are by no means the only one) and factors relevant to the visual impact on the aspect of openness which the Green Belt presents.

5.12 Having regard to the table above, the proposal would impact on the quantitative and qualitative aspects of the openness of the Green Belt when compared with the existing development on site.

5.13 However, we address the fallback position below and demonstrate that the dwelling proposed would result in a reduction in built form when compared with the permitted development fallback position. The fallback position would be more harmful to the character, appearance and openness of the Green Belt when compared with the proposed replacement dwelling.

5.14 Accordingly, whilst the proposed development would result in some loss of openness as compared with the existing situation there would be no loss of visual openness and a beneficial spatial impact when compared with the fallback positon.

Very special circumstances

5.15 Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In essence there is a requirement to assess the harm resulting from the proposal, outline and assess the very special circumstances and undertake a balancing exercise whereby the harm caused by the proposal is weighed against the very special circumstances.

5.16 The harm which arises in this case is the harm arising from the inappropriateness of the development (as the replacement building is considered to be materially larger) and the harm which would be caused to the openness of the Green Belt when compared with the existing.

5.17 The NPPF does not prescribe or define the scope of very special circumstances. The weight to be given to very special circumstances is therefore dependent upon the context of each individual case.

5.18 The very special circumstances in this case relate to the fallback position which, if implemented, would have a greater impact on the openness of the Green Belt than the application proposals.

5.19 The weight to be attributed to the fallback is determined in accordance with the legal principles set out in case law: *R v Secretary of State for the Environment and Havering BC [1998] Env LR 189*. This established 3 elements to the fallback test:

- Whether there is a fallback (i.e. a lawful ability to undertake the development);
- Whether there is a likelihood or real prospect of it occurring; and if so
- A comparison must be made between the proposed development and the fallback.

5.20 This test is referred to in the recent judgment in *Mansell v Tonbridge and Malling* [2016] EWHC 2832 (Admin) (subsequently upheld in the Court of Appeal) attached at Appendix EP5.

5.21 In this case, the applicants have had drawings prepared by an architect showing the alternative development that could be constructed using permitted development (PD) rights

and sought a Certificate of Lawfulness to confirm this. Therefore there is an alternative development which could be implemented as a fallback. The first stand of the above legal test is met.

5.22 The second strand of the test relates to the prospect of the development being carried out. There can be no doubt that the applicants wish to increase the size and modernise the accommodation at Fernlea. This is demonstrated by the application itself and also by the fact that the applicants had previously explored whether they could achieve what they wanted using PD rights.

5.23 The PD option would not be the applicants' first choice primarily because it does not offer the same opportunities as the replacement dwelling to provide a high quality, energy efficient home. Nevertheless, if the applicants are unable to obtain planning permission for a replacement dwelling, they would without doubt extend the dwelling using PD rights to get as close as possible to the additional accommodation they require.

5.24 The applicants have provided email confirmation that this would be their intention if planning permission cannot be obtained for a replacement dwelling of similar size. This is attached at Appendix EP6.

5.25 In this instance, the fallback position is more than just a theoretical prospect; there is a high probability of it occurring. It is clearly in the landowner's interest to construct the permitted development extensions and outbuildings if they were unsuccessful in obtaining planning permission for the proposed replacement dwelling.

5.26 In *Mansell* the weighting to be attributed to a fallback development was considered. In that case the LPA had granted planning permission for redevelopment of an agricultural building and a bungalow, with 4 large dwellings, justified by a fallback potential to undertake alternative development, including converting the agricultural building using PD rights. The decision was challenged by a neighbour on various grounds. In particular we refer to paragraphs 11 - 41 of the judgment.

5.27 The substance of the challenge in relation to the fallback issue is summarised paragraph 28, including that it had not been shown that there was any real prospect of the alternative development occurring as no application for prior approval had been submitted; and the fallback scheme would additionally involve development requiring planning permission, for

which no application had been submitted either. Consequently it was claimed to be no more than a theoretical prospect.

5.28 The judge stated that it was crystal clear from discussions between the council and the applicant's planning agent that the intention was to develop the site in one way or another. He found it wholly unrealistic to imagine that if permission was refused, the owner would not take advantage of PD rights to the fullest extent possible. In fact, he determined it would have been unrealistic to conclude that the interested party would do nothing to develop the site. The implication is clear – the fallback was more than a theoretical prospect, as the site had clear development potential, even though the details had not been approved.

5.29 Similar conclusions must be reached in this case. The existing dwelling 'underachieves' in terms of the site's potential in respect of the size, and value. Fernlea is situated in a very desirable part of the borough within close proximity to the services available in Chinley and Chapel-en-le-Frith but with 360 degree views of the open countryside. The applicants have had serious discussions with the architect about alternative permitted developments and have had plans drawn up, which exploit PD rights. Implementing the PD extensions would improve the size of the dwelling to provide accommodation more in line with expectations for the site and would also be financially viable. The email from the applicants makes clear that whilst the redevelopment scheme has advantages, as already mentioned should permission for the replacement dwelling be refused the applicants would revert to plan A of remodelling the house. The applicants would therefore be content with the PD scheme as a second option (fallback).

5.30 The LPA cannot choose to disregard this fallback, or attribute little weight to it, without good reason. There is no reason not to build the extensions given the circumstances of the case.

5.31 The second strand of the test relating to fallback is therefore met.

5.32 The third part of the test; the comparison between the proposed development and the fallback, is addressed below.

5.33 In terms of size, the permitted development extensions would result in a dwelling that would be similar to what is proposed in this application as set out below.

	Existing with permitted development (A)	Proposed replacement (B)	Difference (B-A)
Footprint	294m^2	310m^2	**+16m^2**
Floor area	360m^2	310m^2	**- 50m^2**

5.34 To summarise, the fallback development is **16% larger** in floor area than the development proposed in this application.

5.35 As already discussed, these spatial comparisons together with the visual impacts determine the overall impact on the openness of the Green Belt. This comparison has already been discussed in respect of the existing dwelling. Whilst the addition of the PD extensions would not affect the height of the existing building, the addition of two extensions on either side would increase the perceived width of the dwelling as compared with the existing, and also the proposed dwelling. The PD option would be more prominent in the street scene on the approach from Charley Lane and would impact adversely on the perceived openness of the Green Belt, as compared with both the existing and proposed dwellings.

5.36 The application is accompanied by a Visual Impact Study which provides accurate CGI imagery of both the fallback position and proposed. This document clearly shows that the fallback would be more prominent in both the street scene and the landscape having an impact on both openness and the character of the area.

5.37 Chinley, Buxworth and Brownside Parish Council were consulted as part of the Certificate of Lawfulness application reference HPK/2016/0639 and made the following comments which are of note with regard to the fallback position:

> *"Chinley, Buxworth and Brownside Parish Council is unable to comment on whether the proposals are lawful development. However, the resultant development would be an unsightly hotchpotch of extensions, additions and alterations of no architectural merit. We urge the Borough Council to negotiate either a more appropriate design solution or demolition and re-build to ensure a design in-keeping with the area is developed from the outset."*

5.38 The disjointed design of the PD option would detract somewhat from the appearance of the site. By comparison the proposed development would be a high quality design solution to enlarging the accommodation on the site. Furthermore, a large proportion of the replacement dwelling would be underground. Therefore, although there would be an increase in floorspace when compared with the existing, some of this floorspace would have no impact on the openness of the Green Belt or the visual amenity of the area.

5.39 Planning benefits of the proposed development as compared with the permitted development scheme are:

- The design and overall visual appearance of the proposed dwelling would be far superior to the fallback.
- The dwelling would appear less prominent in the street scene as it would be built into the existing contours on site. The fallback development would be constructed on a single plane corresponding with the building line of the existing rear elevation of the dwelling and visually prominent from the surrounding countryside

5.40 The above demonstrates that the fallback scenario would result in an increase in the amount of development on the site if planning permission was not granted for the replacement dwelling. Therefore, there would be a quantitative loss of openness. In terms of the qualitative impact on openness, we also consider that a perception of greater harm would arise from the fallback as compared with what is proposed in this application. Consequently the balance falls in favour of the application proposals on the basis of overall beneficial impact on the openness of the Green Belt.

5.41 It is also true to say that the permitted development would not appear as visually appealing as the proposed replacement. It would reduce the architectural quality of the street scene. Nevertheless it would provide the accommodation required by the applicants (and add value to the site) and as such its appearance would not reduce the likelihood of the development being carried out.

5.42 Conversely, the proposed development would replace the existing already badly extended dwelling, with a contemporary, high quality, architect-designed home. Good design is itself a key aspect of sustainable development, which weighs in favour of approval (NPPF para 56).

5.43 In comparing the respective impacts of the fallback and proposed developments, it is clear that the proposed development has advantages in policy terms (Green Belt and other policy

objectives) over the fallback. Accordingly, the third strand of the legal test in respect of fallback is met, and the existence of the fallback development must carry compelling weight in favour of the application proposal in this case.

5.44 Having regard to the above, significant weight should be given to the fallback option as it is a realistic and viable alternative to the development proposed. Furthermore, it would clearly be more harmful to the character, appearance and openness of the Green Belt compared with the proposed replacement dwelling. The fallback option is a significant material consideration and a very special circumstance to justify the approval of planning permission should it be concluded that the proposal is inappropriate development in the Green Belt.

Summary of very special circumstances

5.45 In summary, the permitted development extensions and the confirmed permitted development represents a valid fallback position. As indicated above, the application proposed would have less impact on the openness of the Green Belt in comparison with the fallback position.

Green Belt purposes

5.46 Referring back to the fundamental aim of Green Belt policy to prevent urban sprawl by keeping land permanently open and to protect the countryside, we do not consider that harm would be caused to the five purposes of including land within the Green Belt as set out in paragraph 80 of the NPPF:

- To check the unrestricted sprawl of large built-up areas - The proposal would have no impact in this respect;
- To prevent neighbouring towns from merging into one another - The proposal would not cause or contribute to the merging of any towns;
- To assist in safeguarding the countryside from encroachment - The proposal would be entirely contained within the curtilage of the existing dwelling, the use of the site would not extend further into the Green Belt and a significant proportion of the site would remain undeveloped.
- To preserve the setting and special character of historic towns - There would be no impact on the setting and special character of historic towns; and
- To assist in urban regeneration, by encouraging the recycling of derelict and other land - There would be no harm caused to urban regeneration initiatives elsewhere. The land is previously developed.

5.47 In summary, the proposal would have no impact on the purposes of including land within the Green Belt.

Design and visual appearance

5.48 The NPPF states at paragraph 59 that:

> *"Design policies should avoid unnecessary prescription or detail and should concentrate on guiding the overall scale, density, massing, height, landscape, layout, materials and access of new development in relation to neighbouring buildings and the local area more generally".*

5.49 The scale and design of the proposed dwelling would have no adverse impact on the character and appearance of the area. Indeed, there would be an improvement to the character and appearance of the site as a result of the proposed development.

5.50 It should be noted that paragraph 60 of the Framework states that:

> *"Planning policies and decisions should not attempt to impose architectural styles or particular tastes and they should not stifle innovation, originality or initiative through unsubstantiated requirements to confirm to certain development forms or styles".*

5.51 Policy EQ6 of the Local Plan deals with design and place making. It requires all development to be well designed and of a high quality that responds positively to both its environment and the challenge of climate change whilst also contributing to local distinctiveness and sense of place.

5.52 The proposal would result in a more compact form of development nestling into the hillside than the approved or existing (which is a material consideration), and is a high quality design befitting of the location and size of the property.

5.53 The design seeks to take account of the differing site levels and to take advantage of the extensive countryside views to the rear aspect. The revised design would improve the visual appearance of the site, although the dwelling would not be visible in the public realm. In respect of solar gain and optimizing views, the proposed dwelling would be better orientated than the existing and lawful schemes (i.e the fallback). The proposal would comply with the design guidance in the Framework and Policy EQ6 of the Local Plan.

Residential amenity

5.54 The dwelling is set within a large plot. The development would have no impact on the amenity of any neighbouring resident. There would be no conflict with policies in the development plan to protect residential amenity.

5.55 The proposal would provide a high standard of amenity for the future occupiers of the development.

Access and highways issues

5.56 There would be no change to the site access and no intensification of use of the site.

5.57 The existing access does not have sufficient space to turn a car meaning that vehicles have no option but to reverse into or out of the property, for which there is poor visibility.

5.58 Therefore there would be an improvement to highway safety as a result of the proposal.

Climate change and sustainability

5.59 As set out in section 2, the applicants are seeking to achieve a highly sustainable and energy efficient replacement dwelling. Policy EQ1 of the Local Plan sets out how High Peak seeks to achieve a low carbon future. The sustainability features which are proposed to be incorporated into the new dwelling would support the aims of Policy EQ1.

Landscape

5.60 Policy EQ2 of the Local Plan relates to landscape character. Map 3 shows that the site falls within the settled valley pastures. Policy EQ2 requires new development to be informed by, and sympathetic to the distinctive landscape character areas as defined in the Landscape Character SPD (amongst other things).

5.61 The landscape character SPD sets out design principles to enable applicants to think about how new development can be made to fit in with its surroundings. It states on page 37 that:

> *"This does not mean trying to replicate the traditional style but to promote buildings that fit in with it in order to maintain the strong local character and identity of this part of the High Peak. This does not rule out appropriate contemporary design that demonstrates a response to the landscape."*

5.62 Key features are:

- Properties are either isolated farmsteads or cottages clustered along the road.
- The rural landscape character must be considered when developing at the urban rural edge.
- Small groups of amenity trees around settlements and particularly farmsteads.
- The impact of hardstanding and other surfaces should be considered, including the colour, brightness and reflectivity of the surface and how it would appear from a distance.
- Development should be contained in low, gritstone, drystone walls.

5.63 The dwelling on site is already part of the landscape and comprises a 1927 built rendered bungalow with 1950s lean-to extensions and glazed sunroom to the rear. It is not intrinsic to the character of the area and is not worthy of retention.

5.64 The proposed dwelling responds to the scale of the landscape, being partially buried within it with a reduced impact on the character of the rural area when compared with the current building.

5.65 It is considered that the proposal would enhance the landscape character and the requirements of Policy EQ2 are met.

Trees, landscaping and ecology

5.66 The site would be appropriately landscaped upon completion of the development.

5.67 The application is accompanied by an ecology survey prepared by Rachel Hacking. No evidence of bat activity was found at Fernlea and the main dwelling and other outbuildings on site are considered to offer negligible bat roost suitability. The application is compliant with Policy EQ5 on biodiversity.

Ground conditions and flood risk

5.68 The site is already occupied by a residential dwelling and the proposed development would also comprise a single residential dwelling. There are no issues relating to pollution control or unstable land and the requirements of Policy EQ10 are met.

5.69 Furthermore, the site lies in flood zone 1 and there is no intensification of use on the site in any event. The requirements of Policy EQ11 on Flood Risk Management are therefore met.

6. Summary and conclusions

6.1 This application seeks full planning permission for the demolition of the existing dwelling and the construction of a replacement dwelling and garage at Fernlea, Buxton Road, Chinley. The replacement dwelling would be constructed on the site of the existing house.

6.2 The replacement dwelling would be materially larger than the existing building. The proposal would therefore be inappropriate form of development in the Green Belt and would not accord with paragraph 89 of the NPPF.

6.3 There are however very special circumstances to justify approval. The very special circumstances comprise the permitted development rear and side extensions and garage. The construction of the permitted development fallback would have a greater impact on the Green Belt than that proposed.

6.4 Paragraph 14 states that where development proposals accord with the development plan, they should be approved without delay. No significant and demonstrable harm has been identified. As such, planning permission should be granted in accordance with Section 38(6) of the Planning and Compulsory Purchase Act 2004.

7. Appendices

EP1. Tandridge DC vs SoSCLG [2015]
EP2. Feather vs SoS DCLG and Cheshire East Council [2010]
EP3. Turner vs SoSCLG and East Dorset Council [2016]
EP4. Timmins vs Gedling BC [2014]
EP5. Mansell vs Tunbridge and Malling [2016]
EP6. Email from applicants

EP1

CO/486/2015

Neutral Citation Number: [2015] EWHC 2503 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 24 June 2015

B e f o r e:

DAVID ELVIN QC
(Sitting as a Deputy High Court Judge)

Between:
TANDRIDGE DISTRICT COUNCIL

Claimant

v.

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

JASON SYRETT

Defendants

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WordWave International Limited
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(Official Shorthand Writers to the Court)

Mr S Stemp (instructed by Tandridge District Council) appeared on behalf of the **Claimant**
Ms I Tafur (instructed by Government Legal Department) appeared on behalf of the **First Defendant**
The **Second Defendant** appeared in person

J U D G M E N T
(As approved by the Court)

THE DEPUTY JUDGE (DAVID ELVIN QC):

Introduction

1. In this application brought under section 288 of the Town and Country Planning Act 1990, Tandridge District Council contends that the first defendant's inspector erred in law in granting planning permission for a new dwelling in the Green Belt as a replacement for a small group of existing buildings. The inspector's decision was given by a decision letter dated 22 December 2014 ("the DL"). That decision concerned two appeals by the second defendant on the same site referred to as Appeals A and B. The inspector refused permission for Appeal A but allowed Appeal B and granted permission subject to conditions. This challenge is concerned only with the grant of permission for Appeal B.

2. Mr Jason Syrett, the second defendant, who appears in person, also disputes the fairness of the procedure and contends that he was not properly served with the papers concerning the challenge in accordance with CPR Part 6.

3. I am grateful to both counsel, Mr Scott Stemp for the claimant and Miss Isabella Tafur for the Secretary of State, and indeed to Mr Syrett, for their clear and concise submissions.

4. Planning permission was sought by Mr Syrett from the Council for two alternative schemes on his land at Castleneau, Ricketts Hill Road, Tatsfield, Surrey ("the site"). The site currently includes a single storey double garage, access from a shared driveway, from which steps lead down around 10 metres to the middle of the site where a detached house is located. The house has three bedrooms and is part single and part two storey. Immediately adjacent to the house is a utility outbuilding, which is a single storey rendered building. Two timber storage sheds lie adjacent to the outbuilding.

5. In respect of Appeal B, Mr Syrett applied for planning permission to demolish the existing dwelling house, the utility building, the detached garage and a number of identified trees, and to construct a replacement dwelling house and driveway. The DL refers to the differences between the two schemes and I will deal with them in that

context. The Council refused permission for both schemes and in the case of the Appeal B scheme, the reasons given for refusal on 1 October 2014 were:

> i. "The proposed replacement dwelling would be materially larger than the dwelling it replaces. Furthermore the new driveway, by reason of its extent and form, would result in significant harm to the openness of the Green Belt. As such, the proposal constitutes inappropriate development in the Green Belt resulting also in a significant reduction in openness. It is considered that there are insufficient very special circumstances to clearly outweigh the harm by reason of inappropriateness and actual harm to the openness of the Green Belt. The proposal is therefore considered to be contrary to policy DP13 of the Tandridge local plan part 2 detailed policies."

6. The appeal was determined by written representations. There was a fundamental disagreement between the claimant and the second defendant as to the interpretation of national Green Belt policy in the National Planning Policy Framework ("the NPPF") at paragraph 89, which is replicated in policy DP13 of the Tandridge local plan which was adopted in July 2014. Policy DP13 provides for a number of exceptions to the normal Green Belt restrictions on inappropriate development, including that found at DP13(F):

> i. "F. The replacement of buildings within the Green Belt (outside the defined villages), where the proposed new building:
>
> b. Is in the same use as the building it is replacing;
>
> c. Is not materially larger than the building it is replacing; and
>
> d. Is sited on or close to the position of the building it is replacing, except where an alternative siting within the curtilage demonstrably improves the openness of the Green Belt."

7. This adds little, if anything, to the NPPF, which provides at paragraphs 87 to 89:

> i. "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.
>
> ii. 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.

iii. 89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:

8. Buildings for agriculture and forestry;

9. Provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;

10. The extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;

11. The replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;

12. Limited infilling in villages, and limited affordable housing for local community needs under policies set out in the local plan; or

13. Limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development."

14. The appeal here was run on the basis of the fourth indented paragraph of 89, i.e. -

    i. "The replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces."

15. The explanatory text of the local plan policy makes it clear that DP13 was intended to replicate the policy in the NPPF, and it is therefore plain that it should be interpreted consistently with it. Neither counsel urged me to take a different view, and it was therefore common ground that the issue before me is to be resolved by reference to paragraph 89 of the NPPF. In the case of bother versions of the policy, the claimant emphasised the use of the singular "building" in the relevant exception.

16. On appeal to the Inspector, the second defendant contended that this exception to inappropriate development in the Green Belt applied not only to single buildings but to groups of buildings which were to be demolished and replaced by a new dwelling. In this

case, it was proposed to demolish the three buildings which sat relatively close to each other as part of a single residential curtilage, as I have already described. It was argued that both in the case of Appeals A and B that the proposed new dwellings were "not materially larger" than the buildings proposed to be replaced.

17. The correct approach to Green Belt policy in the NPPF as compared to earlier versions of the policy, particularly in PPG2, has been considered twice recently by the Court of Appeal in Redhill Aerodrome Limited v Secretary of State [2015] PTSR 274 and R (Timmins) v Gedling Borough Council [2015] JPL 816, which dealt with different aspects of Green Belt policy in the NPPF - though neither were concerned with the specific issue before me. In Timmins at [24] Richards LJ made an observation of general application:

> i. "There is no dispute as to the correct general approach towards the interpretation of the NPPF. Policy statements of this kind should be interpreted objectively in accordance with the language used, read as always in its proper context, which is not to say that such statements should be construed as if they were statutory or contractual provisions (see per Lord Reed JSC in Tesco Stores Ltd v Dundee City Council [2012] UKSC 13, [2012] PTSR 983, at paragraphs 18-19). The NPPF is on the face of it a stand-alone document which should be interpreted within its own terms and is in certain respects more than a simple carry-across of the language in the guidance it replaced (see Europa Oil and Gas Limited v Secretary of State for Communities and Local Government and Others [2014] EWCA Civ 825, [2014] JPL 1259, in particular at paragraphs 15 and 32). But the previous guidance, in this case the guidance on Green Belt policy in PPG2, remains relevant. In Secretary of State for Communities and Local Government and Others v Redhill Aerodrome Limited [2014] EWCA Civ 1386 the Court of Appeal rejected a submission that "any other harm" in paragraph 88 of the NPPF had a narrower meaning than in paragraph 3.2 of PPG2, which would have made it less difficult than under PPG2 to establish the existence of very special circumstances justifying a development."

18. It is common ground here that the meaning of the replacement building exception should be approached in a similar manner to the earlier manifestation of the exception considered in R (Heath and Hampstead Society) v Camden LBC [2008] 2 P&CR 13. I will return to this point when considering the first ground of challenge.

19. <u>The Inspector's Decision</u>

20. At DL 5, the inspector identified the following issues, which are not criticised:

    i. "5. The main issues are:

21. Whether the proposals would be inappropriate development in the Green Belt;

22. The effect of the proposals on the openness of the Green Belt; and

23. If the developments are inappropriate, whether the harm, by reason of inappropriateness, and any or harm, would be clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify the developments."

24. The inspector then turned to the substance of the issues. I will refer to both appeals, since the approach to Appeal A also sheds light on the Inspector's decision in Appeal B:

    i. "6. The framework states that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. The construction of new buildings should be regarded as inappropriate development in the Green Belt. A number of exceptions are set out in paragraph 89. Of these, the parties agree that bullet four of this paragraph, allowing for the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces, is most relevant to the appeal proposal.

    ii. 7. The appeal schemes are for replacement dwellings and, as such, meet the first part of this criterion. The dispute between the parties centres on (a) whether it is appropriate for the demolition of the other buildings on the site, as well as the existing dwelling, to be included in any allowance for the size of the replacement dwellings and (b) whether the replacement dwellings are, therefore, 'materially larger' than the extant dwelling.

    iii. 8. The site is currently occupied by a single storey double garage, accessed from a shared driveway, from which steps lead down around ten metres to the middle of site where the house, a utility building and two sheds are located. The house is a three bedroomed, detached dwelling and is part single, part two storey.

    iv. 9. With regard to the first matter in dispute, notwithstanding the precise wording of bullet four, there is no reason why the principle of redevelopment should not apply to a group of buildings being replaced by one. Indeed, in my experience this approach to the

redevelopment of brownfield sites in the Green Belt is not unusual. The additional buildings in question, noted above, are domestic in scale, part of the same planning unit, clearly ancillary to the residential use of the existing house and not widely dispersed around the site. Thus, I am not persuaded that, in this instance, the loss of these ancillary buildings and the dwelling, with their replacement by a single appropriately sized dwelling, would be at odds with the fundamental aim of Green Belt policy, which is to keep land permanently open."

25. Having concluded that the policy exception applied in principle to more than one building, and having considered the relationship between those buildings by reference to the touchstone of Green Belt openness, the inspector then turned to consider the question of "not materially larger":

i. "10. Turning to the second matter, the total combined footprint of the existing house, garage and utility building, as set out in the appellant's statements, is around 195 square metres. No assessment appears to have been made for the footprint of the sheds. The total combined volume of the existing house, garage, utility building and sheds, which is not disputed by the Council, is cited as around 821 cubic metres.

ii. 11. Notwithstanding that they have been provided, the appellant has questioned the use of volumetric measurements as a means of assessing whether a building is materially larger than the one(s) it replaces. The Council has drawn my attention to another appeal decision, in which the inspector indicates that the Council has, in the past, used a 'rule of thumb' of up to 15 per cent uplift in volume as appropriate, although it is evident from correspondence between the Council and the appellant that volume increases of around 20 per cent may be acceptable. Notwithstanding these points, however, the adopted development plan does not set out any volumetric, or other, standards. Nor does it, or the framework, provide any detailed guidance on how 'materially larger' should be assessed. Thus, I agree with the inspector in the decision cited that this is, ultimately, a matter for the decision maker. In my view, the term has its ordinary meaning and an assessment should consider all of the relevant circumstances, which could include, among other things, the floor area, volume and form of the relevant buildings.

iii. 12. With regard to Appeal A, the footprint and volume of the proposed dwelling is given by the appellant as around 243 square metres and 1717 cubic metres respectively. The Council officer's

report cites a volume of 1760 cubic metres. However, even taking the smaller assessment into account, this would mean that the proposed dwelling would be around 25 per cent larger in terms of footprint, and result in an increase in volume of around 109 per cent, over the existing buildings. The dwelling would also, with the exception of the proposed swimming pool, be two stories with a pitched roof. This would have a ridge height around three metres higher than the existing dwelling. As such, although the proposal would sit in the same location as the existing dwelling and have no significant impact upon mature trees, it would result in a significant increase in bulk and mass over the existing buildings. Taking these factors in the round, I conclude that the proposed dwelling would be materially larger than those it replaces. It would, therefore, be inappropriate development in the Green Belt and I give this consideration substantial weight. It would also conflict with policy DP13 of the local plan part 2, which seeks to ensure, among other things, that new replacement buildings in the Green Belt are not materially larger than the building being replaced."

26. The inspector therefore concluded that Appeal A was inappropriate development and in conflict with policy. However, with regard to Appeal B, he reached a different conclusion:

i. "13. With regard to Appeal B, the footprint and volume of the proposed dwelling are assessed as around 152 square metres and 985 cubic metres respectively. However, the latter calculation excludes the space under the house, agreed as 475 cubic metres. How this space is utilised, be it for parking or a garden patio area, is moot. It would clearly be an integral part of the design and purpose of the building, used to support the first floor over it, albeit that it is not enclosed to all sides. Thus, its inclusion within the volumetric calculations, whatever its use, is appropriate.

ii. 14. This would mean that the proposed dwelling would have a volume of 1460 cubic metres. Although it would be around 78 per cent larger in volume than the existing buildings, it would be around 22 per cent smaller in terms of footprint. It would stand around one metre taller at its highest point than the dwelling that it replaces, yet its flat roofed design, long with the use of an extensive single storey element, would serve to break up its bulk and massing, reflecting the scale and form of the extant dwelling. In the context of this specific proposal, therefore, weighing the relevant factors in the balance I conclude that it would not be materially larger. Subsequently, it would pass the

exception test of bullet four of paragraph 89 of the framework. Thus, it would not be inappropriate development in the Green Belt. It would accord, therefore, with policy DP13 of the local plan part 2, which seeks to ensure, among other things, that new replacement buildings in the Green Belt are not materially larger than the building being replaced."

27. The inspector found that Appeal A would impact adversely on openness in that it:

    i. "Would be materially larger than the building it replaces, with its scale and mass increasing the amount of development on the site."

28. However, he reached a different conclusion with regard to Appeal B:

    i. "16. The proposal under Appeal B would, in purely volumetric terms, be larger than the dwelling it replaces. There would, therefore, be a small loss to openness. However, for the reasons I have set out above it would not, in my judgment, be in overall terms materially larger. Thus, openness would be preserved. Furthermore, I do not consider that such a small loss of openness justifies refusal, given the framework's identification of the appeal scheme as not inappropriate development in the Green Belt."

29. Having rejected the contention that his assessments were altered by a consideration of the proposed driveway or hard standing, he ended paragraph 17 as follows:

    i. "This being so it would be, in principle, not inappropriate development in the Green Belt in accordance with bullet 2 of paragraph 90 of the framework. I conclude that the proposal under Appeal B would not have an adverse effect upon openness."

30. He then turned to "other considerations" with regard to Appeal A, which did not cause him to alter his conclusion that Appeal A was harmful and should be refused but concluded that Appeal B should be allowed:

    i. "21. I have identified that the proposal under Appeal A would be inappropriate development in the Green Belt and, thus, harmful to it. The framework is clear that such harm should be afforded substantial weight. I have also concluded that the proposal would harm the openness of the Green Belt, which is a factor to which I also afford significant weight. I have considered the matters cited in support of the proposal but I conclude that taken together they do not clearly outweigh the harm that the scheme would cause. Subsequently, I do not consider that the very special circumstances

exist that are necessary to justify inappropriate development in the Green Belt. Thus, for the above reasons, and taking all other matters into consideration, I conclude that Appeal A should be dismissed.

ii. 22. I have found that Appeal B would be not inappropriate development in the Green Belt and would preserve openness. This being so, for the above reasons, and taking all other matters into consideration, I conclude that Appeal B should be allowed."

31. The issues

32. Mr Stemp on behalf of the Council argued:

a. The inspector erred in that he misconstrued the term "building" in the Tandridge local plan and the NPPF at paragraph 89 to include "buildings" and should have concluded that as a matter of law the policy meant that a proposed new building could only be compared with a single existing building. Mr Stemp contended that by adopting the approach he did, the inspector effectively adopted the "no greater impact" approach criticised by Carnwath LJ, as he then was, in the Heath and Hampstead case; and

b. The inspector reached an irrational conclusion in applying the "not materially larger" policy in reaching a conclusion to that effect, notwithstanding a 22 per cent decrease in the footprint of the proposed development over the existing buildings, a 78 per cent increase by volume over the existing buildings, and a 138 per cent increase by volume over the existing dwelling house.

33. Miss Tafur for the Secretary of State, with the support of Mr Syrett, resisted the challenge on the basis that the inspector correctly construed and applied Green Belt policy. On the first ground, she pointed in particular to the Green Belt context of the preservation of openness and that depending on the circumstances, this fundamental objective may be met, in some cases possibly better met, by allowing the replacement of a group of buildings by a single building. In the case of the second ground, she relied upon the court's general reluctance to interfere with planning judgments on the facts noting that there was nothing on the facts of this case which justified interference.

34. Discussion

35. I will not repeat the well-established principles of law which apply to the consideration of decision letters and whether they reveal an error of law; see for example Seddon Properties v Secretary of State for the Environment [1981] 42 P&CR 26, Clarke Homes Ltd v Secretary of State for the Environment [1993] 66 P&CR 263 and Lindblom J's more recent distillation of the applicable principles in Bloor Homes East Midlands Ltd v Secretary of State for Communities & Local Government [2014] EWHC 754 (Admin) at [19]. The interpretation of policy is a matter for the court, as noted by Richards LJ in Timmins, but the application of policy properly understood to the facts remains a matter for the judgment of the decision maker, subject to the court's supervision on Wednesbury grounds: Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 per Lord Reed JSC, especially at [17] to [19].

36. Here the apparently simple question is whether "building" should be understood as meaning only a single building and excluding any group of two or more buildings. I agree that this term, and its role as an exception to the general principle that new buildings are inappropriate development in the Green Belt, should be considered in its context of the NPPF as a whole and in the context of the Green Belt policies in particular: see Richards LJ in Timmins above at [24]. Paragraphs 79 and 80 of the NPPF set out the long-standing purposes of the Green Belt:

    i. "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 characters of Green Belts are their openness and their permanence.

    ii. 80. Green Belt serves five purposes:

37. To check the unrestricted sprawl of large built up areas;

38. To prevent neighbouring towns merging into one another;

39. To assist in safeguarding the countryside from encroachment;

40. To preserve the setting and special character of historic towns; and.

41. To assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

42. Mr Stemp submits that the approach to the fourth exception in paragraph 89 should focus precisely on the language used, namely the use of the singular "a building", which contrasts with the various uses of "building" or "buildings" elsewhere in paragraph 89. He accepted that the context of the NPPF has changed since PPG2, at least to the extent that the reference to "dwelling" in the former paragraph 3.6 of PPG2 has been replaced by "building". To that extent it is wider than the former policy, which only applied to dwellings. He also relied on the fact that there is no reference to making any judgment under the fourth exception by reference to the effect on the openness of the Green Belt, which he contrasts with the second and sixth exceptions, which do refer to it in terms.

43. Mr Stemp relied on Timmins and the rejection there of the unsuccessful attempt to imply a category of appropriate development of material changes of use which had been present in PPG2 but was omitted from the NPPF. He relied in particular on Richards LJ's judgment at [24] (quoted above) and at [31]:

> i. "31. ... The drafting of the NPPF could have been clearer but it seems to me that paragraphs 89 and 90 are properly to be read as closed lists. Paragraph 89 states the general rule that the construction of new buildings is inappropriate development and sets out the only exceptions to that general rule. Paragraph 90 sets out other forms of development (mineral extraction, engineering operations, etc) that are appropriate provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. It is not stated expressly but is implicit that other forms of development apart from those listed in paragraph 90 are inappropriate. I do not think that the NPPF gives any scope to local planning authorities to treat development as appropriate if it does not fall within paragraph 89 or paragraph 90. In particular, there is no general test that development is appropriate provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land within the Green Belt. Had such a general test been intended, in my view it would have been spelled out in express terms and would also have affected the way in which the specific exceptions were expressed."

44. I also note that Richards LJ added at [33] and [34] that:

i. "... even if it was unintentional, there is no proper basis for reading the provision into the NPPF. If there is a material omission, the right course is for the Secretary of State to amend the policy, not for the court to adopt a strained interpretation of the policy.

ii. 34. Nor do I accept that this interpretation of the NPPF leads to absurdity or to such anomalous consequences as to compel a different interpretation. Even if my preferred interpretation produces some odd results, that is not a sufficient reason for reading into the NPPF a general provision which is conspicuously absent from it, to the effect that any material change of use (or, on a more limited basis, any material change of use to use for sport or recreation, or to use as a cemetery) is appropriate development provided it preserves the openness of the Green Belt and does not conflict with the purposes of including land in the Green Belt."

45. However, while noting the change in language from PPG2, the exception under consideration here is still found in the NPPF, and all parties urged me to adopt the same approach in respect of the "not materially larger" test as was endorsed in the Heath and Hampstead case with regard to paragraph 3.6 of PPG2.

46. I agree that this is the appropriate approach, because it appears to me that the exceptions, though modified, generally replicate those in PPG2 and more importantly the underlying purpose of this exception does not appear to me to have changed. This is not a case like Timmins where the court is being asked to imply a category of appropriate development omitted from the NPPF, but concerns the interpretation of a category of appropriate development which has been included, and is broadly similar to its predecessor. Paragraph 3.6 of PPG2 had stated:

i. "3.6. Provided that it does not result in disproportionate additions over and above the size of the *original* building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

47. Although there clearly have been drafting changes between the exception as found in PPG2 and that now found in paragraph 89 of the NPPF, and there is no longer reference

to development plans, apart from the change from "dwelling" to "building", the general tenor and language of the exception remains the same. Therefore the question is not in my judgment whether the inspector introduced a new category of appropriate development which would not have been permissible, but simply what is meant by the fourth exception, which he purported to apply.

48. Mr Stemp's linguistic analysis will only take the interpretation of the exception so far, since it is also necessary to examine the underlying purpose of the exception, as made clear by Richards LJ in Timmins. This is, as the Secretary of State submits, to recognise that a replacement may be made because of the existence of buildings in the Green Belt which already have some effect on the openness on the Green Belt. The reason for the "not materially larger" test is to confine the extent to which the replacement may differ in scale from that which it replaces.

49. As Buxton LJ pointed out in Petter & Harris v Secretary of State for Environment [2000] 79 P&CR 214 at pp. 223-4 in the context of policy relating to agricultural dwellings in the form of PPG7, it is necessary not to overlook the purpose and objective of policy that is being applied, and to consider that purpose when applying the policy to the individual facts of the case. In that particular case, the inspector was criticised for not having considered the purpose and objective of the policy when applying the particular policy wording under consideration.

50. In the case of the "not materially larger" test, Carnwath LJ stated in Heath and Hampstead at [37]:

> i. "The words 'replacement' and 'not materially larger' must be read together and in the same context. So read, I do not think that the meaning of the word 'material', notwithstanding its use in planning law more generally, can bear the weight which the authority sought to give it. Size as Sullivan J said is the primary test. The general intention is that the new building should be similar in scale to that which it replaces. The Surrey Homes case illustrates why some qualification to the word 'larger' is needed. A small increase may be significant or insignificant in planning terms, depending on such matters as design, massing and disposition on the site. The qualification provides the necessary flexibility to allow planning

judgment and common sense to play a part, and it is not a precise formula ..."

51. In my judgment, the explicit reference to openness in the second and sixth exceptions in paragraph 89 is not a contraindication to its being the underlying purpose of the fourth exception, but merely that in the cases of the second and sixth exceptions, the exceptions are not dealing with the extension, alteration or replacement of existing buildings which provide the baseline for testing their acceptability and the acceptability of proposals, but with proposals without such baselines where it is necessary to consider their effect on openness. If anything, the explicit reference in those cases underlines the fact that it is implicit in exceptions 3 and 4. The fifth of the exceptions allows for provision to be made in local plans where doubtless consideration will be given to the issue of openness the policies are set. The first exception is simply dealing with agricultural and forestry operations which are doubtless considered consistent with the openness of the Green Belt.

52. In Heath and Hampstead, Carnwath LJ was concerned in the context of metropolitan open land with the "not materially larger" test as I have mentioned; see his judgment at [6] to [12]. As I have mentioned, although that context has changed to some degree, it remains generally as found in the context of PPG2 as referred to by Carnwath LJ at [33] to [37] of his judgment. In my judgment, the exceptions to the general inappropriateness of new building in the Green Belt are generally expressed restrictively in order to limit the impact on openness, as in the case of the conclusion reached in Heath and Hampstead on the question of "not materially larger". In reaching that conclusion, Carnwath LJ, as had Sullivan J at first instance, referred with approval to the judgment of Christopher Lockhart-Mummery QC sitting as a Deputy High Court Judge in Surrey Homes Limited v Secretary of State for Environment unreported [2001] JPL 379 (note).

53. Since the fundamental aim is to preserve openness, the question then arises as to whether that suggests an answer to the question of whether "building" should be read in the singular or could include the plural. I do not regard that fundamental aim, or any of the other purposes of the Green Belt, as leading to the conclusion that only one building may be taken into account. Depending on the circumstances, it may be that there are benefits

to the Green Belt and its openness from the replacement of a cluster of buildings rather than merely a single building. In my judgment, provided the inspector considers the relationship of the buildings to each other, and to the issue of openness, and does not simply undertake an arithmetical exercise, regardless of the relationship of the buildings to themselves and to the openness of the Green Belt, there is no reason in principle why the objectives of Green Belt policy cannot be met by the application of the exception to a group of buildings as opposed to a single building.

54. To take an extreme example, a single building may comprise of a series of linked individual blocks, all of which impact on the Green Belt. It is difficult to see why in terms of impact on openness it should fall to be considered under the council's approach to the exception, whereas if those blocks were all separate, though only by a small distance, they would not so qualify. Similarly, buildings of specific footprint and size may not differ greatly in their impact on openness than a cluster of smaller buildings of similar total scale. The issue appears to me to be a typical one of planning judgment having regard to the facts of the application.

55. Miss Tafur for the Secretary of State, supported by Mr Syrett, submits that it is consistent with the underlying aim of preserving openness to construe "building" as the inspector did, that the issue was a question of fact and degree, and the application of the "not materially larger" test should secure an outcome which is consistent with that purpose. She submitted that if, as Mr Stemp suggested, the exception were applied to each building individually, even though they were located within a group, rather than making an overall judgment on "not materially larger" by reference to a single replacement building, it could result in a greater increase in floor space and volume than if multiple buildings were replaced by a single building. This was the case, as Miss Tafur and Mr Syrett explained, with the most recent grant of planning permission for the site by the Council which considered each of the buildings separately.

56. I do not determine this issue on the basis of that example, however, but on the basis of the underlying policy. That is to allow a replacement for buildings which are constrained in their size in order to prevent greater impact on Green Belt openness. That is why the "not

materially larger" test is a test based on size, since the question of the effect on openness, at least in the terms of appropriate development, is determined by the application of that policy which confines replacement buildings to those not materially larger than the originals. As the Court found in Heath and Hampstead, acceptability is not to be determined by applying a general impact test to the replacement.

57. It is also significant that Mr Stemp was unable to provide any reason why, if the replacement of one building resulted in a particular size of new building, there would be any lesser consistency with the preservation its openness if three related buildings of similar total size were replaced by a similar replacement building. Indeed, he did not articulate, other than by means of his linguistic analysis, why a result which was neutral in terms of impact on the openness of the Green Belt should lead to a different conclusion depending on the use of singular or plural. In any event, an unduly precise linguistic analysis may not lead to the correct conclusion in construing planning policy which is generally not approached as if it had been drafted by Parliamentary Counsel. See Lord Reed in Tesco v. Dundee, at [19].

58. In my judgment, therefore, the question of whether more than one building may be taken into account, as in the case of the issue of comparative size under the "not materially larger" test, is to be determined on the facts by reference to the objectives of Green Belt policy. As the Deputy Judge held in the Surrey Homes case, even the issue of "not materially larger" does not always depend simply on a floor space comparison but must also be judged by reference to other factors which might affect openness:

> i. "23 ... In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion. But I entertain no doubt that the concept of whether a dwelling is 'materially larger' can be assessed by reference to matters such as bulk, height, mass and prominence. These are all matters going to the openness of the Green Belt. They are plainly all material considerations relevant to deciding on the meaning of the term in the context in which it arises, namely Green Belt policy.
>
> ii. 24. Indeed, were it otherwise, absurd results could arise. One could have equivalent or possibly even reduced floor space, but disposed within a tower-like structure, having far more impact on

the Green Belt. It would be a strange result, in my judgment, if an Inspector were debarred from concluding that the proposed structure harmed openness and was inappropriate development."

59. Here the inspector considered the relationship of the group of buildings in DL 9 by reference to their function, their dispersal and the issue of openness:

    i. "... there is no reason why the principle of redevelopment should not apply to a group of buildings being replaced by one. Indeed, in my experience this approach to the redevelopment of brownfield sites in the Green Belt is not unusual. The additional buildings in question, noted above, are domestic in scale, part of the same planning unit, clearly ancillary to the residential use of the existing house and not widely dispersed around the site. Thus, I am not persuaded that, in this instance, the loss of these ancillary buildings and the dwelling, with their replacement by a single appropriately sized dwelling, would be at odds with the fundamental aim of Green Belt policy, which is to keep land permanently open."

60. It is also relevant to note that the use of the term "building" has a particular meaning in the planning context (see e.g. section 55 of the Town and Country Planning Act 1990). In Timmins at [7] and [30] Richards LJ applied the statutory definition in the 1990 Act to paragraph 89.

61. Section 336(1) of the 1990 Act defines it as including:

    i. "Any structure or erection, and any part of a building, as so defined, but does not include plant and machinery comprised in a building."

62. As a statutory term, "building" is subject to section 6C of the Interpretation Act 1978, which provides, subject to proof of a contrary intention, that:

    i. "Words in the singular include the plural and words in the plural include the singular."

63. There is nothing in the statutory context of the 1990 Act which would militate against reading "building" in the plural where appropriate. Whilst the Interpretation Act does not apply directly to the construction of policy language, the context of the 1990 Act usage and lends at least indirect support to the view that the plural may be appropriate in the context of paragraph 89 of the NPPF which uses the language of the 1990 Act.

64. In conclusion on this aspect of the challenge, I do not consider that "building" should be read as excluding more than one building, providing as a matter of planning judgment they can sensibly be considered together in comparison with what is proposed to replace them. In my judgment, the inspector, particularly at DL 9, considered the matter correctly and reached a conclusion which cannot be faulted as a matter of law.

65. On the second issue, Mr Stemp argues that the inspector reached an irrational judgment and effectively reintroduced the impact based approach criticised in Heath and Hampstead. I disagree. The inspector considered the relative sizes of the existing buildings and the two proposals before him and reached a conclusion by comparing their physical dimensions, noting that the local plan provided no guidance as to how to approach the issue of "not materially larger", nor sought to place any limits on what might qualify as such. The inspector's reasons at DL 14 appear to me to reflect the approach of the Deputy Judge in Surrey Homes, which while starting from floor area also considered that bulk, height, mass and prominence may be relevant.

66. I do not agree with Mr Stemp's criticism of the Inspector's consideration of the use of a flat roof breaking up the bulk and massing of the building, having regard to the scale and form of the existing dwelling and to the design of the new. It does not seem to me that it is an impermissible reintroduction of the impact test criticised in Heath and Hampstead, but merely an application of the approach set out in Surrey Homes and endorsed in Heath and Hampstead. As Sullivan J had found at first instance in Heath and Hampstead [2007] 2 P&CR 19 at [44]:

    i. "44. ... the question is not whether the replacement dwelling would be more visually intrusive from the public realm, but whether it would be materially larger than the existing dwelling. That is principally a question of size, actual rather than perceived size. It is one thing to say that the perception of size may be relevant in deciding whether a measured increase in size is material, it is quite another to substitute an assessment of visual impact for a measurement of size. Although the perception of size may be relevant in marginal cases, the tail must not be allowed to wag the dog. On any basis it is impossible to avoid the conclusion that this replacement dwelling was materially larger, very much larger, than the existing house."

67. Therefore, providing the inspector properly applied the "not materially larger" test, the fact that he considered issues such as bulk, massing, scale and form does not mean that he substituted an impact test, but was merely considering the issue of materiality of the comparative scale in accordance with Surrey Homes. In my judgment, the inspector did not apply the incorrect test and proceeded consistently with authority.

68. Once the first ground dealing with the scope of the paragraph 89 exception is disposed of, all that remains in the claimant's submissions is the bald assertion that no reasonable inspector could have concluded that a structure some 78 per cent greater by volume than a group of structures, and one metre taller than the highest point of the building to be replaced, was not "materially larger" than the structure currently in situ.

69. It is relevant to recall that the problem in Heath and Hampstead was that Camden Council had accepted a building more than twice the size of the existing in terms not only of floor space but also of volume and footprint (see Carnwath LJ at [24] to [32] and [38]) and had approached the question primarily by reference to whether it was visible and caused harm to the MOL: see also Sullivan J at [44], quoted above. That is not what the inspector did here, and he applied his judgment to the physical factors indicating relative size in accordance with authority. He considered actual, not perceived, size, and this was underscored by his rejection of Appeal A as being materially larger than what it was to replace, which can be compared with the exercise undertaken in respect of Appeal B.

70. The claimant does not demonstrate that the judgment here was reached irrationally simply because of the factors mentioned of increases in volume and height, when it is clear that they were only part of the inspector's consideration of scale and went to the issue of materiality. This is ultimately a question of planning judgment and, absent compelling reasons to interfere with it, I reject the second ground of challenge.

71. Service on the second defendant

72. I have left this issue until last since it is largely academic in view of my judgment on the merits of the grounds of challenge. The claim form was issued on 2 February 2015, the last day of the six week period prescribed by section 288(3) of the 1990 Act, so could not

have been served earlier. The papers were left at the appeal site, which was a valid location for service under the CPR, although the Council might have given further attention to the fact that the second defendant had requested on several occasions that correspondence be sent via his business address (he was acting as his own agent), that they knew he was not in occupation of the site, and that the appeal form had referred to that business address. That said, there was some evidence of inconsistency in the use of addresses by the second defendant.

73. It is not disputed that the second defendant was informed of the grounds of challenge by email on the day of issue, 2 February, even if he did not receive all the papers in the proceedings until the following day, just before 10 am. The delay, if such it was, was therefore less than 24 hours.

74. Whilst section 288 requires an application to be made within six weeks of the decision under challenge, the rules for service are those set out in the Part 8 PD8A, section 22 (see Part 8APD.22.3. The rules for service allow for an extension of time, unlike the mandatory statutory requirement to issue proceedings within 6 weeks of the decision. Even if there had been a failure to serve in time, it was clear the prejudice complained of by the second defendant results from the making of the challenge itself rather than the delay of a day in effecting service. The same issues with respect to prejudice would have arisen had the second defendant been served on 2 February.

75. Until the amendments to section 288 are brought into force, which will require permission to be obtained for bringing a section 288 challenge, a section 288 claim may still be brought as of right by a person aggrieved, and this will have an effect of putting at risk the grant of a planning permission, and thus deterring implementation, even if the claim is ultimately dismissed.

76. Nonetheless, if service had been late, it only caused a very minor delay and, since no prejudice arose from the delay itself, I would have extended time for service, having regard to the overriding objective. However, since I reject the grounds of challenge that issue does not arise.

77. In conclusion, the claim is dismissed.

78. THE DEPUTY JUDGE: Thank you.

79. MS TAFUR: I'm grateful, my Lord. In those circumstances, I do have an application for costs. I wonder if your Lordship has seen a schedule.

80. THE DEPUTY JUDGE: Yes, I have. I have had schedules from both of you.

81. MS TAFUR: Thank.

82. THE DEPUTY JUDGE: That is both the represented parties. Yes. And you're seeking £8,011?

83. MS TAFUR: That's right, my Lord.

84. THE DEPUTY JUDGE: Is that resisted, Mr Stemp?

85. MR STEMP: Not at all, my Lord.

86. THE DEPUTY JUDGE: No. In fact it's cheaper than your costs.

87. MR STEMP: It is, yes.

88. THE DEPUTY JUDGE: Very well. I shall order the claimant to pay the first defendant's costs summarily assessed in the sum of £8,011. Are there any other matters?

89. MR STEMP: No thank you, my Lord.

90. THE DEPUTY JUDGE: No. Thank you all very much.

EP2

Case No: CO/12308/2009

Neutral Citation Number: [2010] EWHC 1420 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Date: Tuesday, 11th May 2010

Before:

MR JUSTICE LANGSTAFF

- - - - - - - - - - - - - - - - - - - -

Between:

FEATHER

Claimant

- and -

CHESHIRE EAST BOROUGH COUNCIL

Defendant

MR CHRISTOPHER WREN AND MRS SUSAN WREN

Interested Parties

- - - - - - - - - - - - - - - - - - - -

(DAR Transcript of
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Mr Jonathan Easton appeared on behalf of the **Claimant**.

Mr Ian Albutt appeared on behalf of the **Defendant**.

The **Interested Parties** did not attend and were not represented.

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Judgment
(As Approved)

MR JUSTICE LANGSTAFF:

1. This is an application for judicial review of a planning permission which was granted on 24 July 2009. Permission to appeal was granted on a renewed application by Foskett J on 17 February following a hearing on 12 February this year. The application relates to a planning permission granted by the Cheshire East Borough Council (the Northern Area Planning Committee were essentially responsible for the decision) for a development comprising a replacement dwelling at Broad Heath House, Over Alderley, Macclesfield. The property is owned by a Mr and Mrs Christopher Wren. The claimant, Mr Simon Feather, owns and lives at Broad Heath Farm, adjacent to Broad Heath House. Both properties are in the Green Belt, and Green Belt planning policies govern the approach to development in the area.

2. Those policies derive from national planning guidance, which is set out in what is known as PPG 2. The relevant paragraph of PPG 2 is paragraph 3, which sets out the policies in respect of control over development. Paragraph 3 begins with a presumption against inappropriate development. A new building is to be regarded as inappropriate, unless it falls within one of a specified number of exceptions. Amongst those is:

> "Limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below)."

   I emphasise the word "limited". Paragraph 3.6, which is central to this application, reads as follows:

> "Provided that it does not result in disproportionate additions over and above the size of the ***original*** building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

   There were no relevant local development plans at the time at which this application fell for consideration. Accordingly, regard had to be had, and had only to paragraph 3, insofar as the policies there set out were concerned.

3. The paragraphs to which I have already referred do not sit in a vacuum. Within paragraph 3 itself, for instance at paragraph 3.8, it is noted that:

> "The re-use of buildings inside a Green Belt is not inappropriate development providing:

> (a) it does not have a materially greater impact than the present use on the openness of the Green Belt and the purposes of including land in it."

And it continues. Of particular relevance in this case, and in particular in understanding, in my view, aspects of the planning officer's advice, is paragraph 3.15. That reads:

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

4. By way of broader background, reference might be made to paragraph 1.4, which sets out what is said to be the fundamental aim of Green Belt policy, which is to prevent urban sprawl by keeping land permanently open. The most important attribute of Green Belts, it says, is their openness. The purposes of including land in Green Belts are set out further at paragraph 1.5, and the use of land at 1.6. Paragraph 2.10 may also be worthy of further note, because it considers the consequences for sustainable development, of channelling development toward urban areas inside an inner Green Belt boundary, therefore away from the Green Belt itself.

5. The terms of this guidance, and in particular paragraph 3.6, were the subject of a decision at appellate level, binding upon me. It is common ground that the relevant legal principles are to be found in R (Heath & Hampstead Society v Camden London Borough Council [2008] EWCA Civ 193. That case involved a decision to grant planning permission for a house in the Vale of Health. It was to replace an existing 1950s dwelling house which was in part two storeys high with one which was in part three storeys high. The various calculations could broadly be summarised (see paragraph 3) by saying that there would be a three-fold increase in floorspace, perhaps a four-floor increase in built volume, and between a two and two and-a-half times increase in the footprint of the building. The planning officers in the council had not considered the question of size when determining whether the building was materially larger, but had rather asked whether the relative visual impact of the replacement building was materially different from that of the existing building.

6. The decision to which the court came, the leading judgment being that of Carnwath LJ, with which Sedley and Waller LJJ agreed, was that that approach was wrong. It drew attention, basing itself upon the policy guidance which I have just set out, first to the concept of appropriate development, as compared to that which was inappropriate development; and that the relevant test as to whether a proposed replacement dwelling was appropriate was whether it would be not materially larger than the dwelling it replaced (see paragraph 12). The issue before the Court of Appeal was expressed at paragraph 13 in these terms:

> "…whether the 'materially larger' test imports, solely or primarily, a simple comparison of the size of the existing

> and proposed buildings; or whether it requires a broader planning judgment as to whether the new building would have a materially greater impact than the existing building on the interests which MOL policy is designed to protect [this policy is indistinguishable from that in PPG 2 which I have cited]. Mr Elvin's case [he appearing for the counsel], in a nutshell, is that, in the context of policies designed to protect the MOL, the development cannot said to be 'materially' larger, if the increase has no 'material' impact on the objectives of the MOL; or at least that the authority could reasonably take that view."

The court observed at paragraph 17 that that argument had been rejected at first instance by Sullivan J. He had relied in part upon the reasoning of Deputy Judge Christopher Lockhart-Mummery QC in Surrey Homes Limited v Secretary of State for the Environment (unreported) CO/1273/2000, in which the Deputy Judge had observed that the physical dimension which was most relevant for the purpose of assessing the relative size of the existing and replacement dwelling houses would depend upon the circumstances of the particular case, and might be floorspace, footprint, build volume, height, width etc, although he thought that in most cases, floorspace would be the starting point if not the most important criterion.

7. The court concluded that Mr Elvin's argument, as rejected by Sullivan J, that the argument (see paragraph 33) was to the effect that "material" meant material in planning terms; that it was a settled principle that matters of planning judgment, including the weight to be given to material considerations, were for the local planning authority and not the courts, and that the authority in that case had correctly identified the increased size of the building in all its aspects as a relevant consideration, but had decided on the facts that it was not material; that that was a judgment for them, and involved no issue of law justifying the intervention of a court. As to that, the Court of Appeal said (paragraph 34 of the judgment of Carnwath LJ):

> "Although I see the force of that submission, it ignores the context in which the word is used. The words "materially larger" in paragraph 3.6 should not be read in isolation. There are two important aspects of the context. First is that paragraph 3.6 is concerned with the definition of "appropriate development", as contrasted with inappropriate development, which is "by definition harmful to the Green Belt" (see para 8 above). This first stage of the analysis is concerned principally with categorisation rather than individual assessment."

I pause there to note that Mr Albutt, who appears here for the council, draws attention to the word "principally"; he does so to note the point that it is not the only matter to which the planning authority may have regard.

8. The judgment continues (see paragraph 35), making the point in the last sentence of that paragraph that if it had been intended to make appropriateness dependent upon a broad "no greater impact" test, the same words could have been used; but instead, the emphasis was on relative size, not relative visual impact. Then this, at paragraph 36:

> "36. That leads to the second aspect of the context, which is that of paragraph 3.6 itself. It is part of the test for a category which covers "limited extension, alteration or replacement…" "Limited" to my mind implies a limitation of size. Paragraph 3.6 deals with both extension and replacement. An extension must be "proportionate" to the size of "the *original* building". The emphasis given to the word "original" shows how tightly this is intended to be drawn, in order presumably to avoid a gradual accretion of extensions, each arguably "proportionate". It would be impossible, in my view, to argue that "proportionate" in this context is unrelated to relative size. For example, an extension three times the size of the original, however beautifully and unobtrusively designed, could not, in my view, be regarded as "proportionate" in the ordinary sense of that word.
>
> 37. The words "replacement" and "not materially larger" must be read together and in the same context. So read, I do not think that the meaning of the word "material", notwithstanding its use in planning law more generally, can bear the weight which the authority sought to give it. Size, as Sullivan J said, is the primary test. The general intention is that the new building should be similar in scale to that which it replaces. The *Surrey Homes* case, [2000] EWHC 633 (Admin), illustrates why some qualification to the word "larger" is needed. A small increase may be significant or insignificant in planning terms, depending on such matters as design, massing and disposition on the site. The qualification provides the necessary flexibility to allow planning judgment and common sense to play a part, and it is not a precise formula. However, that flexibility does not justify stretching the word "materially" to produce a different, much broader test. As has been seen, where the authors of PPG2 intend a broader test, the intention is clearly expressed."

9. Reference is made in his submissions by Mr Albutt to the fact that here, reference is made to such matters as design and disposition on the site as relevant to the question of whether one building is materially larger than another. Neither design nor disposition are themselves direct references to size. They are, however, plainly, and in this paragraph recognised to be, relevant planning considerations.

10. Mr Easton, appearing as he does for the claimants, argues for his part that in this paragraph a distinction is made between a small increase in physical size, measured objectively, as to which planning considerations may make the difference between an increase in size which is material and that which is not, and a larger increase in size, as to which he submits, bearing in mind the example given obiter at the conclusion of paragraph 36, the focus on size simply leaves no space for planning judgment to play a part. It is said here that the planning authority failed in two respects. It is argued by the claimants that the authority did not pay regard to the size of the building as it should have done, and it is said it reached a conclusion to which no reasonable authority could, on the facts, have come.

11. I turn, therefore, to look in greater detail at what was proposed, the advice given by the planning officer, in this case to the Northern Area Planning Committee, and subsequently to those two officials to whom that committee delegated the ultimate decision, and to review the arguments in detail against that background. The proposal in outline was to replace a 5-bedroom house, built in two storeys, which had an attached single-storey element reaching 5.8 metres in height. That existing dwelling has a stepped roof design, acting as a visual break in the overall appearance of the dwelling. The replacement dwelling would take the form of what was described by the planning officer as a solid two-storey dwelling of grand appearance, fabricated in facing brick, render and slate roof. The proposed design, as to a lay observer is manifestly apparent from looking at the architect's pictures and elevations, would be of solid appearance with a solid ridge line, therefore differing from the current stepped character of the existing building. The planning officer noted that the proposed dwelling would be approximately one metre taller than the existing dwelling, but that the overall height would increase only 0.2 of a metre; that may be a reflection of the fact that the replacement dwelling was to be sited further back from the road on the application site than the existing building, and that some minor excavation works were to be carried out. The overall depth and span of the replacement dwelling was to provide a small reduction upon that which exists.

12. In the planning officer's report which was compiled first on 28 May 2009, then updated on 22 June (see page 100 in the bundle) and updated again on 9 July (see page 138), the detail continued as follows:

> "In assessing whether the replacement dwelling would be materially larger than the existing it is important to assess the overall scale and appearance of the building, and also comparing the footprint and floorspace of each dwelling. As discussed above, the overall scale and appearance of the dwelling is considered to be relatively similar to the existing. The proposed replacement dwelling would provide a smaller footprint, approximately a reduction of 11%. The amount of floorspace afforded to the replacement dwelling would increase by approximately 30%. This increase in floorspace to the dwelling must be considered in conjunction with the overall scale and

> appearance of the dwelling. The increase in floorspace is noted, however, it is considered that as the overall appearance of the building would be broadly similar, therefore it is not considered that the replacement dwelling would be materially larger; therefore, it is considered that the proposal would comply with paragraph 3.6 of PPG2."

13. One can well understand those observations in relation to the building described in the terms I have already described it; however, that would be to omit what is a very significant feature of the proposed dwelling. It is this: it is proposed that the dwelling has a basement. The basement, so the plans show, extends well beyond the ground-level footprint of the existing dwelling, or the dwelling as described; it is completely subterranean and enclosed. It contains, or is to contain, a swimming pool, changing rooms, and associated plant and equipment. It is plainly an extensive and large basement area. There is no indication in the extracts which I have thus far read from the report to council of the existence of such a basement, or how the area and volume of the basement is to be taken into account in considering the size or scale of the building, and whether it has any relevance at all to the issue whether the building to be erected is or is not materially larger than the existing. But I have omitted to read a short paragraph which immediately follows that which I have already quoted. It reads:

> "It is noted that the dwelling would be afforded a large basement area underneath the dwelling. This area would be fully subterranean and therefore it is considered that there would be no impact on the visual amenity of the area."

14. The advice to the council in each of its forms, that in May, that in June, and that in July, returned toward the end to consider again the question of whether the proposed building was materially larger than the existing. These words are used:

> "… as discussed within the body of this committee report it is considered that the proposal would not result in a materially larger dwelling. This assessment has been made using several tests relating to increase in floorspace, foot print, and the scale and massing of the proposed replacement dwelling. The figures used regarding the potential increase in floorspace of the dwelling have been assessed within the report as 32% using the Council's own figures. The agent has also put forward floorspace counts that demonstrate that the percentage increase in floorspace would be 36%. Whilst this would increase the level of habitable floorspace afforded to the dwelling, it is not considered to result in an unreasonable increase."

15. The approach which a court should take to the reasoning of a decision made by a planning officer or planning inspector has been expounded in the House of Lords by Lord Brown

of Eaton-under-Heywood in South Buckinghamshire District Council v Porter (No. 2) [2004] UKHL 33 at paragraph 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

16. Here I draw attention to these features arising from the case of Heath & Hampstead to which the council was obliged to pay particular attention. First, the question of "materially larger" is regarded as a threshold question. Secondly, that visual amenity is not the determinant of that question, though it is separately and importantly relevant (see paragraph 3.15 of PPG 2). I must bear in mind that the planning officer's advice fulfils a number of functions. It must draw attention when it is addressed to the committee to the law which applies, to the threshold question, and to those matters which it is relevant to consider in respect of that threshold question; but it must also necessarily consider the other several planning issues which arise. One would thus expect it to contain a mixture of observation about design, size, appearance and the like. And in the light of the approach to be taken (see South Buckinghamshire), it cannot be a valid criticism of that advice or report that it runs a number of matters together. I have to, however, recall that a building which is not materially larger is not thereby necessarily rendered appropriate. It may be, it may not be; that will depend upon other considerations, and one must expect the planning authority to have regard to those other considerations. But what can

certainly be said is that a building which is materially larger cannot be appropriate; except, that is, in very special circumstances indeed, none of which applies here.

17. With those considerations in mind, I turn to look more closely at was, and what was not, said in the planning officer's report to the council, bearing in mind the forgiving approach which must necessarily be adopted to its wording. Under the heading "Scale and Design", it is plain that the planning officer directed the attention of committee members to issues of size. However, Mr Easton complains that it is clear textually, and on any sensible reading of the paragraph, that it does not include any reference to the basement. It is common ground between counsel that the size of the basement is relevant to the question whether the dwelling is materially larger than that which it is designed to replace. He points to the reference to the amount of floorspace increasing by approximately 30%. It is quite plain, he says, that that 30% can relate in context only to the portion of the building which is at ground level and above, and does not contain any consideration of the size of the basement, swimming pool and adjacent area.

18. Indeed, that point, it seems to me, is obvious simply from looking at the plans for the proposed building; but if it were not so, it has as a matter of objective fact been put beyond doubt, and without any dispute from Mr Albutt, in general terms, by a report -- albeit compiled after the decision was taken -- by a Mr Turley, from which it is apparent that if the floorspace of the basement were to be included, there would be an increase in floor area not of 30% but of some 230%.

19. The footprint of the proposed building which is referred to, it might be added, is referred to in the text as being smaller by 11% than the existing; that plainly looks, and looks only, at the footprint of the building as measured at ground level; it does not look at the basement, which extends considerably beyond the confines of the original foundations. I might add that the paragraph itself indicates that the author drew a distinction between the "dwelling" and "the basement". She posed the question whether the replacement dwelling would be materially larger. She answered that by saying that the replacement dwelling would not be materially larger, but the reference to the footprint of the dwelling, and the reference which immediately follows to the large basement area being *underneath the dwelling*, leads a reader naturally to conclude that when considering the question of material size and largeness, one has regard to that which is built from ground level upwards as constituting the dwelling, and not that which is beneath the dwelling.

20. When the author returned towards the conclusion of her report, and referred to the proposal not resulting in a materially larger dwelling, she mentioned as I have noted that assessment fell to be made using several tests relating to an increase in floorspace, footprint, scale and massing; but all that was said about floorspace, or footprint and scale, and massing, related to the building at ground level and above. The conclusion to which I am bound to come is that any reader of this report would understand that the question of material increase in size was important; but they would think the answer to the question lay in the size of the dwelling above ground level, and would not necessarily include the basement.

21. It is said in his submissions by Mr Easton that there are two reasons for holding the decision made by the council to be flawed. The first is that the council did not take account of a material consideration. He argues that the evidence shows that the council considered, and considered only, the building at and above ground level, and did not take into account the basement. It is accepted by Mr Albutt that the council were bound to have regard to the size of the basement, though he asks me to see it in context. Mr Easton augments his submission by noting that there was no comparison made here in the report between the built volume of the house as is, and the house as was to be. He urges the court to have regard to the fact, as he submits, that the increase in floorspace and in built volume is so significant that it the report to the committee is inadequately stated.

22. As a second point, he argues that a house of this proposed size, containing the basement as it is designed to do, could not be granted planning permission by any reasonable council upon a proper understanding of the law; it would be perverse to do so. He argues this by reference to the material which has emerged since the decision was taken in two reports by Mr Turley, containing a calculation of the built volume; there was no calculation of built volume before the council. He draws my attention to the tables contained in a report dated 15 April 2010 (the second report from Mr Turley). Those tables show that if the floorspace and volume of the basement is to be included, the built volume (see table 1, page 4 of the second report) is 209% larger; that on different scenarios, there is a range of values, all indicating a greater than doubling of the existing volume. This, he says, could not possibly be regarded by any council as not being materially larger.

23. In response, Mr Albutt argues first, that on the evidence, I should conclude that the relevant Planning Committee and Officials did indeed have regard to the size of the basement in determining whether the building was to be materially larger. He relies on a witness statement of Susie Helen Bishop of 26 March 2010. She explains that she is a planning assistant who was the planning officer responsible for the planning application which is subject to challenge. She describes how that application was not determined by her, but was called in for consideration by the Northern Planning Area Committee -- hence it going to committee -- and that at the meeting of that committee on 10 June, oral representations were made by the applicant's agent, Peter Yates (the architect who had designed the replacement building) and by neighbours, including the claimant. The claimant, she reports, drew the basement area to the attention of members, and gave its dimensions to perform floorspace calculations. She notes that that figure was also included within letters of representation received during the course of the application, and reports that during the meeting, members requested a site visit, in order to provide better clarity and understand of the proposal in the context of the site itself. They requested that the basement area be marked out on site. And she comments that they were fully aware of the basement being *part of* the proposed replacement dwelling: I note that her observation here is not to the same effect as that given by a fair reading of the reports which she made to the committee, which as I have noted drew a distinction between the dwelling and the basement.

24. Her statement then says this at paragraph 17:

> "The site visit held by the Council's Northern Area Planning Committee was attended by 13 out of 14 members who considered the application at the meeting of the committee on 1 July 2009. [I should add, the site visit was on 26 June, therefore before that meeting]. As requested by members the basement area was pegged out using hooks and white tape. The area was measured by the attending planning officers, Emma Tutton, Principal Planner and me. The area followed the submitted plans. The planning application plans were also provided during the site visit for members to view. This level of detail enabled members to be better informed of both the application sites site-specific issues and the scale of the basement."

She went on to describe that the application was not finally determined by the committee on 1st. July because of a letter making representations being missing, but that the members resolved to approve the application, subject to the contents of that missing letter not raising any issues material to the decision-making process which had not already been considered by them. It delegated the decision to its head of planning and policy, John Knight. Miss Bishop comments at paragraph 20:

> "The letter of representation was located … and its contents assessed after the committee meeting on the 1 July. The letter made reference to the basement area, and stated that it should form part of the assessment of whether the replacement dwelling would be materially larger. This was the approach I had adopted in the assessment of the application. The basement area had been considered as part of the proposal in terms of whether the replacement dwelling would be materially larger."

25. That is evidence that Miss Bishop had in mind the basement as relevant to the issue of size, and had considered it herself as such. It is not, however, evidence that that is how the members of committee saw it. I have no direct evidence from any member of committee. I have no evidence from Miss Bishop or from anyone that the committee were told in terms that they should consider the size of the basement when they came to consider the size of the dwelling. Indeed, I have a repeated description in each of the three planning reports to which I have referred which deal with the "materially larger" question which excludes, rather than includes, the basement, and which appears to deal with the question of the basement by considering whether it would have any visual impact or not; a highly relevant planning consideration under paragraph 3.15 for instance, but not obviously relevant when one is considering the question of material size.

26. There were matters, Mr Albutt asks me to note, which I could conclude directed the minds of the committee on 1 July to having regard to the size of the basement as part of their determination of what was or was not materially larger. Thus, the letters of objection were fairly summarised in Miss Bishop's reports to council. Thus, the size of

the basement was orally drawn to the attention of the members in committee. One has to ask why it was the members of the committee asked that the basement area be indicated on the ground surface by tape and post, as they did, if they did not fully appreciate the size and scale of the basement. In my view, all these are significant and important points.

Conclusions

27. In reply, Mr Easton has pointed out to me what is contained in a documentary update to the agenda of 29 June 2009 (see page 131). In that, in the first paragraph under the heading "issues", it is noted that the basement was to be sited within the confirmed garden area, it therefore being considered that the potential outstanding enforcement issues on site would have no impact on the determination of the proposal. That was a reference to the potential for the dwelling -- and one has in mind here the basement of it -- to encroach into agricultural land to the rear of the site. The siting of the basement was thus materially important for that reason.

28. It is impossible for me to determine whether it was for that reason (to be assured there was no material encroachment on agricultural land) or because the members wished to have some proper idea of the size of the basement relative to the existing building, that they asked for it to be mapped out. What was relevant for the consideration of the committee, and the two Officers to whom the decision was delegated thereafter, was how they should approach the question of "materially larger". Can I be satisfied that they took into account the basement area and size? The planning officers' reports, upon a fair and not over-technical reading, were to the effect that that was not something which fell for consideration; those precise words are not used, but that is the sense of it. There is no evidence that anything different was said to the members during the course of the hearings. There is no material to indicate to me that they were told to accept as legally valid the point which the objectors were making; one bears in mind that objections are frequently made, so have to be evaluated, and the committee will make that evaluation, one supposes, by reference to the guidance which the Officers of the council can give. And here there was no steer, in terms to which Mr Albutt can point, to assist them to make it properly.

29. I have, therefore, come to the conclusion that in this case, I cannot be satisfied that the council had regard to what was, it is accepted, a material consideration; namely, the size and scale of the basement. I, therefore, cannot be satisfied that the council took that into account in determining whether the building was or was not materially larger. Indeed, such indications as there are in the papers before me indicate, and if necessary I would hold, that they did not do so. That being my conclusion, Mr Albutt accepts that the necessary consequence will follow that the decision made by the council as local planning authority must be quashed, because it was reached in the absence of a consideration to which material regard should have been had.

30. However, I am conscious that the matter of perversity has been fully argued before me, and I should deal with that, since I can see that it may be relevant to the parties in what may follow consequent upon my decision upon the ground on which it was reached. Here, I conclude that all necessarily depends in an assessment of "materially larger" upon the particular facts and circumstances of a case. It can be said, usually, whether one

building is or is not larger than another; though reference may need to be had to particular measurements in respect of which it is said to be larger than the other. Whether it is "materially larger" has to be answered in accordance with the guidance given by the Court of Appeal; that is, primarily as a question of size. But it is not exclusively a question of size; I entirely accept Mr Albutt's submissions as to that.

31. The expression "materially" invites a consideration of size in context; what is the relevant context? The relevant context necessarily has to be the object of and policies relating to establishing a Green Belt. It is possible to give several examples which may illustrate this, and may demonstrate that it is not a sufficient answer, as Mr Easton would propose, to suggest that a qualitative analysis is only relevant within very small increases in size. The first example was that given in the Surrey Homes case. There, the Deputy Judge pointed out that a building might have a much smaller footprint, and have the same overall floorspace, because it was built as a tower; yet if a tower replaced a bungalow, it is not difficult to see how the relevant considerations of size would have nothing to do with footprint, and nothing to do with floorspace, but everything to do with height. In the context of affecting the openness which green belt policy emphasises, the tower might be said to have much greater impact than the bungalow.

32. It is equally not difficult to see that some buildings may have a much larger floorspace as newly-built than those than they replaced, without altering in any way the external dimensions and footprint of the original building. For instance, where a large barn is converted or rebuilt; where a high-ceilinged building is replaced by one with more floors, and therefore more floorspace, but with no change to exterior dimensions. Similarly, it is not difficult to see how, if one replaced a bungalow with a two-storey building on a narrower footprint, the planning considerations relevant to a determination of material largeness would not depend at all upon floorspace or footprint, but in that case upon height and depth of the building.

33. The dictum of Carnwath LJ at the end of paragraph 36 made the point that if an extension were three times the size of the original -- and I note that would mean a building four times the size of the original, being the original plus the extension - it could not be regarded as proportionate. When looking at a replacement building, the test is not what is "proportionate" , though material largeness is to be read in the same spirit. But that is very different, as it seems to me, from the situation here. It seems to me that, in this particular case, a very important fact and issue to which the local planning authority will wish to have regard in attributing whatever weight it thinks is appropriate to the size of the basement is the fact that, as part of the dwelling, that basement is intended to be entirely below ground level.

34. I could not, in short, have said that it would necessarily and obviously have been perverse for the local authority in this case to have concluded, if it did so having had regard to all proper considerations, that the replacement building was not *materially* larger than the existing. Providing it did not lose sight of the overall size and floorspace of the basement, the authority would be entitled, in my view, to come to a conclusion that the building above ground was such, and the basement such, that overall, the building, in the contexts to which I have referred, was not materially larger. Indeed, it is plain from Susie

Bishop's statement that she did not regard that conclusion as being to her, as an experienced planning officer, necessarily perverse.

35. But it does not follow that I can say that the decision to be reached by the local authority will necessarily be the same if it has regard to the matters to which it should properly have regard as that it actually reached which is the subject of this litigation; indeed, Mr Albutt has not sought to argue that I should sustain the decision upon the basis that it is plainly and obviously right. It seems to me that the size of the basement is significant. As a matter of sheer size, the issue of how that affects a conclusion as to whether it is or is not such as to make the building as a whole materially larger than that which it replaces, is not one which I can say necessarily should be determined one way or the other.

36. Although this last part of my decision, from paragraph 30 onward, is necessarily obiter, I hope that those observations are of assistance to the parties.

37. In conclusion, for the reasons I have given, this application must succeed. The decision ultimately taken on 24 July 2009, and signed by Head of Planning and Policy for Cheshire East Borough Council, must be quashed, and I shall hear counsel as to any consequential orders which they may seek.

Order: Application granted.

MR EASTON: My Lord, I am grateful. I do have an application for costs against the local authority defendant. My Lord, I have a schedule, a copy of which has been handed to my learned friend and his instructing solicitor, I regret only recently.

MR ALBUTT: And we agreed that to be fair and sensible.

MR EASTON: I do not understand there to be any objection in principle but it is agreed between the parties, subject to anything my Lord has to say, that the costs should be set off to a detailed assessment if not agreed.

MR JUSTICE LANGSTAFF: Very well.

MR EASTON: That is the order that we propose.

MR JUSTICE LANGSTAFF: So be it.

MR EASTON: I am very grateful.

MR ALBUTT: My Lord, there is only one other matter. First of all, with regard to your Lordship's obiter comments towards the end, I express our gratitude, because in terms of the guidance that we can obviously adopt. The next matter that arises is obviously the question of permission to appeal. Clearly, my Lord, I accept that there is a great deal that you have decided clearly upon the particular facts of this case; what I can point to is that is obviously

of considerable importance to the authority, and in addition it is, so far as I am aware, the first case really regarding the application of the test of "materially larger" in circumstances where there is a wholly-enclosed basement. Certainly all of the other cases that have been tested on appeal all relate to where there is some impact, because it is a part of the basement. So my Lord, I do, with respect, seek permission to appeal on those grounds.

MR JUSTICE LANGSTAFF: I do not need to trouble you. No; the reasons are these. You are absolutely right in saying that there has not been a case, so far as I am aware, which involves an enclosed area such as the basement, but in this case it was common ground between counsel before me that the size of the basement was relevant, and my decision was that the council as a matter of fact, so far as I can determine it, did not have regard to that matter. And therefore, it is no more and no less than a failure to take into account what was agreed to be a relevant criterion. It follows that no new principle of law or no issue of law really arises; and if, in the light of that, you wish leave to appeal, you will have to get it from the Court of Appeal.

MR ALBUTT: My Lord, we will see if we can interest the Court of Appeal or not.

MR JUSTICE LANGSTAFF: I should add that on the issue of substance which interests you, I appreciate that Mr Easton may in due course have something to say, that you rather succeeded rather than failed.

MR ALBUTT: Yes, indeed.

MR JUSTICE LANGSTAFF: But that was obiter.

MR ALBUTT: I know, my Lord, and I am most grateful. Thank you.

MR JUSTICE LANGSTAFF: Can I thank you both for the economic way in which you presented your submissions.

MR EASTON: Thank you, my Lord.

EP3

Case No: C1/2015/3507

Neutral Citation Number: [2016] EWCA Civ 466
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE LANG DBE
[2015] EWHC 2788 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2016

Before :

LADY JUSTICE ARDEN
LORD JUSTICE FLOYD
and
LORD JUSTICE SALES

- -

Between :

John Turner	**Appellant**
- and -	
(1) Secretary of State for Communities and Local Government	**Respondents**
(2) East Dorset Council	

- -
- -

Michael Rudd (instructed by **Hawksley's Solicitors**) for the **Appellant**
Richard Kimblin QC (instructed by **Government Legal Department)** for the **Respondent**
The 2nd Respondent did not appear and was not represented

Hearing dates : 4 May 2016

- -

Judgment

Lord Justice Sales:

1. This is an appeal from the judgment of Lang J in which she dismissed an application under section 288 of the Town and Country Planning Act 1990 to quash a decision of a Planning Inspector to refuse to grant planning permission for development of a plot of land on Barrack Road, West Parley, Ferndown, Dorset (ñthe siteò). The site is located in the South East Dorset Green Belt. The appellant developer submits that the Inspector erred in his interpretation and application of para. 89 of the National Planning Policy Framework (ñthe NPPFò) concerning the circumstances in which development on the Green Belt may not be regarded as inappropriate and in his approach to the concept of the ñopennessò of the Green Belt.

Factual background

2. Barrack Road is characterised by a mix of residential and commercial properties spasmodically placed along the road. The eastern side of the road where the site is located does not have a continuously built up frontage. The site is in open countryside, and not in an urban area or settlement.

3. There is a static single unit mobile home stationed on the site which is used for residential purposes. Adjacent to this is a substantial area of a commercial storage yard which is used for the storage of vehicles; the preparation, repair, valeting and sale of commercial vehicles and cars; the ancillary breaking and dismantling of up to eight vehicles per month; and the ancillary sale and storage of vehicle parts from a workshop on the site. A certificate of lawful existing use was granted in 2003 for the mobile home and lawful use has been established in respect of the storage yard in a planning appeal decision. We were told that the storage yard has capacity to park some 41 lorries as an established lawful use of the site.

4. The appellantôs application for planning permission is for a proposal to replace the mobile home and storage yard with a three bedroom residential bungalow and associated residential curtilage. Another area of land adjacent to the site would be retained to continue the existing commercial enterprise. In his application, the appellant compared the proposed redevelopment with the existing lawful use of the land for the mobile home and 11 parked lorries in order to suggest that the volume of the proposed bungalow would be less than the volume of the mobile home and that many lorries and that, accordingly, the proposed redevelopment ñwould not have a greater impact on the openness of the Green Beltò than the existing lawful use of the site, with the result that it should not be regarded as inappropriate development in the Green Belt (para. 89 of the NPPF).

5. The local planning authority refused the application. The Inspector, Mr Philip Willmer, dismissed the appellantôs appeal. He found that the proposed redevelopment was inappropriate development in the Green Belt, notwithstanding that it would replace the existing lawful use of the site, and that there were no ñvery special circumstancesò (para. 87 of the NPPF) which would justify the grant of permission for the development. The judge dismissed the application to quash his decision.

The policy framework

6. This appeal turns on the application of the NPPF, and in particular para. 89. Section 9 of the NPPF is headed "Protecting Green Belt land". It starts at paras. 79-81 with a statement of some broad principles:

> "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:
>
> * 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 urban land.
>
> 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."

7. The provisions relating to inappropriate development are at paras. 87-90:

> "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. Exceptions to this are:
>
> * buildings for agriculture and forestry;

> * provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
>
> * the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
>
> * the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
>
> * limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
>
> * limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.
>
> 90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:
>
> * mineral extraction;
>
> * engineering operations;
>
> * local transport infrastructure which can demonstrate a requirement for a Green Belt location;
>
> * the re-use of buildings provided that the buildings are of permanent and substantial construction; and
>
> * development brought forward under a Community Right to Build Order."

The Inspector's decision

8. An important part of the appellant's case before the Inspector was his contention that his application fell within the sixth bullet point in para. 89 of the NPPF, so that the proposed development by building the bungalow would not count as inappropriate development in the Green Belt. The Inspector dismissed this contention in paras. 8 to 15 of his decision. At para. 8 he set out the sixth bullet point and recorded the appellant's argument and at para. 9 he explained that the development would not constitute limited infilling. The issue therefore turned on the question of impact on the openness of the Green Belt. The Inspector dealt with this as follows:

ñ10. The appellant contends that if the development were to go ahead then, in addition to the loss of the volume of the mobile home, or potentially a larger replacement double unit, a further volume of some 372.9 cubic metres, equivalent to eleven commercial vehicles that he has demonstrated could be stored on the appeal site, might also be off set against the volume of the proposed dwelling, thereby limiting the new dwellingôs impact on the openness of the Green Belt.

11. Openness is essentially freedom from operational development and relates primarily to the quantum and extent of development and its physical effect on the appeal site. The Certificate of Lawful Existing Use conveys that the use of the land may be for a mobile home rather than a permanent dwelling. In this respect the mobile home may be replaced with another and I have no doubt, if planning permission is not granted for this development, that over time this may well occur. However, the Certificate of Lawful Existing Use is for the use of the land for the siting of a mobile home for residential purposes, which is distinct from the replacement of one dwelling with another.

12. In my view, therefore, no valid comparison can reasonably be made between the volume of moveable chattels such as caravans and vehicles on one hand, and permanent operational development such as a dwelling on the other. While the retention of the mobile home and vehicles, associated hardstandings etc., will inevitably have their effect on the openness of the Green Belt, this cannot properly be judged simply on measured volume which can vary at any time, unlike the new dwelling that would be a permanent feature. I am therefore not persuaded that the volume of the mobile home and the stored/displayed vehicles proposed to be removed should be off-set in terms of the developmentôs overall impact on openness.

13. Accordingly, while the replacement of the current single unit mobile home, or even a replacement double unit and vehicles, with the new dwelling might only result in a marginal or no increase in volume, these two things cannot be directly compared as proposed by the appellant.

14. I noted that existing commercial vehicles were parked on either side of the access road to the site during my site visit. However, as I saw, due to their limited height they do not close off longer views into the site. On the other hand the proposed bungalow, as illustrated, that would in any case be permanent with a dominating symmetrical front façade and high pitch roof, would in my view obstruct views into the site and appear as a dominant feature that would have a harmful impact on openness here.

> 15. For the reasons set out I consider that the proposed development would have a considerably greater impact on the openness of the Green Belt and the purpose of including land within it than the existing lawful use of the land. I therefore conclude that the proposal does not meet criterion six of the exceptions set out in paragraph 89 of the Framework and, therefore, would be inappropriate development, which by definition is harmful to the Green Belt. I give substantial weight to this harm.ò

9. It is this part of the Inspectorôs reasoning which is under challenge. (I should mention that although in paras. 11 and 12 of the decision the Inspector referred to ñoperational developmentò rather than simply ñdevelopmentò, the judge correctly found that this was an immaterial slip and there is no appeal in that regard). Having found that the redevelopment was inappropriate development in the Green Belt, it is unsurprising that the Inspector found that there were not adequate grounds to justify the grant of planning permission.

The appeal: discussion

10. On the appellantôs section 288 application the appellant had three grounds of challenge to the Inspectorôs decision, of which two are relevant on this appeal: (i) the Inspector failed to treat the existing development on the site as a relevant material factor to be taken into account in considering whether the sixth bullet point of para. 89 was applicable, and (ii) the Inspector wrongly conflated the concept of openness in relation to the Green Belt with the concept of visual impact. The judge rejected all the grounds of challenge and the appellant now appeals to this Court, relying again on these two grounds.

11. In his oral submissions, Mr Rudd developed the first ground somewhat. His submission was that the Inspector was wrong to say that no valid comparison could be made between the volume of moveable chattels (mobile home and lorries) on the site and a permanent structure in the form of the proposed bungalow; on the proper construction of the concept of ñopenness of the Green Beltò as used in the sixth bullet point in para. 89 of the NPPF the sole criterion of openness for the purpose of the comparison required by that bullet point was the volume of structures comprising the existing lawful use of a site compared with that of the structure proposed by way of redevelopment of that site (ñthe volumetric approachò); a comparison between the volume of existing development on the site in this case in the form of the mobile home and 11 lorries as against the volume of the proposed bungalow showed that there would be a lesser impact on the openness of the Green Belt if the existing development were replaced by the bungalow and the Inspector should so have concluded; and the Inspector erred by having regard to a wider range of considerations apart from the volume of development on the site (including the factor of visual impact) in para. 14 of the decision on the way to reaching his conclusion at para. 15. This last point overlaps with the second ground of challenge and it is appropriate to address both grounds together, as the judge did.

12. I do not accept these submissions by Mr Rudd. First, in so far as it is suggested that the Inspector did not address himself to the comparative exercise called for under the sixth bullet point in para. 89, the suggestion is incorrect. The Inspector set out that

bullet point and then proceeded to make an evaluative comparative assessment of the existing lawful use and the proposed redevelopment in paras. 10 to 15 of the decision.

13. The principal matter in issue is whether the Inspector adopted an improper approach to the question of openness of the Green Belt when he made that comparison. The question of the true interpretation of the NPPF is a matter for the court. In my judgment, the approach the Inspector adopted was correct and the judge was right so to hold.

14. The concept of ñopenness of the Green Beltò is not narrowly limited to the volumetric approach suggested by Mr Rudd. The word ñopennessò is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case. Prominent among these will be factors relevant to how built up the Green Belt is now and how built up it would be if redevelopment occurs (in the context of which, volumetric matters may be a material concern, but are by no means the only one) and factors relevant to the visual impact on the aspect of openness which the Green Belt presents.

15. The question of visual impact is implicitly part of the concept of ñopenness of the Green Beltò as a matter of the natural meaning of the language used in para. 89 of the NPPF. I consider that this interpretation is also reinforced by the general guidance in paras. 79-81 of the NPPF, which introduce section 9 on the protection of Green Belt Land. There is an important visual dimension to checking ñthe unrestricted sprawl of large built-up areasò and the merging of neighbouring towns, as indeed the name ñGreen Beltò itself implies. Greenness is a visual quality: part of the idea of the Green Belt is that the eye and the spirit should be relieved from the prospect of unrelenting urban sprawl. Openness of aspect is a characteristic quality of the countryside, and ñsafeguarding the countryside from encroachmentò includes preservation of that quality of openness. The preservation of ñthe setting é of historic townsò obviously refers in a material way to their visual setting, for instance when seen from a distance across open fields. Again, the reference in para. 81 to planning positively ñto retain and enhance landscapes, visual amenity and biodiversityò in the Green Belt makes it clear that the visual dimension of the Green Belt is an important part of the point of designating land as Green Belt.

16. The visual dimension of the openness of the Green Belt does not exhaust all relevant planning factors relating to visual impact when a proposal for development in the Green Belt comes up for consideration. For example, there may be harm to visual amenity for neighbouring properties arising from the proposed development which needs to be taken into account as well. But it does not follow from the fact that there may be other harms with a visual dimension apart from harm to the openness of the Green Belt that the concept of openness of the Green Belt has no visual dimension itself.

17. Mr Rudd relied upon a section of the judgment of Green J sitting at first instance in *R (Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin) at [67]-[78], in which the learned judge addressed the question of the relationship between openness of the Green Belt and visual impact. Green J referred to the judgment of Sullivan J in *R (Heath and Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P&CR 19, which related to previous policy in relation to the Green Belt as set out in Planning Policy Guidance 2 (ñPPG 2ò), and drew from it the propositions

that ñthere is a clear conceptual distinction between openness and visual impactò and ñit is therefore wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impactò: para. [78] (Green Jôs emphasis). The case went on appeal, but this part of Green Jôs judgment was not in issue on the appeal: [2015] EWCA Civ 10; [2016] 1 All ER 895.

18. In my view, Green J went too far and erred in stating the propositions set out above. This section of his judgment should not be followed. There are three problems with it. First, with respect to Green J, I do not think that he focused sufficiently on the language of section 9 of the NPPF, read as part of the coherent and self-contained statement of national planning policy which the NPPF is intended to be. The learned judge does not consider the points made above. Secondly, through his reliance on the *Heath and Hampstead Society* case Green J has given excessive weight to the statement of planning policy in PPG 2 for the purposes of interpretation of the NPPF. He has not made proper allowance for the fact that PPG 2 is expressed in materially different terms from section 9 of the NPPF. Thirdly, I consider that the conclusion he has drawn is not in fact supported by the judgment of Sullivan J in the *Heath and Hampstead Society* case.

19. The general objective of PPG 2 was to make provision for the protection of Green Belts. Paragraph 3.2 stated that inappropriate development was, by definition, harmful to the Green Belt. Paragraph 3.6 stated:

> ñProvided that it does not result in disproportionate additions over and above the size of the original building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, proving the new dwelling is not materially larger than the dwelling it replaces é ò

20. It was the application of this provision which was in issue in the *Heath and Hampstead Society* case. It can be seen that this provision broadly corresponds with the fourth bullet point in para. 89 of the NPPF and that it has a specific focus on the relative size of an existing building and of the proposed addition or replacement.

21. The NPPF was introduced in 2012 as a new, self-contained statement of national planning policy to replace the various policy guidance documents that had proliferated previously. The NPPF did not simply repeat what was in those documents. It set out national planning policy afresh in terms which are at various points materially different from what went before. This court gave guidance regarding the proper approach to the interpretation of the NPPF in the *Timmins* case at para. [24]. The NPPF should be interpreted objectively in accordance with the language used, read in its proper context. But the previous guidance ï specifically in *Timmins*, as in this case and in *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] 1 P & CR 36 to which the court in *Timmins* referred, the guidance on Green Belt policy in PPG 2 ï remains relevant. In particular, since in promulgating the NPPF the Government made it clear that it strongly supported the Green Belt and did not intend to change the central policy that inappropriate development in the Green Belt should not be allowed, section 9 of the NPPF should not be read in such a way as to weaken protection for the Green Belt: see the *Redhill Aerodrome* case at [16] per Sullivan LJ, quoted in *Timmins* at [24].

22. The *Heath and Hampstead Society* case concerned a proposal to demolish an existing residential building on Metropolitan Open Land (which was subject to a policy giving it the same level of protection as the Green Belt) and replace it with a new dwelling. Sullivan J rejected the submission that the test in para. 3.6 was solely concerned with a mathematical comparison of relevant dimensions: [19]. However, he accepted the alternative submission that the exercise under para. 3.6 was primarily an objective one by reference to size, where which particular physical dimension was most relevant would depend on the circumstances of a particular case, albeit with floor space usually being an important criterion: [20]. It was not appropriate to substitute a test such as ñproviding the new dwelling is not more visually intrusive than the dwelling it replacesò for the test actually stated in para. 3.6, namely whether the new dwelling was materially larger or not: [20]. As Sullivan J said, ñParagraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impactò: [21]. In that regard, also at para. [21], he relied in addition on para. 3.15 of PPG 2 which made specific provision in relation to visual amenities in the Green Belt. Neither para. 3.6 of PPG 2 (with its specific focus on comparative size of the existing and replacement buildings) nor para. 3.15 of PPG 2 refer to the concept of the ñopenness of the Green Beltò. They do not correspond with the text of the sixth bullet point in para. 89 of the NPPF, and section 9 of the NPPF contains no provision equivalent to para. 3.15 of PPG 2. It is therefore not appropriate to treat this part of the judgment in *Heath and Hampstead Society* as providing authoritative guidance on the interpretation of the sixth bullet point in para. 89 of the NPPF. At paras. [22] and [36]-[38] Sullivan J emphasised that the relevant issue in the case specifically concerned the application of para. 3.6 of PPG 2 and whether the proposed replacement house was materially larger than the existing house.

23. At para. [22] Sullivan J said, ñThe loss of openness (i.e. unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objectiveò. Since the concept of the openness of the Green Belt has a spatial or physical aspect as well as a visual aspect, that statement is true in the context of the NPPF as well, provided it is not taken to mean that openness is *only* concerned with the spatial issue. Such an interpretation accords with the guidance on interpretation of the NPPF given by this court in the *Timmins* and *Redhill Aerodrome* cases, to the effect that the NPPF is to be interpreted as providing no less protection for the Green Belt than PPG 2. The case before Sullivan J was concerned with a proposed new, larger building which represented a spatial intrusion upon the openness of the Green Belt but which did not intrude visually on that openness, so he was not concerned to explain what might be the position under PPG 2 generally if there had been visual intrusion instead or as well.

24. Sullivan J gives a general reason for the importance of spatial intrusion at para. [37] of his judgment:

> ñThe planning officerôs approach can be paraphrased as follows:
>
> > óThe footprint of the replacement dwelling will be twice as large as that of the existing dwelling, but the public will not be able to see very much of the increase.ô

> It was the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause ódemonstrable harmô that led to the clear statement of policy in para. 3.2 of PPG 2 that inappropriate development is, by definition, harmful to the Green Belt. The approach adopted in the officerôs report runs the risk that Green Belt of Metropolitan Open Land will suffer the death of a thousand cuts. While it may not be possible to demonstrate harm by reason of visual intrusion as a result of an individual ï possibly very modest ï proposal, the cumulative effect of a number of such proposals, each very modest in itself, could be very damaging to the essential quality of openness of the Green Belt and Metropolitan Open Land.ò

25. This remains relevant guidance in relation to the concept of openness of the Green Belt in the NPPF. The same strict approach to protection of the Green Belt appears from para. 87 of the NPPF. The openness of the Green Belt has a spatial aspect as well as a visual aspect, and 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 or materially larger building there. But, as observed above, it does not follow that openness of the Green Belt has no visual dimension.

26. What is also significant in this paragraph of Sullivan Jôs judgment for present purposes is the last sentence, from which it appears that Sullivan J considered that a series of modest visual intrusions from new developments would be a way in which the essential quality of the openness of the Green Belt could be damaged, even if it could not be said of each such intrusion that it represented demonstrable harm to the openness of the Green Belt in itself. At any rate, Sullivan J does not say that the openness of the Green Belt has no visual dimension. Hence I think that Green J erred in *Timmins* in taking the *Heath and Hampstead Society* case to provide authority for the two propositions he sets out at para. [78] of his judgment, to which I have referred above.

27. Turning back to the Inspectorôs decision in the present case, there is no error of approach by the Inspector in his assessment of the issue of impact on the openness of the Green Belt. In paras. 11 to 13 the Inspector made a legitimate comparison of the existing position regarding use of the site with the proposed redevelopment. This was a matter of evaluative assessment for the Inspector in the context of making a planning judgment about relative impact on the openness of the Green Belt. His assessment cannot be said to be irrational. It was rational and legitimate for him to assess on the facts of this case that there is a difference between a permanent physical structure in the form of the proposed bungalow and a shifting body of lorries, which would come and go; and even following the narrow volumetric approach urged by the appellant the Inspector was entitled to make the assessment that the two types of use and their impact on the Green Belt could not in the context of this site be ñdirectly compared as proposed by the appellantò (para. 13). The Inspector was also entitled to take into account the difference in the visual intrusion on the openness of the Green Belt as he did in para. 14.

Conclusion

28. For the reasons given above, I would dismiss this appeal.

Lord Justice Floyd:

29. I agree.

Lady Justice Arden DBE:

30. I also agree.

EP4

Case No: CO/9587/2013 & CO/9276/2013

Neutral Citation Number: [2014] EWHC 654 (Admin)

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham

Date: 11/03/2014

Before :

MR JUSTICE GREEN

- -

Between :

1) Mrs Jean Timmins	**Claimants**
2) A W Lymn (The Family Funeral Service) Limited	
- and -	
Gedling Borough Council	**Defendant**
- and –	
Westerleigh Group Limited	**Interested Party**

- -
- -

Paul Brown QC (instructed by **Taylor & Emmet LLP**) for the **First Claimant**
James Strachan QC (instructed by **Clyde & Co LLP**) for the **Second Claimant**
Richard Kimblin and Hashi Mohamed (instructed by **Helen Barrington, Gelding Borough Council**) for the **Defendant**
Paul Tucker QC (instructed by **Hill Dickinson LLP) for the Interested Party**

Hearing dates: 14th February 2014

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Judgment

Mr Justice Green :

1. Issues

1. Three issues arise upon this application for judicial review.

2. First, whether pursuant to the Green Belt (ñGreen Beltò) Policy as set out in the March 2012 National Planning Policy Framework (ñNPPFò) *all* developments are prima facie inappropriate and can therefore only be justified by very special circumstances unless they fall within the specific exceptions set out in paragraphs 89 and/or 90 NPPF. A related issue is whether the exceptions from the requirement to prove very special circumstances in paragraph 89 NPPF applies to (1) buildings for cemeteries or (2) the cemeteries themselves.

3. Secondly, this application concerns the meaning of ñopennessò and ñvisual impactò and the relationship between these two concepts. Are they different? Do they overlap? Can an evaluation of openness take into consideration measures proposed to mitigate the visual perception of the structure in question? Alternatively, is it permissible as part of the very special circumstances balancing exercise to take account of such proposed measures?

4. Thirdly, what is the scope and extent of the duty on planning authorities under the Town and Country Planning (Development Management Procedure) (England) (Amendment No. 2) Order 2012 (hereafter ñDMPOò), as from 1st December 2012, to include a statement on every decision letter stating ñhowò they have worked with the applicant in a positive and proactive way? The issue arising in this application is whether the Defendant complied with that duty and, if not, what the consequences of that failure may be.

2. The facts

5. The facts may be summarised as follows. This case concerns a dispute over the grant of planning permission for the siting of a crematorium and cemetery in an area known as the ñLambley Dumblesò in Nottinghamshire. This is an area of rolling farmland and deep wooded valleys. It runs from the Mapperley Plains towards the ancient village of Lambley. The area is reputed to have been visited by DH Lawrence. It is an area popular with walkers and constitutes designated Green Belt.

6. In May 2012 Westerleigh Group Limited (hereafter ñWesterleighò) made an application to Gedling Borough Council (hereafter ñGBCò) for planning permission for the construction of a crematorium and cemetery on Catfoot Lane, Lambley.

7. In June 2012 a further application for permission to develop a crematorium within the same area was submitted by A W Lymn the Family Funeral Service Limited (hereafter ñLymnò). Lymn is a family run firm of funeral directors of longstanding in Nottingham, Derby and Mansfield. The Lymn application concerned a proposed crematorium but there was no proposal for an additional cemetery. The proposed siting for the development was at Orchard Farm, 216 Catfoot Lane, Lambley.

8. Both the Westerleigh and Lymn sites are within the Green Belt. Although the proposed crematoria had different designs they are both of a broadly similar size. The

Westerleigh proposal entailed a total internal floor space of 536 square metres and the Lymn proposal entailed a total floor space of 555 square metres. These applications were the culmination of a series of earlier, and unsuccessful, applications by other applicants for the development of a crematorium within GBC. The Westerleigh and Lymn applications came before the GBC Planning Committee on 8th May 2013.

9. In preparation for this meeting the planning officers of GBC had prepared three detailed documents all dated 8th May 2013. The first was an Introductory Report (hereafter ñthe Introductory Reportò) and addressed issues common to the Westerleigh and Lymn applications and conducted a comparative assessment of the two competing applications. The second and third Reports concerned the details of the Westerleigh and Lymn applications respectively (hereafter the ñWesterleigh Reportò and the ñLymn Reportò). The Introductory Report is a 42 page report which covered both planning applications and addressed matters of commonality between the applications. Paragraph 3 to this report identified the two central issues. It stated:

> ñ3. The reason for reporting in this fashion is that Planning Committee needs to consider a number of common issues and reach a view on these before it is able to make either determination. The two most important decisions it must take are to determine:-
>
> i) Whether there is a need for crematoria services in the Borough and if so at what scale.
>
> ii) If this is a situation when, in determining the applications, alternatives to the proposals are a material considerationò.

In section 7 of this report the planning officer advised the Committee of the options open to it. These were: (1) refuse planning permission for both crematoriums; (2) grant planning permission for both applications; (3) grant planning permission for one application and refuse the other (see paragraphs [119]-[127] of the Introductory Report). The report provided information to the Committee on the current proposals and the three previous proposals summarising in turn why each had been refused. It provided advice on national and local planning policy. In section 4 it provided legal and evidential advice in relation to the ñvery special circumstancesò test. The report further set out the quantitative and qualitative evidence for ñneedò for crematoria services within the Borough, including within this section detailed isochronic evidence. The overall conclusion on ñneedò was in the following terms:

> ñ96. It is considered that the Council has now had the fullest evidence presented to it on this matter. It certainly has more evidence before it than any of the previous Inspectors had. The decision as to whether need has been proven is extremely finely balanced but in terms of meeting the needs of the residents of the Borough it is therefore recommended that it is in the public interest that a single crematorium site is provided in the Borough to serve the Arnold and Carlton areas, and this is sufficient to be regarded as very special circumstances in this instanceò.

10. The officers also concluded that there were no reasonable alternative sites which had been identified which were capable of performing better in terms of planning policy and meeting the identified needs of the community than the two sites the subject of the Westerleigh and Lymn applications: see Report paragraph [118].

11. As observed above the Committee also had before it reports from the planning officers on the merits of the individual Westerleigh and Lymn applications. When the time came for the Committee to vote the position was hence that the officers were advising that in principle one or other of the applications should prevail. One application proposed a crematorium and cemetery; the other only a crematorium. In short the officerôs conclusion, if accepted, placed Westerleigh and Lymn in direct competition with each other for the grant of a single permission.

12. By a decision dated 17th May 2013 (ñthe Decisionò) GBC granted to Westerleigh permission, subject to compliance with conditions, for the development of a crematorium and cemetery.

13. The Decision has triggered litigation on two fronts. First, Mrs Jean Timmins seeks judicial review of the Decision to grant permission to Westerleigh. Mrs Timmins is a 69 year old retired civil servant. She joined an opposition group to the grant of any permission for a crematorium in the Lambley Dumbles area known as the Catfoot Crematorium Opposition Group (ñCCOGò). The second application for judicial review was brought by Lymn, the disappointed competitor to Westerleigh. Whilst both Westerleigh and Mrs Timmins challenge the decision of the Defendant both do so of course for very different reasons.

3. Ground 1: Scope and effect of section 9 NPPF on Green Belt policy

(i) Legal Framework

14. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (ñPCPA 2004ò) requires that planning applications be determined in accordance with the development plan unless material considerations indicate otherwise.

15. It is common ground that the NPPF constitutes ñmaterial considerationsò and that therefore planning applications must be taken with due regard being paid to that Framework. The Introductory Report purports to apply the NPPF upon the basis that GBCôs own development plan is fully consistent therewith. Paragraphs 17 and 18 of the Introductory Report provide:

> ñ17. The publication of the National Planning Policy Framework (NPPF) on 27th March 2012 has not altered the fundamental legal requirement under Section 38(6) of the Planning and Compulsory Purchase Act 2004 that decisions must be made in accordance with the Development Plan unless material considerations (such as the NPPF) indicate otherwise.
>
> 18. However, the NPPF makes clear at paragraphs 214 and 215 that the weight to be given to older development plans not prepared in accordance with NPPF was time limited. Paragraph 215 stated that, following a 12 month period from the date of

> the application of the NPPF, due weight should be given in determining planning applications to the relevant policies according to their consistency within the Frameworkò.

16. The Planning Officer then stated that in his view the saved policies in the Replacement Local Plan were up to date and consistent with the NPPF: Introductory Report paragraph [20]. He then continued:

> ñ21. The NPPF is an important material consideration in determining the applications. The aim of the NPPF is to deliver ñsustainable developmentò which balances environmental, social and economic objectives. As part of this the NPPF includes a presumption in favour of sustainable development, which should be seen as a golden thread running through both the plan-making and decision-making.
>
> 22. However the NPPF, in Section 9 (paragraphs 79-92), still retains the requirement that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. It goes on to say that when considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. ñVery special circumstancesò 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.
>
> 23. The NPPF goes [on] (sic) to define the construction of new buildings as inappropriate with various exceptions. Building for crematoria are not listed in the exceptionò.

17. The present application turns upon the construction and proper meaning of the NPPF and whether, in the circumstances of this case, it has been misconstrued and misapplied by the Defendant.

(ii) Defendant's interpretation of NPPF

18. The position of the Planning Officer in relation to cemeteries is set out in paragraphs 469 and 470 of the Westerleigh Report. These provide:

> ñ469. With regard to the proposed cemetery, the list of appropriate Green Belt uses within paragraph 89 of the NPPF and Policy ENV 26 of the RLP include cemeteries and, as such, this element of the proposal is acceptable in policy terms, if it were proposed on its own.
>
> 470. In my opinion, therefore, the proposed cemetery constitutes an appropriate form of development within the Green Belt and that, given the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows, it would preserve the openness of the

> Green Belt in this location and would not conflict with any of the purposes of including land within the Green Belt, in accordance with Policy ENV 26 of the RLP and paragraphs 89 of the NPPFò.

19. It is apparent that the Planning Officer thus construed the NPPF as not treating cemeteries as inappropriate and adverse to the Green Belt.

20. The NPPF addresses Green Belt policy in section 9 entitled ñProtecting Green Belt landò. Paragraph 79, within that section takes as its fundamental starting point the importance of maintaining ñopennessò on a ñpermanentò basis. It provides:

> ñ79. 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 permanenceò.

Paragraphs 87-90 of section 9 NPPF sets out various exceptions where a development will not be subject to the very special circumstances test but may be subject to some other criteria of assessment. The second bullet point in paragraph 89 refers to cemeteries. These paragraphs provide:

> ñ87. 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. ôVery special circumstancesô 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. Exceptions to this are:
>
> ŏ buildings for agriculture and forestry;
>
> ŏ provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
>
> ŏ the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
>
> ŏ the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;

ǒ limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or

ǒ limited infilling or the partial or complete redevelopment of previously developed sites (Brownfield Land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.

90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:

ǒ mineral extraction;

ǒ engineering operations;

ǒ local transport infrastructure which can demonstrate a requirement for a Green Belt location;

ǒ the re-use of buildings provided that the buildings are of permanent and substantial construction; and

ǒ development brought forward under a Community Right to Build Orderò.

21. The Defendant submits that the directions given by the Planning Officer to the Planning Committee in paragraphs 469, 470 of the Westerleigh Report (see paragraph [18] above) are correct. It is to be noted that the oral address by the Planning Officer to the Planning Committee at their meeting convened to determine the applications was in similar terms in relation to the cemetery. According to the notes of the oral address the officer stated:

> ñé it should be noted that the cemetery element of the proposal does not conflict with the GBò.

It is clear from a reading of the Introductory Report and the Westerleigh and Lymn Reports that the Planning Officer considered that, substantively, it was <u>only</u> the crematoria element of each application that needed to be justified upon the basis that it was prima facie ñinappropriateò and therefore had to be measured against the ñvery special circumstancesò test for approval. There is no reference in any of the Reports to the cemetery element of the Westerleigh application being subject to an equivalent ñvery special circumstancesò assessment. On the contrary the officerôs assessment assumed that a cemetery in the Green Belt should be assessed by the lesser test set out in paragraph 89 NPPF (set out above). Accordingly, the manner in which the Planning Officer assessed each application was upon the basis that the cemetery element in the Westerleigh application did <u>not</u> need the same level of justification as the crematorium element.

22. Two questions arise. First, was the Defendant correct to interpret paragraph 89 NPPF as permitting cemeteries to be treated as ñappropriateò provided they preserved the openness of the Green Belt and did not conflict with the purposes of including land within it, i.e. by reference to a test which is less onerous than the ñvery special circumstancesò test? Secondly, if the Defendant is incorrect in its construction of paragraph 89 is it, nonetheless, the case that cemeteries fall outwith the scope of section 9 NPPF?

(iii) Analysis of the scope and effect of section 9 NPPF

(a) Question 1: Scope of paragraph 89 NPPF

23. I turn to consider the first question, namely whether the Defendant erred in its interpretation of paragraph 89 NPPF. As to this the answer is, in my judgment, that the Defendant clearly erred. It is apparent that it construed paragraph 89 as treating cemeteries as ñappropriateò (provided they met the limited test contained therein). However, paragraph 89 is not concerned with cemeteries *per se* but with the construction of ñnew buildingsò which provide appropriate facilities for cemeteries. The two are clearly different. Thus, for example, paragraph 89 might address toilet facilities, or a cafeteria or a car park which serves a cemetery. But it is not concerned with the cemetery itself. The structure of paragraph 89 makes this clear. It creates a *prima facie* rule namely that the construction of new buildings is inappropriate. It then states that there are certain ñExceptions to thisò. Amongst the exceptions are the ñé provision of appropriate facilities foré cemeteriesé ò. In my judgment the Defendant erred in treating the exception as applying to the cemetery as opposed to a new building which provided facilities to serve the cemetery.

(b) Question 2: Does Chapter 9 NPPF apply in principle to all developments?

24. The conclusion that I have arrived at above in relation to paragraph 89 does not, however, matter if upon a true construction of section 9 of the NPPF as a whole (as opposed to paragraph 89 specifically) cemeteries are not treated as exerting any adverse effect upon the Green Belt. The Defendant argued, in the alternative to its position in paragraph 89, that if paragraph 89 was concerned only with new buildings then properly interpreted cemeteries fell wholly outwith section 9 NPPF and did not have to be justified by ñvery special circumstancesò.

25. In my judgment, properly interpreted, section 9 NPPF means that *any* development in the Green Belt is treated as *prima facie* ñinappropriateò and can only be justified by reference to ñvery special circumstancesò save in the defined circumstances set out in paragraphs 89 and 90. I accept that there is no express statement in section 9 NPPF to this effect. Indeed there is no definition of ñpermanently openò or ñopennessò or ñinappropriateò or ñnot inappropriateò, even though these concepts lie at the core of the Green Belt policy contained in section 9. There are a number of reasons which lead me to this conclusion. These are based upon the language of Chapter 9, its underlying purpose, the practical implications of this conclusion being wrong, and the guidance available from decided case law. I have in this respect had regard to the principles of interpretation referred to by Lord Neuberger in *Cusack v Harrow LBC* [2013] UKSC at paragraphs [58] and [60].

26. First, although not express, this conclusion is to be inferred from the language used in paragraphs 79, 87 and 88 NPPF. Paragraph 79 emphasises that a ñfundamental aimò of the Green Belt policy is ñkeeping land permanently openò. The ñessentialò characteristic of Green Belt is its ñopennessò. Paragraph 87 takes as its starting point that inappropriate development is ñby definitionò harmful to the Green Belt. In answering the question why is development ñinappropriateò it is, in my view, because it is adverse to ñopennessò. As I explain below at paragraphs [68]-[75] openness means the absence of buildings or development. Paragraph 87 reflects the policy objective of preserving the Green Belt by stating in effect that any development should not be approved except in very special circumstances. The first sentence at paragraph 88 uses the all embracing ñanyò on two occasions. It applies to ñ*any*ò planning application. It thus applies in every circumstance. It also provides that ñsubstantial weight is given to *any* harm to the Green Beltò. Again the word ñanyò is notable: Any development constitutes an impairment of openness, at least to some degree. A cemetery may be relatively innocuous in its effect upon openness but there is, nonetheless, some effect. In my view the inference to be drawn from the combined effect of the language used in paragraphs 79, 87 and 88 is that <u>all</u> developments proposed for the Green Belt are *prima facie* treated as ñinappropriateò and can only be justified by reference to very special circumstances.

27. Secondly, the way in which exceptions in paragraphs 89 and 90 are drafted reinforce this conclusion. In my view the structure of the reasoning in paragraphs 87-90 is, first, to lay down a general rule and, secondly, to lay down the exceptions to the general rule. Paragraphs 89 and 90 represent those exceptions. Exceptions exist for ñnew buildingsò in certain defined circumstances set out in paragraph 89; and, ñcertain other forms of developmentò set out in paragraph 90. The fact that paragraphs 89 and 90 concern ñbuildingsò and ñother forms of developmentò suggests that the prima facie rule (in paragraphs 87 and 88) apply to any ñdevelopmentò whether it comprises a building or some other usage or change thereof.

28. Thirdly, the conclusion can be assessed by considering whether the Defendantôs interpretation is consistent with ordinary assumptions concerning drafting practice. The Defendantôs submission would imply that there are certain types of development, undefined in section 9, which may nonetheless be engaged upon within the Green Belt without restriction because they will always be treated as ñappropriateò (or ñnot inappropriateò). The fact that the Defendantôs interpretation necessarily proceeds through an argument based on inference, or sub-silentio reasoning, is itself significant. If it were indeed the intention of the NPPF to create categories of development wholly outwith section 9 then section 9 would have been expressly drafted so as to set out these exceptions. It is, in my view, inconceivable that an entire category of ñappropriateò developments would be permitted by virtue of a drafting lacuna. In short if the draftsman had intended to create a significant exception to the fundamental principle of the permanent preservation of the integrity of the Green Belt this would have been addressed explicitly in the Framework. Accordingly the absence of such text is in my view a strong indication that it does not exist.

29. Fourthly, it is also relevant to consider the practical implications of the Defendantôs argument. Were the Defendant to be correct the implications would be highly material for the Green Belt. The approach of considering the practical implications of a posited construction has been recognised in this area upon a number of occasions. In

particular the courts have considered what the cumulative effect on the Green Belt would be if a particular argument were correct. In *Doncaster Metropolitan BC v Secretary of State for the Environment Transport and the Regions* [2002] EWHC (Admin) 808 (10th April 2002) the Claimant Council issued two enforcement notices and refused an application for planning permission in respect of the unauthorised use of land in the Green Belt for the stationing of a mobile home, the construction of a septic tank and the laying of hardcore, for domestic use. However, an appeal was allowed by an Inspector subject to conditions. The Claimant appealed. One of the grounds of appeal was that the Inspector failed to consider the consequences of the precedent that would be set for the Green Belt by the decision. It was further contended that the decision was irrational since the sole factor identified by the Inspector (the educational needs of the children of the applicant for permission) was not in the least unusual and could not sensibly amount to ñvery special circumstancesò sufficient to outweigh the adverse effect on the Green Belt. In paragraph 68 of his judgment Sullivan J stated:

> ñ68. In paragraph 15 of the present decision letter the Inspector did not state in terms that there were very special circumstances which justify permitting inappropriate development in the Green Belt. The decision letter has to be read as a whole and if this was the only point of criticism I would have accepted Mr Littonôs submission that since this was the test posed in paragraph 13 it would be unrealistic to assume that it was not still in the Inspectorôs mind in paragraph 15 of the decision letter. However, it is very important that full weight is given to the proposition that inappropriate development is by definition harmful to the Green Belt. That policy is a reflection of the fact that there may be many applications in the Green Belt where the proposal would be relatively inconspicuous or have a limited effect on the openness of the Green Belt, but if such arguments were to be repeated the cumulative effect of any permissions would destroy the very qualities which underlie the Green Belt designation. Hence the importance of recognising at all times that inappropriate development is by definition harmful, and then going on to consider whether there will be additional harm by reason of such matters as loss of openness and impact on the function of the Green Beltò.

30. It is to be noted that the decision in *Doncaster Metropolitan BC* was in relation to the scope and effect of paragraph 3.2 of Planning Policy Guidance 2 (ñPPG2ò) (see below). That provision is, in substance, reflected in paragraphs 87 and 88 NPPF. A similar observation was also made by Sullivan J in *Heath & Hampsted Society v London Borough of Camden* [2007] EWHC 977 (Admin) at paragraph [37] thereof to the effect that the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause demonstrable harm was precisely the reason that led to the statement of policy that inappropriate development was by definition harmful to the Green Belt. The judge there observed that were this not to be the case the Green Belt would ñé suffer the death of a thousand cutsò. The

upshot of this point is that the effect of the Defendantôs submission would, if it were correct, open Pandoraôs Box to potentially numerous developments within the Green Belt which, cumulatively, could destroy the very characteristics of permanent openness of the Green Belt which the NPPF seeks to preserve. In this regard paragraph 80 NPPF identifies five purposes of the Green Belt. These include checking unrestricted sprawl of built up areas; assisting in safeguarding the countryside from encroachment; and preserving the setting and special character of historic towns. An unfettered right for developments which are not within paragraphs 89 and 90 to occur within the Green Belt would run counter to each of these purposes. Mr Paul Tucker QC for Westerleigh took me through a number of hypothetical illustrations which he submitted showed that the conclusion I have arrived at could lead to ñabsurdò results. In fact his illustrations were themselves extreme. But the core point is that chapter 9 NPPF is intended to lay down a principle that any development must be justified by very special circumstances unless it falls within the exceptions in paragraphs 89 and 90. That is coherent and logical. The fact that this principle may throw up some hard cases does not undermine the coherence or logic of the basic position.

31. Fifthly, it is relevant that the NPPF does not, in all respects, mirror its predecessor guidance in relation to Green Belt. The earlier Green Belt policy was contained in PPG2 first published in January 1995 and amended in March 2001. Paragraph 3.12 of PPG2 made clear that material changes in the use of land would be considered inappropriate unless they maintained openness and did not conflict with the purposes of including land in the Green Belt. It accordingly indicated that a change of use which met a test falling short of ñvery special circumstancesò could be considered appropriate. The relevant provision provided:

> ñ3.12 The statutory definition of development includes engineering and other operations, and the making of any material change in the use of land. The carrying out of such operations and the making of material changes in the use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the Green Belt. (Advice on material changes in the use of buildings is given in paragraph 3.8 above)ò.

The present development constituted a change of use from agricultural land to a cemetery. Had paragraph 3.12 of PPG2 been applied then it would be considered appropriate insofar as it maintained openness and did not conflict with the purpose of including land in the Green Belt. However that paragraph has not been replicated in the NPPF. This, in my view, was intentional and reflects a deliberate shift in policy towards a tightening of the circumstances in which development could occur within the Green Belt.

32. For all the above reasons in my view a change of use from agricultural land to a cemetery constitutes a development which is prima facie ñinappropriateò and to be prohibited in the absence of ñvery special circumstancesò. Further for the reasons that I have already given the creation of a cemetery does not fall within one of the exceptions in paragraphs 89 and 90 NPPF. I turn now to assess these conclusions against existing case law.

(iv) Relevant authorities

33. I draw support for the above conclusion from various authorities.

34. In particular in the recent judgment of HHJ Pelling QC in *Fordent Holdings Limited v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin) is on point and consistent with my conclusion. There the court was concerned with an application under section 288 Town and Country Planning Act 1990 (ñTCPAò) for an order quashing a decision of a planning inspector appointed by the Secretary of State by which the inspector dismissed an appeal against a refusal of the Council to grant outlying planning permission for a change of use for a 9 hectare site located within the Green Belt from agricultural use to a caravan and camping site to accommodate up to 120 touring caravans and up to 60 tent pitches on a mixture of grass and hard standing together with the construction of a shop, reception and office building.

35. The inspector had concluded that the proposal would amount to an outdoor sports and recreational use which therefore, prima facie, fell potentially within the scope of paragraph 89 NPPF. The Secretary of State did not challenge this particular conclusion about the scope of paragraph 89 in the course of the proceedings: See judgment paragraph [9].

36. The inspector concluded that a change of use from agricultural use to outdoor sport and recreation was an inappropriate development and thus not to be permitted in the absence of very special circumstances. Further, he concluded that paragraph 89 NPPF did not apply to changes of use but was concerned with ñnew buildingsò. It was contended by the Claimant that in these conclusions the Inspector erred and particularly that the Inspector erred in failing to have regard to the NPPF policy that significant weight should be given to the need to support economic growth through the planning system: See the summary of grounds at Judgment paragraph [15].

37. In his analysis the Judge started by reminding himself that a change of use constituted ñdevelopmentò within the meaning of section 55 TCPA. He stated that the word ñdevelopmentò in the NPPF had the same meaning as that in section 55, a conclusion previously arrived at by Ouseley J in *Europa Oil and Gas Limited v SSCLG* [2013] EWHC 2643 (Admin) at paragraph [53]. From this the Judge deduced that a material change of use was capable of constituting ñinappropriateò development within the meaning of paragraph 87 NPPF. He then stated:

> ñ19. Previous national policy in relation to Green Belt development defined material changes of use as inappropriate unless they maintained openness and did not conflict with the purposes of including land within the Green Belt ï see PPG2, Paragraph 3.12. That approach has not been carried through into the NPPF. However, where the preferred approach is to attempt to define what is capable of being ñnot inappropriateò development within the Green Belt with all other development being regarded as inappropriate by necessary implication. It is for this reason that there is no definition within Chapter 9 of the NPPF of what constitutes inappropriate development, or any criteria by which whether a proposed development is or is not appropriate could be ascertained. It is for that reason that Paragraph 89 of the NPPF provides that a particular form of

> development ï the construction of new buildings ï in the Green Belt is inappropriate unless one of the exceptions identified in the Paragraph applies. Paragraph 90 defines the ñother forms of developmentò there referred to as also at least potentially not inappropriate. The effect of Paragraph 87, 89 and 90, when read together is that all development in the Green Belt is inappropriate unless it is either development (as that word is defined in s.55 of the TCPA) falling within one or more of the categories set out in Paragraph 90 or is the construction of a new building or building that comes or potentially comes within one of the exceptions referred to in Paragraph 89ò.

In paragraph 24 the Judge concluded that paragraphs 89 and 90 NPPF comprised closed lists of classes of development that were capable of being ñnot inappropriateò by way of exception to the general rule and that there was no general exception for changes of use that maintained the openness of the Green Belt and did not conflict with the purposes of the policy of the Green Belt.

38. It may be of some relevance to the present case that the submissions which the Judge in *Fordent* accepted emanated from the Secretary of State for Communities and Local Government, who was the Defendant to the proceedings. This point was relied upon by the Claimants in the present case although the Defendant Council pointed out, no doubt correctly, that whatever the position of the Secretary of State in those proceedings, the law was for the courts to decide not for the Minister. See *per* Carnwath J in *Wychavon DC v Secretary of State for Communities & Local Government* [2008] EWCA Civ 692 para [31].

39. In short the conclusions I have arrived at are the same as those of the Judge in *Fordent*.

40. In *Europa Oil and Gas Limited v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin) the Claimant challenged the decision of the Inspector under section 288 TCPA 1990 refusing the Claimantôs appeal against a refusal to grant permission by Surrey County Council to construct a site for the drilling of an exploratory bore hole for the purpose of testing for hydrocarbons and for the erection of associated security fencing and works. In the course of his judgment Ouseley J set out paragraphs 89 and 90 NPPF in terms making it clear that, in his view, both paragraphs set out basic propositions which were subject to ñexceptionsò. The manner in which the Judge described paragraphs 89 and 90 made it clear that it was, to him, uncontroversial that each paragraph started with a basic proposition then set out exceptions thereto. I make this observation in response to the Defendantôs arguments that, properly construed, the categories of activity which are capable of being ñappropriateò in paragraphs 89 and 90 were to be treated as generic and not simply exceptions to a basic rule contained within the relevant paragraph. So for example it was submitted in the present case that properly interpreted paragraph 89 meant that both cemeteries and the provision of facilities therefore were to be deemed ñappropriateò and this conclusion arose quite irrespective of the reference to ñthe construction of new buildingsò in the introductory part of paragraph 89. I do not accept this submission. I share the view of HHJ Pelling QC, and Ouseley J that paragraph 89 is concerned with new building and not with other types of development.

(v) The Kemnal Manor point

41. There is one other matter relating to case law which I should address. In the Introductory Report at paragraph 30 the Planning Officer stated:

> ñ30. Both applications are for inappropriate development in the Green Belt. It should be noted that even if an application contains elements that on their own would be appropriate development (such as a cemetery), the Courts have held that the whole of the development is still to be regarded as inappropriateò.

42. In support of this proposition the Planning Officer specifically cited (in a footnote) the decision of the Court of Appeal in *Kemnal Manor Memorial Gardens Limited v First Secretary of State* [2005] EWCA Civ 835. It was submitted to me in argument that the direction hence given by the Planning Officer to the Planning Committee was that they were still required to consider the entirety of the development (crematorium and cemetery) as inappropriate and apply thereto the very special circumstances test. I am unable to accept this submission for three reasons.

43. First, the submission is simply inconsistent with the facts. There is no evidence to suggest that the Planning Officers or the Planning Committee applied the very special circumstances test to the cemetery part of the overall proposed development. On the contrary the documents show clearly that the test was applied exclusively to the crematorium part.

44. Secondly, the true meaning of paragraph 30 of the Introductory Report is evident from the judgment of the Court of Appeal in *Kemnal*. In that case the claimant had sought to challenge an inspectorôs decision refusing to grant permission for a crematorium and cemetery in the Green Belt. The claimant contended that the inspector should have recognised that the cemetery, which constituted the largest part of the proposal, was appropriate development and that the only element of the proposal that was inappropriate was the crematorium. It was contended that because the major part of the development was appropriate that should be dispositive of the characterisation of the entire proposal, i.e. it should be treated as wholly appropriate. Keene LJ, not surprisingly, rejected this ingenious but counter-intuitive argument. He stated ï in my view correctly - (ibid paragraph [34]):

> ñI would emphasise that a development is not to be seen as acceptable in green belt policy terms merely because part of it is appropriate. That would be the fallacy committed by the curate when tackling his bad eggò.

45. Thirdly, that observation must, in my view, be correct. It is the converse of the ñdeath by a thousand cutsò observation of Sullivan J cited at paragraph [30] above. If developers could attach inappropriate development to an otherwise appropriate development and through such alchemy render the entire development appropriate then the cumulative effect would, over the passage of time, be severely detrimental to objectives of the Green Belt policy. In my judgment the reference in paragraph 30 of the Introductory Report was no more than an instruction to the Planning Committee that the inclusion of a cemetery (which the Planning Officers wrongly concluded was

appropriate) did not mean that the crematoria component of the proposal should likewise be treated as appropriate.

(vi) Conclusion

46. In conclusion for the above reasons the proposed change of use from agricultural land to a cemetery constituted a development which was *prima facie* inappropriate save insofar as it was justified by very exceptional circumstances. Further, it did not fall within any of the posited exceptions set out in paragraph 89 and 90. It necessarily follows from this conclusion that the Defendantôs Planning Officers erred in directing the Planning Committee that a cemetery was an ñappropriateò use. I find as a fact (and it was not contended otherwise before me) that the Planning Committee accepted this advice and acted accordingly: See in relation to the relationship between the Officerôs Report and a Committeeôs decision the observations of Lord Justice Sullivan in *Siraj v Kirklees Metropolitan Council* [2010] EWCA Civ 1286 paragraphs [16]-[17] that where the members adopt a decision consistent with the Officerôs Report and there is nothing to suggest the Committee disagreed with the Report it is reasonable to infer that the Committee accepted the advice.

47. I note that in his First Witness Statement on behalf of the Defendant Mr Nick Morley states, with commendable frankness, of the judgment in *Fordent*:

> ñ9. However, if *Fordent* had been available at that time of writing the report, they would have gone on to consider whether the very special circumstances justified the approval of the cemetery as inappropriate developmentò.

Mr Morley is the Principal Planning Officer of the Defendant and was one of the team dealing with the application made by the Claimant and the Interested Party. I should also observe that the judgment in *Fordent* was delivered on 26th September 2013, some months after the Decision in this case so of course Mr Morley and his team did not have the benefit of sight of this judgment when they composed the Reports.

(vii) Materiality of the error of law

48. I must now consider the question of the materiality of the error. It was contended by the Defendant that if, *ex hypothesi*, they were in error it was immaterial. I cannot accept this. The error is, in my view, fundamental. It would be a substantial incursion into the important principle of preserving the Green Belt if errors in approving ñinappropriateò developments were to be waived through without the planning authority being required to reconsider the application, this time applying the correct test which takes into account the strong guidance given in Chapter 9. In any event the error was, in actual fact, material. This is evident from the evidence of Mr Morley who, in his Witness Statement, accepted that in his view the inclusion of the cemetery within the proposal made it more attractive. In the Introductory Report at paragraph 47 the Planning Officers identified as one of the ñkey pointsò in the Westerleigh Report in relation to the question of ñNeedsò as follows:

> ñÅ Alternatively the new cemetery would bring over 94,000 people within a 30 minute catchment area and a further drive time improvement for an additional 66,449 peopleò.

49. In the Westerleigh Report the Planning Officers recorded as one of the advantages which the Westerleigh proposal would bring:

> ñ280. The provision of a crematorium and a burial ground is better than just a crematorium alone. Having a cemetery for the burial and scattering of ashes on the same grounds as the crematorium means the bereaved can go back to somewhere peaceful to be close to their loved one, which would be appreciatedò.

In paragraph 96 of the Introductory Report set out at paragraph [9] above in relation to the Planning Officers overall conclusion on ñneedò, it is recorded that the decision for the Committee was in the Officers view ñextremely finely balancedò.

50. There was some evidence, pointed out to me by the Claimant, that the Planning Committee also in fact have treated the inclusion of the cemetery element in the Westerleigh application as an attractive proposition. My attention was drawn to notes of the Planning Committeeôs meeting from which it is clear that the decision in favour of the Westerleigh application was by a bare majority of one (hence endorsing the view of the officers that the applications were closely matched). Further, that at least one of those voting in favour of the Westerleigh application expressed support for the cemetery element of the proposal.

51. Finally, in this regard I am also influenced by the possibility that because the Planning Officers made an error in their interpretation of the law this might, possibly, have caused them to give misleading advice to the competing developers in the pre-application submission stage which might have exerted an effect upon the decision of either or both of the applicants whether to submit applications which included as a component thereof, a cemetery: See the factual matters referred to at paragraphs [96] and [107] below.

52. It is in my view clear that in a decision between two competing applications where the applications are ñextremely finely balancedò (at least in relation to ñneedò see above), the addition of a cemetery could have been the tipping point between the two competing bids. I cannot say that it necessarily was; but I am clear that since it could have been it would be quite wrong to treat the error as *de minimis*.

53. To overcome this problem Westerleigh has sought to take the forensic sting out of the point by proposing to enter into a unilateral section 106 obligation committing Westerleigh not to bring forward the development at that part of the planning permission which related to the cemetery. Westerleigh submitted as follows:

> ñWithout prejudice to the Interested Partyôs submissions on ground 1 it is noted that both Claimants have stressed concerns over the treatment of that part of the planning application which related to the cemetery. It is further noted that in respect of A.W. Lymn that this is a claim brought by a competitor whose real concern revolves over the grant of permission to a direct rival to its proposal for a new crematorium. In those circumstances the Interested Party proposes to enter into a unilateral obligation under s.106 which will commit it not to

> bring forward developments at that part of the planning permission which relates to the cemetery. Such an obligation will be completed in advance of the forthcoming hearing. In the circumstances further consideration of ground 1 is thereby rendered academic, irrespective of the competing merits of the partiesò.

This is, notwithstanding the pragmatism inherent in the argument, not an answer to the criticism made. For the reasons already given it is possible that as of the date of the Decision the Planning Committee was materially influenced by the attractions of a combined crematorium and cemetery. The unilateral section 106 obligation comes far too late to affect the decision making of the Planning Committee. It cannot, therefore, have any effect upon the analysis of the materiality of the Defendantôs error which must be measured as at the date of the Decision.

(viii) The commercial character of the Lymn application

54. There is one further matter that I should refer to. Westerleigh, in part of its submissions, made the point that the Claimant, Lymn, was a direct rival: See e.g. the quotation set out at paragraph [53] above. The oblique message being conveyed was that considerable scepticism should be applied to the complaint of a competitor who was motivated by purely commercial objectives. On the facts of this case I do not accept this submission. In general terms litigation by parties with vested interests is common place, and this includes in judicial review. It is, for example, a regular feature of judicial reviews in specialist tribunals such as the Competition Appeal Tribunal where decisions by the Office of Fair Trading or the Competition Commission approving a merger may be challenged by a rival to that merger. The motivation is always commercial. However that does not mean that the challenge is necessarily unfounded. Experience has proven that many successful and important applications for judicial review have been brought by those who may quite fairly (but irrelevantly) be labelled as ñdisgruntledò and ñdisappointedò competitors. No one in the present case described Mrs Timmins and those she represents as NIMBYs. The reason for this is that local residents who are impacted upon by a proposed development are treated within the regulatory regime as legitimate consultees. They play an important part in the planning process. In principle, where they establish *locus* they are entitled to object and pursue their objections through the courts. Equally, but in particular in circumstances where (as here) there are competing applications for permission but where there is a ñneedò for only one facility, there will inevitably be a disappointed competitor. Such persons also play a legitimate part in the planning process and have every right to bring proper complaints to the courts. The mere fact that such a person has *locus* does not, of course, mean that their application will be granted but it does mean that their concerns will be accorded due weight. I have noted the adverse comments about competitor judicial reviews made by Lord Justice Auld in *Noble Organisation Limited v Thanet DC* [2005] EWHC Civ 782 at paragraph [68] but there the judge was, in substance, objecting to tactical challenges of a highly technical nature lacking any demonstrable ñ*concern about potential or other planning harm*ò. That is not the case here. And moreover, the Judge only went so far as to say that such applications for permission should be scrutinised with rigour by the single Judge to ensure that they were properly arguable, which is a proposition that must be wholly unexceptional.

(ix) Relevance of witness statement evidence

55. I have not in the above analysis had regard to the Witness Statement evidence of Mr Morley save insofar as it contains admissions. It seems to me that the decision stands or falls by reference to the Planning Officerôs report, the minutes of the meeting of the Planning Committee and the subsequent formal grant of approval and other relevant contemporaneous documentation. I address the more general issue of the relevance of Witness Statement evidence from the decision maker in section 6 below.

(x) Conclusion: Ground 1

56. In conclusion on Ground 1 the Defendant erred in adopting the Decision without applying the very special circumstances test to the cemetery element of the Westerleigh application. That error was material. The proper course is to quash the Decision and remit it to be re-taken. For the avoidance of doubt nothing in this judgment indicates any view whatsoever as to the merits of the decision to be re-taken.

4. Ground 2: Openness v Visual impact

(i) Ground 2: The issue

57. Ground 2 concerns the criticism made by the Claimants that the Defendant wrongly elided the two different concepts of ñopennessò and ñvisual impactò and thereby misdirected itself as to the meaning of ñopennessò. This is a challenge to the Decision in relation to the crematorium and is therefore quite separate from Ground 1 which concerns only the cemetery. The point raised is a subtle but not unimportant one. In this section of the judgment I start by setting out the evidence upon which the Claimant relies. I then consider in terms of broad principle how a planning authority should address the issues of openness and visual impact as they apply in the context of Chapter 9 NPPF and the Green Belt. I then consider whether the Defendant erred and if so as to the consequences of this.

(ii) The Claimants' case: Wrongful elision of openness and visual impact by the Defendant

58. The Claimants relied upon the general effect of the three Reports and supplementary advice provided to the Committee taken *as a whole* in support of Ground 2. The overall effect of the advice given was ï it is argued - that the Council were either seriously misdirected about, or failed to take into account, or misunderstood, the key difference between the protection of openness and the issue of visual impact. In response to an invitation from me to identify the three or four best examples from the documents which it was said illustrated the Claimantsô contention Mr Strachan QC produced a very helpful note which set out and analysed the 3 principal references he relied upon and which reflected the high water mark of his contention. I summarise below the Claimants submissions in relation to each. In each of the three examples the Claimants say that the Defendant can be seen misdirecting itself as to the meaning of ñopennessò.

(a) Example 1: The Westerleigh Report, paragraphs 466-470.

59. The Planning Officerôs assessment of the óPlanning Considerationsô starts at paragraph 445. The Officer identifies that the key planning consideration is the location of the site within the Green Belt. Although there is reference to relevant parts of Green Belt policy, there is no identification by way of advice, guidance or assistance to the members as to the important difference between impact on openness and visual impact anywhere in the report. The Officerôs assessment of openness is contained in paragraphs 466-470.

60. The first part concerns the crematorium:

> ñ466. With regard to the openness of the Green Belt, it is considered that the amount of built development and the level of parking provision is both proportionate and essential to the proposed use, given that any harm arising as a consequence is outweighed by the very special circumstances that have been demonstrated in the Introduction Report. The layout, scale, appearance, and use of existing contours would minimise the overall impact of the proposed development in this respect and I am satisfied that the proposed levels would ensure that the proposed development would not be unduly prominent on the ridgeline.
>
> 467. The impact on openness would be further mitigated by existing hedgerows and hedgerow trees around the site and as the proposed landscaping matures. It is considered that the level of activity which would be generated would not have any undue impact on the openness of this part of the Green Belt.
>
> 468. As such, it is considered that, given the very special circumstances that apply in this case, the proposed development would not unduly harm the openness of the Green Belt and consider that the proposal complies with Policy ENV26 of and paragraphs 80, 87, 88 and 89 of the NPPFò.

61. The second part concerns the cemetery:

> ñ469. With regard to the proposed cemetery, the list of appropriate Green Belt uses within paragraph 89 of the NPPF and Policy ENV26 of the RLP includes cemeteries and, as such, this element of the proposal is acceptable in policy terms, if it were proposed on its own.
>
> 470. In my opinion, therefore, the proposed cemetery constitutes an appropriate form of development within the Green Belt and that, given the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows, it would preserve the openness of the Green Belt in this location and would not conflict with any of the purposes of including within the Green Belt, in accordance with Policy ENV26 of the [the GBC Plan] and paragraphs 89 of the NPPFò.

62. The Claimant submitted that in these paragraphs the Planning Officer elided the issue of openness with visual impact. Mr Strachan QC, made five (largely overlapping) main points about the evidence: (1) That the Officer did not recognise the difference between these concepts and did not direct the Committee as to the difference. He failed to treat visual impact upon openness as a separate type of intrinsic harm from openness itself. Visual impact is an additional harm which will need to be overcome in and of itself; (2) in the last sentence of paragraph 466, the Officer explicitly and impermissibly, elided the two concepts. He advised the Committee that the appearance of the crematorium, and the use of existing contours (therefore referring to how it will be located in the landscape and perceived) would ñminimise the overall impact of the proposed development in this respectò i.e. in relation to impact on openness. In the same sentence, he expressed his satisfaction that the ñproposed levelsò would ensure the development is not ñunduly prominent on the ridgelineò. The Officer thereby confused the issue of impact on intrinsic openness, with the different issue of the developmentôs visual impact and how it would be perceived in the landscape. A conclusion that the impact on openness will be ñminimisedò is a misconceived approach to the issue of effect on intrinsic openness given that the visual harm that development will cause to the Green Belt is a separate and additional harm to that caused to openness. If a development causes visual harm as well, that is an additional factor to consider to the harm that the development causes to intrinsic openness. In short, limited visual harm is incapable of mitigating or minimising impact on intrinsic openness; (3) the erroneous elision of openness and visual impact error is perpetuated in paragraph 467 where the Officer advises members that the impact on openness *"would be further mitigated by existing hedgerows and hedgerow trees around the site and as the proposed landscaping matures*ò. The way in which the development will be perceived visually does not mitigate the effect of development on the openness of the Green Belt; (4) The approach reflected in the Officers report gives rise to the creation of an obvious lacuna in the scheme of protection and ñdeath by a thousand cutsò identified by Sullivan J in *Hampstead Heath Society* (ibid at paragraph [37] set out in paragraphs [30] and/or [75] of this judgment); (5) the same error is repeated for the assessment of the cemetery element in paragraphs 469-470 where the Officer (having already and wrongly decided that it was an appropriate development) concluded that in light of its use, extent and the fact that *"it would be screened by existing and proposed hedgerows*ò, it would preserve the openness of the Green Belt in this location and would not conflict with the purposes of including land within the Green Belt. The Claimant submits that the perceived lack of visual impact of the development cannot in principle be relevant to any assessment of openness and in particular cannot preserve openness.

(b) Example 2: The Introductory Report: Table at paragraph 127

63. In the Introductory Report the Officer performed a comparative summary assessment of the attributes of the two applications in a Table (as set out in the individual reports on the two applications). The Claimant submitted that the Table evidenced the same flawed elision of the concepts of openness and visual impact. The first three criteria in the Table are: (1) Openness of Green Belt; (2) Landscape Character; and (3), Landscape Visual Impact. The relevant part of the Table is as follows:-

Attributes	**Westerleigh**	**Lymn**

Openness of Green Belt	Local impact on openness	Local impact on openness partly mitigated by demolition
Landscape (Landscape Character)	Slight Adverse	Moderate Adverse
Landscape (visual impact)	Slight adverse	Moderate adverse

64. It was submitted that the reference to a ñlocalò impact on openness is a reference to the Officerôs analysis in the respective committee reports on how the two proposals will be perceived in the ñlocalò landscape. But, it is said, the concept of a local impact on intrinsic openness is misconceived in principle. The impact on Green Belt openness occurs from physical development. It can never properly be characterised, or minimised, as ñlocalò. It either occurs or it does not and it has the same intrusive effect on openness whether perceived locally or from afar. The concept of ñlocal impactò reflects the erroneous mixing up of how the development will be perceived visually (so giving rise to perceived local effects), rather than a proper assessment of its effect on openness.

(c) Example 3: Planning Officer's Oral Address and Additional Material to Members of the Planning Committee (8 May 2013)

65. The third example relied upon by the Claimants relates to part of the Officers oral address to the Committee The notes for that oral address (reflecting the presentation by the Planning Officer) were disclosed by the Defendant. The Claimants submitted that no advice was given to the Committee as to the difference between openness and visual impact. On the contrary, the address included specific direction by the Planning Officer to the Committee members on the comparison exercise he considered should be applied when considering ñOpenness of Green Beltò. The notes record:

> ñComparison
>
> Openness of GB;
>
> W[esterleigh]; Regarding the impact on the openness of the GB, the scale of development and parking is considered to be proportionate. Proposal uses contours and layout, including the footprint of the bldg and its location within the site to minimise impact. Not unduly prominent on ridgeline. Therefore local impact on openness. It should be noted that the cemetery element of the proposal does not conflict with the GB.
>
> L[ymn]; overall similar local impact on openness. Strength here is that there are already buildings on site, which already have an impactò.

66. The oral address on óOpenness of G[reen] B[elt]ô was subsequently followed by a separate oral address on óLandscape Characterô and then óVisual impactô and, so it is

submitted, it therefore cannot hence be argued that the advice given on ópennessô was intended to be more compendious and somehow incorporated (separate) advice on óVisual impactô. In respect of the Westerleigh proposal the notes say: ñ*Proposal uses contours and layout, including the footprint of the [building] and its location within the site to minimise impact*ò. The advice is accordingly that the impact on openness is minimised or mitigated because of the way that the development will be seen visually. Equally there is a reference to the development not being ñ*unduly prominent on ridgeline*ò which treats an effect upon openness as being reduced by visual perception. There is then a reference to ñlocalò impact which, for the reasons already referred to, reflects the basic error in approach.

(iii) Analysis: The relationship between openness and visual impact

67. I start the analysis of this issue by considering two questions of principle. First, is the visual impact of a development a relevant factor to be taken into account in considering its openness? Secondly, what are the correct questions for a planning authority to ask itself in relation to the connection between a building and its visual impact?

68. The point of departure is to define ñopennessò which is an important question since the essence of the Green Belt is its openness. This is plain from the NPPF paragraph 79 which provides:

> ñThe Government attaches great importance to the Green Belt. 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 p-permanenceò.

69. There is however no specific definition of ñopennessò in the NPPF.

70. The issue was considered, albeit in a somewhat different context, in *Heath & Hampsted Society v London Borough of Camden* [2007] EWHC 977 (Admin) (3rd April 2007). There Sullivan J (as he then was) was concerned with a challenge to the grant of permission for the demolition of a 2 story building and with its replacement by a 3 story building in the Vale of Health, Hampstead, London. Under the existing guidance (paragraph 3.6 of PPG2) a replacement dwelling was not necessarily inappropriate provided the new dwelling ñ*is not materially larger than the dwelling it replaces"*. The dispute before the Court was whether the Officersô report correctly identified and applied the test of materiality and whether, if it did, the decision of the planning committee was one that was reasonably open to them to take: See Judgment paragraphs [9] and [10]. If the conclusion was that the new building was not materially larger than the original building then there was no need to consider the merits of the application (which included its visual impact); but if the conclusion was that the new building did materially outstrip the dimensions of the original building then the merits of the development would need to be considered. These considerations would include:

> ñits visual impact and, in the circumstances of the present case, whether the new dwelling would preserve or enhance the character or appearance of the conservation areaé ò.

71. In paragraph 21 the Judge explained the difference between openness and visual impact in the context of paragraph 3.6 PPG2:

> ñ21. Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact. There are good reasons why the relevant test for replacement dwellings in the Green Belt and Metropolitan Open Land is one of size rather than visual impact. The essential characteristic of Green Belts and Metropolitan Open Land is their openness (see paragraph 7 above). The extent to which that openness is, or is not, visible from public vantage points and the extent to which a new building in the Green Belt would be visually intrusive are a separate issue. Paragraph 3.15 of PPG 2 deals with "visual amenity" in the Green Belt in those terms:
>
> > ñThe visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or designò.
>
> The fact that a materially larger (in terms in footprint, floor space or building volume) replacement dwelling is more concealed from public view than a smaller but more prominent existing dwelling does not mean that the replacement dwelling is appropriate development in the Green Belt or Metropolitan Open Landò.

72. In paragraph 22 the Judge explained that openness was a concept which related to the absence of building; it is land that is not built upon. Openness is hence epitomised by the lack of buildings but not by buildings that are unobtrusive or camouflaged or screened in some way:

> ñ22. The loss of openness (i.e. unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness, which will have to be outweighed by those special circumstances if planning permission is to be granted (paragraph 3.15 of PPG 2, above). *If the materially larger replacement dwelling is less visually intrusive than the existing dwelling then that would be a factor which could be taken into consideration when deciding whether the harm by reason of inappropriateness was outweighed by very special circumstances*ò.

73. It is clear from the (added) italicised part of this quote that measures taken to limit the intrusiveness of the development whilst not affecting the assessment of openness may nonetheless be relevant to the ñvery special circumstanceò weighing exercising.

Hence openness and visual impact are different concepts; yet they can nonetheless relate to each other. The distinction is subtle but important.

74. Any construction harms openness quite irrespective of its impact in terms of its obtrusiveness or its aesthetic attractions or qualities. A beautiful building is still an affront to openness, simply because it exists. The same applies to a building this is camouflaged or rendered unobtrusive by felicitous landscaping.

75. In *Heath & Hampsted* (ibid) the Judge found that the Officers report, which had been adopted by the planning committee, was significantly flawed because he came to a conclusion about the materiality of the difference between the old 2 story building and the new 3 story building by reference to visual perception. This was wrong said the Judge because were it to be correct it would subject the Green Belt to ñ*death by a thousand cuts*ò. I have referred to this above (at paragraph [30]) but the quotation from the judgment is worth setting out in full:

> ñ37. The planning officer's approach can be paraphrased as follows:
>
> > ñThe footprint of the replacement dwelling will be twice as large as that of the existing dwelling, but the public will not be able to see very much of the increaseò.
>
> It was the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause "demonstrable harm" that led to the clear statement of policy in paragraph 3.2 of PPG 2 that inappropriate development is, by definition, harmful to the Green Belt. The approach adopted in the officer's report runs the risk that Green Belt or Metropolitan Open Land will suffer the death of a thousand cuts. While it may not be possible to demonstrate harm by reason of visual intrusion as a result of an individual - possibly very modest - proposal, the cumulative effect of a number of such proposals, each very modest in itself, could be very damaging to the essential quality of openness of the Green Belt and Metropolitan Open Land.
>
> 38. Turning to paragraph 6.8.5, the question was not whether the "loss" of Metropolitan Open Land as a result of this particular development was "significant". Again it would be extremely difficult in many cases to demonstrate that a "loss" of Metropolitan Open Land or Green Belt as a result of a particular proposal would be "significant". It is precisely this danger that the policy approach in paragraph 3.2 of PPG 6 is intended to avoid. The question was whether the replacement dwelling was materially larger, not whether it was no more visually intrusive from the Heath. The report simply failed to grapple with that key questionò.

76. The key question therefore in my view is whether visual impact can properly be taken into account in assessing very special circumstances. As to this I can see no reason

why in logic that it cannot be and the quotation from Sullivan J in *Heath & Hampstead* (set out at in paragraph [72] above) supports this conclusion.

77. In terms of the policy underlying chapter 9 of the NPPF any development in the Green Belt is by definition harmful and offends against ñopennessò. In order to justify that development it follows that the countervailing (ñvery specialò) benefits relied upon to justify the grant of permission must not only get the development back to par (i.e. be neutral in the balancing exercise) but it must go well beyond par. This is clear from paragraph 88 of the NPPF which provides that the harm must be ñ*clearly outweighed*ò by countervailing considerations. To be ñ*clearly outweighed*ò it is not enough simply to show that the harm and the countervailing considerations are in balance ï this is neutralising but not outweighing and certainly not ñclearlyò outweighing. When a planning authority is conducting this balancing exercise I can see no reason why visual impact cannot be taken into account. Since measures to reduce or mitigate visual impact are, as their name suggests, mitigating measures, they can only bear a modest weight in the scales. They reduce to some degree the harm caused by the adverse effect of the development and to this extent they can begin to redress the scales. But as measures in mitigation they can never completely remove the harm since a development that is wholly invisible to the eye remains, by definition, adverse to openness. But, in principle, it is not wrong to place visual impact onto the scales of very special circumstances. In practice (and certainly in this case) the very special circumstances will invariably be much more affected by issues of ñneedò and the availability of alternative sites than visual impact.

78. In short it seems to me that there are three points which arise from the above analysis. First, there is a clear conceptual distinction between openness and visual impact. Secondly, it is therefore is wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact. Thirdly, when considering however whether a development in the Green Belt which adversely impacts upon openness can be justified by very special circumstances it is not wrong to take account of the visual impact of a development as one, inter alia, of the considerations that form part of the overall weighing exercise.

(iv) How to construe the Officers Reports

79. An issue in this case concerns the manner in which the Officers Report should be interpreted.

80. The law relating to the approach to be adopted towards the interpretation of Officersô reports and the decisions of planning authorities or inspectors reports is settled. In *Heath & Hampstead* (ibid) Sullivan J stated:

> ñ32. I am mindful of the fact that the report is not to be construed as though it was a statutory instrument. The dicta of Lord Justice Hoffmann (as he then was) in South Somerset District Council v Secretary of State for Environment [1993] 1 PLR 80 apply with even greater force to an officer's report to a planning committee. Lord Justice Hoffman was dealing with an inspector's decision letter:

> ñThe inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to polices must be taken in the context of the general thrust of the inspector's reasoning. A reference to a policy does not necessarily mean that it played a significant part in the reasoning: it may have been mentioned only because it was urged on the inspector by one of the representatives of the parties and he wanted to make it clear that he had not overlooked it. Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the relevant policy or proposed alteration to the policy.ò (Page 83)ò.

81. Officersô reports must therefore be read as a whole, in their entirety, and a judgment formed as to whether they actively risk misleading the planning committee or are otherwise unfair in an overall sense: See e.g. *R v Selby District Council ex parte Oxton Farms* [1997] EB 60 (CA) per Pill LJ and per Judge LJ; and, *R v Mendip DC ex parte Fabre* (2000) 80 P&CR 500.

82. It also needs to be borne in mind that the Officersô report is not the Decision of the Planning Committee itself. It is guidance to them which includes advice and recommendations. In the absence of detailed reasons from the Planning Committee itself a Court can *prima facie* assume that the guidance, advice and recommendations contained within that report were accepted: See paragraph [46] above. However, sometimes the notes of the Planning Committee will themselves be available and can be assessed: see e.g. *Heath & Hampstead* (ibid) paragraphs 39 *et seq*. In this connection the Courts have recognised that the members of Planning Committees are well versed in the issues that relate to their locality and come to the decision they are required to take with local knowledge and understanding. They can also, as a collective, be treated as having some experience in planning matters: See e.g. per Sullivan J in *Fabre* (ibid) at page 509. It is not therefore to be assumed that every infelicity of language or expression by the Officer or every mis-description of the relevant test will necessarily have exerted any material impact upon the Committee even in respect of reports that are accepted by the Committee. To conclude otherwise would mean that even if the decision of the members was taken in an altogether impeccable manner with experienced members directing themselves perfectly, their decision would nonetheless be at risk of being quashed because the Officers report contained infelicities or ambiguities which the Committee had recognised and ignored.

83. In the present case the Planning Committeeôs Decision does not provide detailed reasons. It is consistent with the Officersô Reports. Argument before me proceeded upon the basis that (at the very least) it was highly germane to the Committeeôs thinking. But this does not mean that I should, for this reason, assume that every infelicity in language or expression in the Reports inevitably operated upon the thought processes of the Committee. In *Doncaster Metropolitan BC* (supra) Sullivan J pointed out that infelicities in the way in which the modalities of the test were applied

would rarely be material, though he also pointed out that they might be in a ñfinely balancedò case. The judge stated as follows (ibid paragraph [74]):

> ñ74. It is important that the need to establish the existence of very special circumstances, not merely special circumstances in Green Belt cases is not watered down. Even if it cannot be categorised as perverse, this decision is so perplexing on its face that it is of particular importance that the Inspector should be seen to have applied the correct test in Green Belt policy terms. I fully accept that there will be many cases where the underlying merits of the decision are relatively obvious, so that the court can safely ignore what might be regarded as infelicities in drafting. It may be obvious in the great majority of cases but it would make no difference whatsoever to the eventual conclusion on the merits whether the true test was whether one factor was outweighed by another, as opposed to whether it was clearly outweighed by another, or whether limited harm to openness was to be regarded as reducing harm in Green Belt policy terms, or as additional harm over and above that due to inappropriateness, or whether circumstances were described as special rather than very special.
>
> 75. In most decisions, fine distinctions of that kind are likely to be of no practical importance and dismissed as matters of emphasis, but there will be a small minority of very finely balanced cases where such detail will be important. This is such a case, given the terms of paragraph 15 of this decision letter I am left in real doubt as to whether the policy in paragraph 3.2 of PPG2 was correctly applied by the Inspectorò.

(v) The approach adopted by the Defendant

84. I turn now to apply the law to the facts. I have come to the conclusion that the Planning Committee did not commit any material error in accepting the Officersô Reports even though the Officersô Reports do betray a certain looseness of language about the nexus between openness and visual impact.

85. I have arrived at this conclusion for three reasons.

86. First, generally speaking the concepts of openness and visual impact were treated as different in the procedure leading up to the Decision and in the various reports. It was pointed out by Mr Kimblin for the Defendant that the consultation responses separated the issues of openness from visual impact and that the reports had been drafted with differences between the concepts well in mind. He pointed out that the Committee had been fully advised on the NPPF, and on the test of very special circumstances. In the Westerleigh report there were discrete sections on ñLandscapeò considerations which included discussion of visual impact. Viewed in the round the 3 reports will have placed squarely in the Committeesô collective mind the high importance to be attached to openness; the real burden presented to applicants by the very special circumstances test; and, the landscaping issues which were to form part of the overall assessment which the Committee had to perform. And

of course it should not be overlooked in this context that by far and away the dominant considerations for the Committee were the two questions of ñneedò and alternative sites. The issue of the impact of visual mitigation upon openness was, in my view, very much a tertiary consideration, at best.

87. Secondly, in the paragraphs complained of there are ï it is true - some suggestions that the Officer did treat visual impact as a part or component of the single concept of openness. However, read more roundly it seems to me that this criticised text is fairly to be described as nothing more than infelicitous drafting and that the pith and substance of the exercise being referred to by the Officer is the very special circumstances weighing exercises that I have referred to above. I have no doubt that the paragraphs criticised could be better phrased. But the distinction being drawn is a subtle ï albeit important - one and drafting lapses must not be seen in and of themselves as warranting the setting aside of the Decision unless the error is sufficiently serious as to warrant that result i.e. risks misleading the Committee or results in an overall unfairness: See authorities cited at paragraph [81] above. In context I do not consider that the errors of drafting come close to meeting this standard. I turn now to consider the actual drafting infelicities. They include the following expressions:

a) ñé the level of traffic activity which would be generated would not have any undue impact on the openness of this part of the Green Beltò (Westerleigh Report paragraph 467);

b) ñgiven the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows , it would preserve the openness of the Green Beltò (Westerleigh Report paragraph 470 in relation to the cemetery);

c) The reference to ò*local*ò in the comparative table at paragraph 127 of the Introductory Report (set out in paragraph [63] above);

d) ñProposal uses contours and layout, including the footprint of the bldg and its location within the site to minimise impact. Not unduly prominent on ridgeline. Therefore local impact on openness. It should be noted that the cemetery element of the proposal does not conflict with the GB. L[ymn]; overall similar local impact on openness. Strength here is that there are already buildings on site, which already have an impactò (oral presentation of the Officer to the Committee set out at paragraph [65] above).

88. However, the thrust of paragraphs 466 ï 470 in the Westerleigh Report, and of the oral presentation of the Officer to the Committee, is concerned with the (legitimate) weighing exercise:

- Paragraph 466 expressly refers to the weighing exercise and I consider that it is fair to read the references to ñ*layout, scale, appearance and use of existing contours"* as ñ*minimising the impact of the proposed development in this respect*ò in that paragraph as a reference to the role that visual impact plays in that weighing exercise.

- The reference to the ñ*impact on openness would be further mitigated by"* in paragraph 467 should be read in the context of the reference to very special circumstances in paragraph 468.

- The oral observations *Proposal uses contours and layout, including the footprint of the bldg and its location within the site to minimise impact. Not unduly prominent on ridgeline. Therefore local impact on openness"* is not unequivocal as the Claimants submit. The reference to ñ*minimising impact*ò is a reference to how landscaping reduces the *effects* of the building but it does not suggest that the harm of openness will necessarily thereby be lessened in quantitative terms. It can fairly be understood to be a reference to the impact that the development has on openness (which remains a constant) being mitigated in the overall weighing exercise by measures to reduce visual impact.

89. Thirdly, the visual impact issue here is the effect of measures mitigating the impact of the perception of the crematorium. As to this the statements made by the Officer as to visual impact are true. As statements of fact they are not challenged. Hence it is not disputed that the proposed visual impact mitigation measures would be effective in mitigating the adverse visual effects of the development. Nor is it argued that if the drafting had been more precise and the Officer had said that notwithstanding the adverse impact on openness when the overall weighing exercise was being conducted the mitigating measures could be taken into account, that this would have represented an error of law. Put another way if the criticised matters had been lifted from their present place in the Officers report and re-located to the visual impact / landscaping sections then there could have been no objection.

90. In my judgment the errors are no more than infelicities in drafting. I consider that the Committee was sufficiently advised about the test to be applied to the crematorium not to have been misled by the niceties of the distinctions now being drawn. But I also take the view that since visual impact mitigation measures have a role to play in the overall weighing exercise and the conclusions arrived at were factually correct any error is *de minimis* and immaterial. I do not take the view on the facts of this case that simply because the decision was finely balanced in relation to ñneedò this can be taken as impacting upon the position of the Planning Committee in relation to the issue of openness and visual impact. It follows that Ground 2 fails.

5. Ground 3: The scope of Article 31(1)(cc) of the DMPO

(i) Ground 3: The issue

91. The issue here is a narrow, somewhat technical, point concerning the scope of the duty on the planning authority to state ñhowò it has worked positively and proactively with applicants. Permission was granted in relation to this ground because of its novelty.

(ii) Statutory Framework

92. Article 31 of the DMPO is entitled ñWritten notice of decision or determination relating to a planning applicationò. This Article imposes an obligation upon local planning authorities to include within planning notices a statement explaining ñhowò

in dealing with the application the authorities worked with the applicant in a positive and proactive manner. This obligation arises in two circumstances. First, where planning permission is granted subject to conditions (cf Article 31(1)(a)). Secondly, where planning permission is refused and where the notice is required to state clearly and precisely the full reasons for refusal (cf Article 31(1)(b)). Article 31(1)(cc) states:

> ñ(cc) Where sub-paragraph (a) or (b) applies the notice shall include a statement explaining how, in dealing with the application, the local planning authority have worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with the planning applicationé ò.

This sub-paragraph was added by the Town and Country Planning (Development Management Procedure) (England) (Amendment No. 2) Order 2012/2274, 1st December 2012. There is, accordingly, no dispute but that the obligation contained therein applied in the present case.

93. The Chief Planner at the Department for Communities and Local Government, on 18th September 2012, sent a round-robin letter to all Chief Planning Officers in local planning authorities in England. He headed the letter: ñExtending existing planning permissions & the positive and proactive statement in decision noticesò. The first two paragraphs of the letter are not relevant for present purposes. The third paragraph was in the following terms:

> ñIn addition, one of the statutory instruments introduces a requirement for local planning authorities, from 1 December 2012, to include a statement on every decision letter stating how they have worked with the applicant in a positive and proactive way, in line with the NPPF. We envisage that in the majority of cases it will be sufficient for the authority to include a simple statement, confirming that they implemented the requirement in the NPPFò.

94. The reference to the NPPF was (by virtue of footnote 3 to the letter) to paragraphs 186-187 therein. Those paragraphs are in a section of the Framework entitled ñDecision-takingò. The paragraphs are in the following terms:

> ñ186. Local planning authorities should approach decision-taking in a positive way to foster the delivery of sustainable development. The relationship between a decision-taking and plan-making should be seamless, translating plans into high quality development on the ground.
>
> 187. Local planning authorities should look for solutions rather than problems, and decision-takers at every level should seek to approve applications for sustainable development where possible. Local planning authorities should work proactively with applicants to secure developments that improve the economic, social and environmental conditions of the areaò.

(iii) The statement made by GBC in the decision letter

95. In the present case, in purported compliance with this requirement, the Notice of Planning Permission, under the heading ñNotes to Applicantò contained the following statement:

> ñPlanning Statement ï The Borough Council has worked positively and proactively with the applicant in accordance with paragraphs 186 to 187 of the National Planning Policy Frameworkò.

(iv) The challenge to the statement

96. The Claimant, Lymn, challenges the adequacy, and hence lawfulness, of this statement upon the basis that it simply purports to record, as a matter of elementary fact, that the Council did work positively with the applicant. But this does not comply with the requirement in Article 31 which is to explain ñhowò the Council went about that exercise in positive engagement. A statement that it has worked with the applicant provides no information as to the *modus operandi* of that relationship. The Claimant submits that this obligation is of particular importance when there are competing applications for permission since both applicants (but in particular the disappointed applicant) are entitled to know what positive and proactive steps the planning authority took *viz a viz* each applicant. In his oral submissions in amplification of this ground Mr James Strachan QC for Lymn sought to emphasise the importance of the obligation. He submitted that the purpose behind Article 31 was two fold. First, to encourage the adoption of a proactive approach by the planning authorities towards applicants by requiring them to explain ñhowò they have behaved proactively. Secondly, to facilitate transparency and confidence in the planning process on the part of the public because a statement on the part of the authority as to ñhowò it has engaged with applicants will enable the public to understand whether what was done was legitimate in terms of good administration. Mr Strachan cited the witness statement of Mr Lymn Rose, the Managing Director of the Claimant, and the competitor to Westerleigh in the application for the grant of planning permission, who explained that in view of the Green Belt nature of the site location and the concerns expressed to the Claimant in pre-application consultation discussions Lymn did not include a cemetery within their proposed design. There is hence a suggestion in the evidence that by virtue of the pre-application discussions the Claimant was deterred from submitting an application which incorporated a cemetery whereas it is suggested Westerleigh might have been advised that submission of a cemetery was appropriate and/or desirable. It is pointed out that in his Witness Statement evidence Mr Morley, the principal planning officer of the Defendant, stated that he wished to make it clear that ñé officers considered that the provision of a cemetery was an additional factor in favour of the Westerleigh applicationò. In short, the Claimant submitted that the obligation to explain ñhowò pre-application engagement occurred could be critical in enabling disappointed applicants to satisfy themselves that in pre-application discussions they had not been (unlawfully) discriminated against in an inappropriate manner.

(v) The purpose behind the obligation in Article 31(1)(cc)

97. In the course of discussions with counsel during the hearing I expressed the tentative view that Article 31(1)(cc) should be interpreted purposively. Once the purpose was identified it was much easier then to pinpoint how the obligation should be satisfied. I postulated that one of the purposes of the Article might (as Mr Strachan QC had suggested) be to render transparent a process of prior dialogue and engagement which might, were it not subject to scrutiny, risk becoming inappropriate. On reflection I have concluded that the purpose of the statement is more limited in nature. The reasons for this are as follows.

98. First, the amendment which introduced Article 31(1)(cc) post-dated the NPPF. It is clear from the language of the Order that it was, indeed, intended to render more concrete the policy set out in paragraphs 186 and 187 thereof. The reference in the Article to local authorities having worked with applicants in a positive and proactive manner based upon seeking solutions to problems reflects the actual language of paragraph 187. That paragraph is in the preface to the section on ñDecision-takingò. It is elaborated upon in paragraphs 188-207 which concern such matters as pre-application engagement and front loading; the importance of applying a presumption in favour of sustainable development; the need to tailor planning control to local circumstances; the encouragement of authorities to render *prima facie* unacceptable development plans acceptable through the use of conditions and/or planning obligations; and, enforcement as a means of maintaining public confidence in the planning system. The purposes of this overall section of the NPPF can be seen through the following statements said to justify a policy of proactive engagement: ñto improve the efficiency and effectiveness of the application systemò (paragraph [188]); to ensure a better coordination of public and private resources (paragraph [188]); to achieve ñbetter outcomes for the communityò (paragraph [188]); to incentivise local authorities to take maximum advantage of the pre-application stage and to encourage applicants to engage with their local communities before submitting applications (paragraph [189]); to facilitate the resolution of issues at an earlier stage and to make the participation of statutory planning consultees more effective and positive (paragraph [190]); to assist local authorities to issue timely decisions and to ensure that applicants do not experience unnecessary delays and costs (paragraph [190]); to facilitate good decision making by ensuring that applicants discuss the information required by the authorities at an early stage (paragraph [192]); to encourage the conclusion of planning performance agreements where this might achieve a faster and more effective application process (paragraph [195]); to ensure that planning controls are tailored to local circumstances to a greater and more effective degree (paragraphs [199]-[202]); and, to facilitate the effect of enforcement of the planning system as a means of maintaining public confidence (paragraph [207]).

99. In view of this analysis of the relevant section of the NPPF it seems to me that the predominant purpose behind Article 31 is simply to promote the efficiency and effectiveness of the application system. Whilst it is possible that it could in theory <u>also</u> have served the purpose of improving the propriety and legitimacy of the planning process and thereby avoiding improper or inappropriate engagement between the local authority officials and applicants, this was <u>not</u>, in actual fact, the purpose behind the introduction of the obligation. In my view this is relevant because it guides the nature of the ñhowò in the Article. An obligation to explain ñhowò pro-active engagement has occurred which is directed towards demonstrating that the authority has sought to encourage efficiency may be very different in nature to a

disclosure statement intended to satisfy the public that the decision making process had been operated in good faith and without bias and avoiding conflicts of interest.

100. The difference between the two can be demonstrated by reference to the facts and matters asserted by the Claimant. The Claimant suggests that there was a bias or discrimination in favour of Westerleigh in the decision making process. I emphasise that I have formed no view whatsoever about the merits of this allegation. Nonetheless, if Article 31 had as a purpose the demonstration of probity, propriety, good faith and absence of conflicts then the statement might need to address a range of issues of a materially different nature to a statement designed to show simply that the authority was proactive, encouraging and generally open for business.

(vi) Conclusion on breach

101. I turn now to consider whether, applying these principles, the statement in the notice was adequate. In this regard there are a number of points to make. First, it is apparent that the form adopted by the Planning Officer was intended to reflect the advice given by the Chief Planner as referred to in paragraph [93] above. The advice given by the Chief Planner is that the obligation in Article 31 can be met minimally by a ñsimpleò statement confirming that they have implemented the requirement in the NPPF. With respect I do not agree. The obligation in Article 31 is explicitly to state ñhowò they have worked with an applicant. The statement by an authority that they have in fact implemented the requirement in the NPPF does not, and cannot, satisfy this obligation. Secondly, the actual statement in issue in the present case (set out at paragraph [95] above) is somewhat more nuanced than that envisaged by the Chief Planner. It is a positive statement that ñthe Borough Council has worked positively and proactively with the applicant in accordance with paragraphs 186 to 187 of the National Planning Policy Frameworkò. It is accordingly not simply a naked cross-reference to the existence of the obligation referred to in the relevant NPPF paragraphs; it goes one step further and is a positive statement that the Defendant ñhasò worked positively and proactively with the particular Applicant. But thirdly the statement by the Defendant in the terms described does not explain ñhowò that positive and proactive engagement occurred. A statement that it has occurred is not a statement as to ñhowò it occurred. Accordingly it seems to me that the statement by the Defendant partially complies with the obligation in Article 31 but does not do so fully. I therefore conclude that there has been a breach of the Article.

(vii) Consequences of breach: Parties' submissions

102. The question now arises as to the consequences of this conclusion.

103. Various alternatives have been put to me by the parties.

104. The Defendant submits that the statement is adequate because reasons were given for the grant of planning permission upon the face of the decision notice and it is appropriate in a case in which planning permission is granted in accordance with the recommendations of grant from officers that the statement pursuant to Article 31 be read in the context of the officerôs report. Further, it is submitted that it is very difficult to envisage any circumstance in which a breach of the Article would provide a foundation for quashing a planning permission since the very grant itself indicates that a positive approach was taken by the authority. Further, it is submitted that the

Claimant cannot point to any substantial prejudice caused by the incomplete statement and that any remedy ordered by this Court should be limited to making good the deficiency in the statement. As to this the Defendant submits that Mr Morley has now provided material to further explain the steps taken so that, albeit with the benefit of hindsight, no lacuna exists in the Defendantôs reasoning. Finally, it is submitted that the High Court is not a proper forum for the argument and the Claimantôs remedy is to challenge the refusal upon an appeal before an inspector appointed by the Secretary of State.

105. For their part, the Claimant, Lymn, submits that the provision of an explanation by Mr Morley constitutes ñ*ex post facto*ò rationalisation which should not be permitted: see *Lanner Parish Council v The Cornwall Council, and Coastline Housing Limited* [2013] EWCA Civ 1290 at paragraphs [59] *et seq*; *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302 at [315h-j] per Hutchison LJ. Further the Claimants submit that the statement in the Notice is from the planning officer not from the Council and that, accordingly, the explanation given by Mr Morley as to the steps that were taken cannot constitute a statement by the Council which would, of necessity, have had to have been adopted in accordance with the planning procedure at the time of the decision. Further, it is stated that, in any event, the explanations given by Mr Morley indicate that the proactive and positive steps that affected his approach to the Westerleigh application included the provision of a new cemetery as part of that application. It is stated by Lymn that had it known that the provision of a cemetery was not only viewed as an appropriate development but also something that the planning officers treated as having merit then Lymn would have been able to pursue this option itself either on the proposed site or upon another site so as to meet any perceived need for a cemetery. Finally, it is submitted that if an error is found this is not a case where it is appropriate to decline relief to quash a decision notice which is defective. If the decision notice is quashed the Council continues to have jurisdiction over the Westerleigh application and in accordance with the principle in *R (Kides) v South Cambridgeshire District Council* [2002] EWCA 1370 the Council was required to reconsider any additional material consideration which has arisen of relevance prior to considering the resolution to grant permission. It is submitted that the discussion and debate which the Defendant entertained with Westerleigh about the cemetery constitutes such a material change in circumstance.

(viii) Conclusion on Ground 3

106. In the circumstances of this case I have decided that the proper course of action is to grant declaratory relief only and that it would be disproportionate to quash the decision purely and simply upon the basis of what is, in my view, quite a technical breach of the law. I have also concluded that there is no utility in remitting this specific matter to be re-performed given that the Decision is in any event to be remitted pursuant to my conclusion in relation to Ground 1 such that a new statement will in due course need to be adopted. This is for the following five reasons:-

i) *No necessary connection between breach and merits of the substantive decision*: A breach of Article 31 does not have an automatic or necessary connection with the merits of a planning decision. It is quite possible, for instance, to envisage the situation of a decision that was impeccable in every way but which had not been taken following any or any sufficient ñpositiveñ engagement with applicant(s). Is a Court to strike down such a decision? It

seems to me that in the absence of a clear nexus between the breach and the Decision it would be wrong (disproportionate) to assume that every breach of the article necessarily justifies a quashing remedy.

ii) *No clear obligation on planning authorities to engage in positive / pro-active engage*ment: No express obligation is imposed upon planning authorities to engage in proactive engagement with applicants. Nothing of that sort is found in the relevant legislation. There is for example no statutory obligation upon planning authorities to ñ*approach decision making in a positive way*ò (to use the language of paragraph 186 NPPF) or to ñ*work proactively with applicants to secure developments that improve the economic, social and environmental conditions of the area"* (to use the language of paragraph 187 NPPF). Further the obligation in Article 31 assumes that authorities have (already) acted positively and imposes a form of *ex post facto* certification obligation upon them to state ñhowò. But it does <u>not</u> itself impose an *a priori* obligation to act positively. The nearest the law comes to creating an obligation of this nature is to identify the desirability of authorities behaving in a positive manner as a material consideration in the NPPF and for that to then become relevant under section 38(6) PCPA 2004. But even here the NPPF simply states that planning authorities should ñtake account ofò policies set out in the NPPF (cf paragraphs 212 ï 215). In fact the NPPF is predominantly concerned with policies that impact directly upon the substantive merits of the decisions being taken; the exhortation upon authorities to act positively and proactively seems to be a weaker and less precise and direct consideration than other policies which go to the heart of the merits of an application. In my view the fact that the obligation is brought into the law through a relatively weak mechanism is a further factor that militates against an automatic assumption that quashing is the appropriate and proportionate remedy for every breach of the article.

iii) *The extent of the duty on planning authorities*: In fashioning a remedy the Court should also have in mind what the obligation breached otherwise required the authority to do. The obligation here is to explain ñ*how*ò the authority has been positive and proactive. I do not consider that this should be treated as a very onerous obligation. It should ordinarily suffice for the authority to produce a concise statement of the main steps taken at the relevant time to encourage applicants in a positive and proactive manner. This case is not the occasion to attempt to set out in any detail what the content of such statements should be. Guidance can however be obtained by reference to the sorts of activities set out in paragraphs 188-207 of the NPPF, which are the paragraphs elaborating upon paragraphs 186 and 187. In particular, I do not envisage that the authority is required to provide a detailed, blow by blow, chronological, account of relations with applicant(s). I am in particular concerned that if this were the case it would serve to provide ammunition and encouragement for what might then become undesirable satellite litigation and applications for pre-action disclosure, which seems to me to be contrary to the spirit and intent of the NPPF as a whole.

iv) *No utility in remitting in this case*: Given that the Decision is going to be set aside and remitted anyway, there is no present utility in remitting the Article

31 issue for the statement to be re-issued. Once a new decision is taken the Defendant can readdress the obligation in Article 31 afresh.

v) *The approach adopted by the authority*: Finally and importantly there are the facts of this case. In selecting an appropriate remedy I have taken account of the approach that the Defendant adopted towards its obligations under Article 31. This is not a case where it is suggested that the Defendant authority failed altogether to engage with the applicant(s) at an early stage or otherwise address itself to paragraphs 186 and 187 NPPF. The authority did what it believed was the advised course of action, as set out in the Chief Plannerôs letter. The point of law arising is entirely novel and in the light of the Chief Planners letter the error is understandable. I consider that this is one of those rare cases where it is sensible, pragmatic and permissible to examine the Defendantôs evidence (see discussion at Section 6 below). In this regard Mr Morley has explained in his Witness Statement (paragraphs 46 ï 50) that he and his team did work positively and proactively with the applicants and that they did this by seeking solutions to problems by:

> ñMeeting the applicant & agent to discuss consultation response.
>
> Providing details of issues raised in consultation responses.
>
> Requesting clarification, additional information or drawing in response to issues raised.
>
> Providing updates on the applicant progress.
>
> Holding a Technical Briefing for Members of the Planning Committee by the applicant & his teamò.

107. I should also address the Claimantôs point that had the obligation been complied with then the differences in approach allegedly adopted by the Defendant towards Lymn and Westerleigh in relation to a cemetery would have been apparent. As to this there are two responses. First, on my assessment of the nature of the obligation this level of detail would never have been evident from the concise statement that in my view is all that is required to comply with Article 31(1)(cc). However, and secondly, I do not wholly discount this evidence and I have taken it into account in deciding that the error under Ground 1 is to be treated as a material error and leads to the Decision being set aside (See paragraph [51] above). I do not have anything approaching the sort of evidence that would be necessary for me to determine this point. I conclude only that in circumstances where the Defendant has erred in law in its approach to the question of cemeteries it is not to be excluded that confused messages might have been conveyed to the two applicants which could have encouraged Westerleigh to include a cemetery in their application which might, for reasons given, have been a material advantage to them in a ñfinely balancedò decision.

108. For these reasons, and in the unusual circumstances of this case, I limit the relief to a declaration that the statement given by the Defendant did not comply with the requirements of Article 31(1)(cc) of the Order.

6. The admissibility of after the event evidence by the Planning Authority

(i) The different uses of after the event evidence

109. There is one final matter that loomed large in submissions that I should deal with. Lymn objected strenuously to the service and admissibility of witness statement evidence by Mr Morley on behalf of the Defendant. They submitted that his evidence was an attempt to re-write history and plug errors in the various planning reports submitted to the Planning Committee. There is no black and white rule which indicates whether a court should accept or reject all or part of a witness statement in judicial review proceedings. A witness statement might serve a number of purposes. First, it might make admissions in pursual of the duty of a public authority to act with candour and openness. Secondly, it might provide a commentary on documents which are provided by way of disclosure in pursuit of the public authorityôs duty to come to court with its cards face upwards on the table. Thirdly, it might provide an explanation why an authority did or did not do something. Fourthly, the statement may seek to plug gaps or lacuna in the reasons for the decision or elaborate upon reasons already given. Given the multiplicity of purposes that a statement can serve it is necessary to identify in relation to each contention the basis upon which the impugned statement is relied upon.

(ii) The reluctance of courts to allow elucidatory statements

110. In the present case a considerable portion of the statement of Mr Morley seeks to summarise and explain the reasons set out in the various reports. Mr Kimblin, for the Defendant, submitted to me that there was no need for me to have recourse to the statement where this merely served to summarise or explain the Reports. It seems to me that as a matter of first principle it should be rare indeed that a court will accept *ex post facto* explanations and justifications which risk conflicting with the reasons set out in the decision. The giving of such explanations will always risk the criticism that they constitute forensic ñboot strappingò. Moreover, by highlighting differences between the reasons given in the statement and those set out in the formal decision they often actually serve to highlight the deficiencies in the decision. Fundamentally, a judicial review focuses the spotlight upon the reasons given at the time of the decision. Subsequent second bites at the reasoning cherry are inherently likely to be viewed as self-serving.

111. In *Ermakov v Westminster City Council* [1995] EWCA Civ 42 the applicant came to the UK from Greece and applied to the respondent for housing under the Homelessness Provisions of the Housing Act 1985. The respondent refused the application saying that the applicant was intentionally homeless. The respondent gave reasons for its decision as required under the Act which were challenged in a judicial review. The respondent then filed supplementary evidence setting out different reasons for its decision from those originally given. A Deputy Judge accepted that evidence and dismissed the claim. The Court of Appeal reversed that decision. The Court of Appeal held that since the respondent was required to give reasons at the time of its decision and those reasons were deficient, the decision should be quashed. Hutchison LJ gave the leading judgment, with which Nourse and Thorpe LJJ agreed. At page 315h-j Hutchison LJ stated:

> ñThe court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJôs observations in ex parte Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence - as in this case - which indicates that the real reasons were wholly different from the stated reasonsò.

112. That judgment was endorsed by the Court of Appeal in *Lanner Parish Council v The Cornwall Council* [2013] EWCA Civ 1290 at paragraphs [61] in relation to contradictory evidence. At paragraph [64] the Court stated:

> ñSave in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached. In the present case the officerôs report, the minutes of the Planning Committee meeting and the stated reasons for the grant of planning permission all indicate a misunderstanding of policy H20. These are official documents upon which members of the public are entitled to rely. Mr Findlayôs submission that this is not a ñreasonsò case like *Ermakov* misses the point. The Council should not have been permitted to rely upon evidence which contradicted those official documents. Alternatively, the judge should not have accepted such evidence in preference to the Councilôs own official recordsò.

113. A further indication of the reluctance of the courts to permit elucidatory statements is found in the recent judgment of Ouseley J in *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945. There, the Judge was confronted with a gap plugging witness statement from an inspector who gave evidence that he did consider a particular issue in circumstances where it was not apparent from the decision letter that he had in fact done so:

> ñ51. I add that I would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge. There is no provision for a second letter or for a challenge to it. A witness statement should not be a backdoor second decision letter. It may reveal further errors of law. In my view, the statement is not admissible, elucidatory or not

> 52. However, if that is wrong, the question whether the statement elucidates or contradicts the reasoning in the decision letter, and so is admissible or inadmissible on *Ermakov* principles, can only be resolved once the decision letter has been construed without it. To the extent that a Court concludes that the reasoning is legally deficient in itself, or shows an error of law for example in failing to deal with a material consideration, it is difficult to see how the statement purporting to resolve the issue could ever be merely elucidatory. A witness statement would also create all the dangers of rationalisation after the event, fitting answers to omissions into the already set framework of the decision letter, risking demands for the Inspector to be cross-examined on his statement, and creating suspicions about what had actually been the reasons, all with the effect of reducing public and professional confidence in the high quality and integrity of the Inspectorate.
>
> 53. Inspectors could be required routinely to produce witness statements when a reasons challenge was brought or when it was alleged that a material consideration had been overlooked, since the challenging advocate would be able to say that, in its absence, there was nothing to support the argument put forward by counsel for the Secretary of State, when there so easily could have been, and he must therefore be flying kites of his own devising. This is not the same as an Inspector giving evidence of fact about what happened before him, which can carry some of the same risks, but if that is occasionally necessary, it is for very different reasonsò.

114. In the present case I have not had regard to Mr Morleyôs statement in relation to Ground 1 save insofar as Mr Morley has made an admission as to the fact that he did not have the *Fordent* judgment available to guide him as of the date of the Reports or his oral advice to the Committee (see paragraph [47] above). This admission did not however influence my analysis of Ground 1 which is essentially a question of law. Equally, I have decided Ground 2 on the basis of the contemporaneous documents not the Witness Statement evidence. On Ground 3 I have taken account of Mr Morleyôs evidence (See paragraph 107(vii) above) but it was not in any way decisive to my reasoning.

7. Overall conclusion

115. In conclusion:

i) The applications succeed on Ground 1. The Decision is quashed and remitted to be taken again.

ii) The applications fail on Ground 2.

iii) The Lymn application succeeds on Ground 3 but only to the extent that a declaration is granted.

EP5

Case No: CO/1001/2016

Neutral Citation Number: [2016] EWHC 2832 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2016

Before :

MR JUSTICE GARNHAM

- -

Between :

Michael Mansell	**Claimant**
- and -	
Tonbridge & Malling Borough Council	**Defendant**

- -
- -

Ms Annabel Graham Paul (instructed by **Richard Buxton Environment & Public Law**) for the **Claimant**
Mr Juan Lopez (instructed by **Tonbridge & Malling Borough Council**) for the **Defendant**

Hearing dates: 25 October 2016

- -

Judgment

THE HONOURABLE MR JUSTICE GARNHAM:

Introduction

1. On 7 January 2016, Tonbridge & Malling Borough Council (ñthe Councilò) granted planning permission to Croudace Portland for the erection of four residential dwellings and associated access, parking and landscaping on land at Rocks Farm, The Rocks Road, East Malling in Kent. The decision to grant planning permission was made by the members of the Councilôs Area 3 Planning Committee at a planning committee meeting on 7 January 2016, with an effective date of 13 January 2016. In reaching that decision, members of the committee were advised by an officerôs report which recommended approval.

2. Croudace Portland and East Malling Trust, the present owners of the site, are interested parties in these proceedings. The Defendant is the Council. The application is brought by Michael Mansell who lives in a listed property next door to the site in respect of which planning permission was granted. Before me, Mr Mansell was represented by Ms Annabel Graham Paul and the Council by Mr Juan Lopez. The interested parties were not represented. I record here my gratitude for the clear and helpful submissions, both written and oral, advanced by both counsel.

The Factual Background

3. The site of the proposed development is in land to the south east of East Malling village. The land is designated in the local plan as ñcountrysideò, and the village is designated as an ñother rural settlementò. Part of the village is a designated conservation area. The Claimantôs property, which lies at the border of the conservation area, is grade 2 listed. It dates from 1507.

4. The development is for four five bedroomed houses, each served by a double garage or car barn with parking for four cars. The development site is presently part of an agricultural holding comprising a large agricultural building of some 600m^2 and a residential bungalow used by a caretaker. The agricultural building has in the past been used as an apple store. I was told that the building remains in use. The development contemplates that both buildings would be demolished. The site is owned by the East Malling Trust. The intention is that it will be sold to the Applicant for planning permission, namely Croudace Portland.

5. A report was prepared for the planning committee by (or on behalf of) the Councilôs Director of Planning, Housing and Environmental Health (hereafter ñthe Officerò). The report runs to some eighteen pages. The report explains that the reasons for reporting to the committee were first the fact that the development involved ñ*departure from the adopted development plan*ò and second because of high levels of local interest. The report described the site and the relevant planning history, which was limited to the grant of planning permission for the building of the bungalow in 1957, and a summary of the consultation.

6. Part 6 of the report contains the operative discussion by, and advice from, the Officer to the committee. The section began by reminding members that as the local planning authority the Council was required to determine planning applications in accordance with the Development Plan in force unless material considerations indicate otherwise.

The report went on to note that the application site was open countryside, outside the village settlement confines of East Malling and that accordingly identified restrictions applied to such development. I will need to return to consider in a little detail the advice contained in Part 6 of the report. For the present, however, it is convenient simply to note that the report concluded with the following observations:

> *"6.42 ...it is important to understand that the starting point for the determination of this planning application rests with the adopted Development Plan. Against that starting point there are other material planning considerations that must be given appropriate regard, not least the requirements set out within the NPPF which is an important material consideration and the planning and design of the proposal for the site in the context of the permitted development fall back position. The weight to attribute to each of those other material planning considerations, on an individual and cumulative basis, and the overall balance is ultimately a matter of judgement for the Planning Committee. My view is that the balance can lie in favour of granting planning permission."*

7. On 7 January 2016 a supplementary report was produced by the Officer and a recommendation, amended as to matters of detail, was made. Later that day the Area 3 committee resolved that the application be approved in accordance with the main and supplementary reports of the Officer.

8. A pre-action protocol letter was sent on behalf of the Claimant on 10 February 2016. A response was sent on 22 February 2016 and these proceedings were commenced on 23 February 2016.

The Legal Framework

9. Central to this challenge are criticisms of the Officerôs main report to the planning committee, seen in the light of national and local planning policy. There was no dispute between the parties as to the relevant legal principles to be applied in considering such a challenge.

10. Those principles are conveniently set out in the judgment of Hickinbottom J in R (on the application of Zurich Assurance Ltd) v North Lincolnshire Council [2012] EWHC 3708). At paragraph 15 of that judgment Hickinbottom J said the following:

> *"15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:*
>
> *i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the*

reasoning of the report, particularly where a recommendation is adopted.

ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole.

Consequently:

"[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106, per Judge LJ as he then was).

iii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application Oxton Farms, per Pill LJ).

16 The principles relevant to the proper approach to national and local planning policy are equally uncontroversial:

i) The interpretation of policy is a matter of law, not of planning judgment (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13) .

ii) National planning policy, and any relevant local plan or strategy, are material considerations; but local authorities need not follow such guidance or plan, if other material considerations outweigh them.

iii) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations is a question of planning judgment: the part any particular material consideration should play in the decision-making process, if any, is a matter entirely for the planning committee (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780 per Lord Hoffman)."

11. The first of the claimantôs grounds of challenge concerns a concept in planning law known as ñfall back positionò. Because such a comparison may be a material consideration, a planning committee will often compare, on the one hand, the developments for which planning permission is sought, with, on the other, what the applicants could do with the land and premises without the permission.

12. The provision governing what the applicants could do with this land at these premises without planning permission is the Town and County Planning (General Permitted Development) (England) Order 2015 (the ñ2015 GPDOò).

13. Paragraph 3 of the 2015 Order provides, at subparagraph (1), that ñ*planning permission is ... granted for the classes of development described as permitted development in Schedule 2*.ò Part 3 of Schedule 2 identifies a number of classes of permitted development. Class Q permits certain development in respect of agricultural buildings.

14. Class Q provides that permitted development is

> *"development consisting of (a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order and (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3…".*

15. Paragraph Q.1 provides that

> *"development is not permitted by Class Q if… the cumulative floor space of the existing building or buildings changing use under Class Q within an established agricultural unit exceeds 450sqm."*

16. It is also material to note that subparagraph (h) provides that

> *"the development under Class Q (together with any previous development under Class Q) would result in a building or buildings having more than 450sqm of floor space having a use falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order…".*

17. It is common ground between the parties that the relevant legal principles relating to fall back were set out in R v Secretary of State for the Environment and Havering BC [1998] EnvLR189. In that case Mr Lockhart-Mummery QC, sitting as a Deputy High Court Judge, accepted submissions that there were three elements to the fall back test:

> *"First whether there is a fall back use, that is to say whether there is a lawful ability to undertake such a use; secondly, whether there is a likelihood or real prospect of such occurring. Thirdly if the answer to the second question is*

"yes" a comparison must be made between the proposed development and the fall back use."

The Relevant National Guidance

18. At the relevant time the national planning policy was contained in a document called the National Planning Policy Framework ("NPPF").

19. Paragraph 7 of the NPPF asserts that there are three dimensions to sustainable development: economic, social and environment. Paragraph 11 provides that planning law requires that applications for planning permission must be determined in accordance with the Development Plan unless material considerations indicate otherwise. Paragraph 14 provides (as far as is material):

> *"At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development which should be seen as a golden thread running through both plan making and decision taking…*
>
> *For decision taking this means*
>
> - *approving development proposals that accord with the development plan without delay; and*
> - *where the development plan is absent, silent or relevant policies are out of date granting permission unless any adverse impact of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole or specific policies in this Framework indicate development should be restricted."*

20. Paragraph 49 and 50 of the NPPF provide as follows:

> *"49. Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."*
>
> *50. To deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable, inclusive and mixed communities, local planning authorities should:*
>
> - *plan for a mix of housing based on current and future demographic trends, market trends and the needs of different groups in the community (such*

as, but not limited to, families with children, older people, people with disabilities, service families and people wishing to build their own homes);

- *identify the size, types, tenure and range of housing that is required in particular locations, reflecting local demand; and*

- *where they have identified that affordable housing is needed, set policies for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified (for example to improve or make more effective use of the existing housing stock) and the agreed approach contributes to the objective of creating mixed and balanced communities. Such policies should be sufficiently flexible to take account of changing market conditions over time."*

21. Paragraph 55 provides as follows:

> *"55. To promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities. For example, where there are groups of smaller settlements, development in one village may support services in a village nearby. Local planning authorities should avoid new isolated homes in the countryside unless there are special circumstances such as:…"*

The Competing Arguments

22. Ms Annabel Graham Paul, for the Claimant, advances four arguments. First she says that the Defendant Council adopted an unlawful approach to ñfall backò. In particular, she says that they erred in finding that the existing agricultural building could be converted into three dwellings under permitted development rights. That argument turns first, on the proper construction of Class Q, of Part 3 of Schedule 2 of the 2015 GPDO, a provision that provides for permitted development in the case of agricultural buildings, and second, on the question whether the Council erred in concluding that there was more than a theoretical possibility of implementing a lawful fall back.

23. Ms Graham Paulôs second ground is that the Council adopted an unlawful approach to the NPPF. In particular, she says that the Council provided no basis for finding that the up-to-date development plan was in any way inconsistent with the policies in the NPPF and that the officerôs reliance on the NPPF was insufficiently reasoned.

24. Third, Ms Graham Paul contends that the Council failed properly to consider the effects of the development on listed buildings and the Conservation Area. Finally,

she argues that there was a failure properly to consider whether the planning committee lacked jurisdiction to determine the application. Resolving that ground will necessitate consideration of the constitution of the Council committees.

25. In response, Mr Lopez, on behalf of the Defendant argues that the Defendantôs interpretation of the 2015 Order was correct. He says, furthermore, that the Council was entitled to conclude that the fall back suggestion was realistic and that that is sufficient to make fall back a material consideration.

26. As to ground 2, Mr Lopez argued that the officerôs approach to the NPPF was entirely proper. As to ground 3, he says that the Claimantôs criticism ó*defies all practical reality*ô and amounts to an ó*impermissible challenge…to planning judgment*ô. As to the jurisdiction challenge, the Defendant asserts that the question whether the development is ó*in fundamental conflict with the development plan*ô was a matter of planning judgment and that the decision in this regard could not fairly be characterised as irrational.

Discussion

Ground 1 – Fall back

27. The Officer addressed the question of ñfall backò at paragraphs 6.14 to 6.16 of his report:

> *"6.14 In practical terms for this site, the new permitted development rights mean that the existing agricultural barn could be converted into three residential units. Some representations point out that only a proportion of the barn could be converted in such a manner (up to 450sqm) but the remainder – a small proportion in terms of the overall footprint – could conceivably be left unconverted and the resultant impacts for the site in terms of the amount of residential activity would be essentially the same. The building could be physically adapted in certain ways that would allow for partial residential occupation and the extensive area of hardstanding which exists between the building and the northern boundary could be used for parking and turning facilities.*
>
> *6.15 The existing bungalow within the site could be replaced in accordance with policy CP14 with a new residential building provided that it was not materially larger than the existing building. Such a scenario would, in effect, give rise to the site being occupied by a total of four residential units albeit of a different form and type to that proposed by this application. This provides a realistic fall back position in terms of how the site could be developed.*
>
> *6.16 I appreciate that discussion concerning realistic 'fall back' positions is rather complicated but, in making an assessment of any application for development, we are bound to consider what the alternatives might be for a site: in terms of*

what could occur on the site without requiring any permission at all (historic use rights) or using permitted development rights for alternative forms of development."

28. Ms Graham Paul argues that the officer erred in that approach. She says that the Councilôs analysis falls at both the first and the second of the two hurdles. She says that permitted development under the 2015 Order would not be such as to permit the conversion of this agricultural building into three homes in the manner envisaged by the Officer. And she argues that it is not been shown that there was any real prospect of such a conversion occurring.

29. Critically, Ms Graham Paul contends that the restriction to 450sqm in subparagraph (b) applies to the floor space of the whole of the existing building in respect of which development is contemplated. She says that the proper construction involves identifying the whole building in respect of there is to be any change of use and then adding up the floor space of that existing building. The result must then be less than 450sqm. She says that interpretation is supported by the inspectorôs decision in a case called Mannings Farm. In that case, the inspector said the following:

"9. The floor space of the existing building…far exceeds the maximum permitted threshold, of 450sqm, as set out in Q.1(b). I note the intention is to reduce the size of the building as part of the proposal but Q.1(b) clearly relates to existing floor space and there is no provision in the GPDO for this to be assessed on any other basis."

30. In my judgment this construction of paragraph Q.1(b) fails because it disregards the definition section of the Order. The critical expression in subparagraph (b) is ñ*the existing building or buildings*ò. Paragraph 2 of the Order defines ñ*building*ò as ñ*any part of a building*ò. Accordingly, the paragraph should be read as meaning ñ*the cumulative floor space of the existing building or any part of the building changing use*éò If that is right, it is self-evident that the limit on floor space relates only to that part of the building which is changing use.

31. That was also the approach adopted by the Inspector in the case of Agricultural Buildings at Bennetts Lane, Binegar, Somerset. I was shown a number of inspectorsô decisions on this topic but, in my view, it was the Inspector in this case, Mr Rory Cridland, who provided the most thorough analysis of the point. The Inspector said this:

"4. Class Q of Schedule 2, Part 3 of the Town and Country Planning (General Permitted Development) (England) Order 2105 ("the Order") permits development consisting of a change of use of a building and any land within its cartilage, from a use as an agricultural building to a dwelling house together with building operations reasonably necessary to convert it. However, paragraph Q.1(b) excludes such development where the cumulative floor space of the existing building changing use within an established agricultural unit exceeds 450m^2. The term "building" is defined by the Order as including "any part thereof".

> *5. The proposal would result in a change of use of part of the existing agricultural building, currently measuring around 960m^2 of floor space, to a residential dwelling house with a floor space measuring approximately 449m^2. The appellants propose to demolish the remaining part of the building but retain agricultural use of the land by returning it to pasture. The Council however contend that paragraph Q.1(b) limits such conversions to smaller agricultural buildings which fall below the 450m^2 threshold.*
>
> *6. Although I acknowledge that the wording of paragraph Q.1(b) of the Order is not explicit on this point, when read in conjunction with the definition of 'building' set out in Article 2(1) of the Order, there is a strong indication that the paragraph permits the part conversion of an agricultural building. This is supported by Planning Practice Guidance (PPG) which states that "the maximum floor space that may be converted is 450m^2 of floor space of a building or buildings within a single established agricultural unit". As such, I find that paragraph Q.1(b) of the Order allows for the part conversion of an agricultural building provided that total floor space to be converted does not exceed 450m^2."*

32. The inspector went on in that decision to refer to correspondence from the Department for Communities and Local Government. I too was shown that correspondence. That correspondence indicates that it is the view of the Department that the reference to ñ*part of a building*ò in the definition section of the Order means that ñ*in the case of a large agricultural building, part of it could change use…and the rest remain in agricultural use*.ò

33. The proper construction of Class Q is plainly a matter for me, but for the reasons set out above my analysis of the relevant provisions coincides with that adopted by Mr Inspector Cridland and that suggested by the Department.

34. Ms Graham Paul contends that that construction of subparagraph (b) means that it adds nothing to subparagraph (h). I can see the force of that submission and, as a matter of first principle, statutory provision should be construed on the assumption that the draftsman was intending to add something substantive by each relevant provision. Nonetheless, giving the interpretation section its proper weight, I see no alternative to the conclusion that Class Q imposes a floor space limit on those parts of the buildings which will change use as a result of the development. In those circumstances, I reject the Claimantôs challenge to the Officerôs construction of the Class Q provisions in the 2015 Order.

35. Ms Graham Paulôs second challenge under this head relates to the requirement that there is more than a theoretical possibility of implementing such a lawful fall back development.

36. In paragraph 6.15 of the report the Officer concluded that the fall back position was ñrealisticò. In my judgment he was entitled so to conclude. The evidence establishes that there had been prior discussions between the Council and the Planning Agent

acting for the East Malling Trust who owns the site. It was crystal clear from that contact that the Trust were intending, one way or another, to develop the site. Alternative proposals had been advanced seeking the Councilôs likely reaction to planning applications. It is in my view wholly unrealistic to imagine that were all such proposals to be turned down the owner of the site would not take advantage of the permitted development provided for by Class Q to the fullest extent possible.

37. It was not a precondition to the Councilôs consideration of the fall back option that the interested party had made an application indicating an intention to take advantage of Class Q. There was no requirement that there be a formulated proposal to that effect. The officer was entitled to have regard to the planning history which was within his knowledge and the obvious preference of the Trust to make the most valuable use it could of the site.

38. Ms Graham Paul argues that, whatever the wishes and intentions of the interested party, it would not, in fact, have been possible to convert the agricultural building into residential use simply by reliance on permitted development. She says that if the aim had been to convert the building to three houses, whose total floor area was less than the maximum of 450m^{2,} there would have been a significant part of the building unused. She points to paragraph (i) of Class Q which provides as follows:

> *"Development is not permitted by Class Q if…(i) the development…would consist of building operations other than*
>
> *I) the installation or replacement of*
>
> *(aa)windows, doors, roofs, or exterior walls, or (bb) water, drainage, electricity, gas or other services, to the extent reasonably necessary for the building to function as a dwelling house; and*
>
> *II) partial demolition to the extent reasonably necessary to carry out building operations allowed by paragraph Q.1(i)(i)…"*

39. Ms Graham Paul also points to the need for planning permission if the bungalow on the site was to be converted and if the hardstanding was to be used for parking and the like.

40. However, as Mr Lopez submits, the Council does not have to shut its eyes to the fact that the proposed development might include elements that required planning permission. In fact, Ms Graham Paul conceded that the fact that planning permission for such parts of the development, notably the car parking, could be sought was a legitimate planning consideration. The building could be converted, so as to provide dwelling houses limited in floor space to 450m^{2,} by the construction of internal walls without using the whole of the internal space of the barn.

41. In my judgment therefore, it would have been unrealistic to have concluded that, were the present application for permission to be rejected, the interested party would do nothing to develop this site. On the contrary it was plain that development was contemplated and that some development could have taken place pursuant to Class Q. The Council was entitled to have regard to the fact that there might be separate applications for permission in respect of some elements of the scheme and to advise

that appropriate regard must be had to material planning considerations including the permitted development fall back position. Accordingly I reject the second element of the Claimantôs challenge on ground 1.

Ground 2 – Unlawful Approach to NPPF

42. Ms Graham Paul accepts that the Council were entitled to have regard to the NPPF but she says that that framework must be interpreted and applied correctly. She says that, in his treatment of paragraphs 49, 50 and 55 of the NPPF, the officer failed to do so.

43. As regards paragraph 49 Ms Graham Paul points out that the Defendantôs development plan was in place and up-to-date. She says that the Defendant had a five year supply of deliverable housing sites and that accordingly there was no warrant for dis-applying the local plan. Accordingly she argues that the presumption in favour of sustainable development set out in paragraph 14 of NPPF was not operative.

44. Ms Graham Paul concedes that it is open to a decision maker to find the development was sustainable, and that sustainability may be capable of being a material consideration outweighing a conflict with the development plan. But, she argues, on the facts of the present case, there was no basis for finding that the development plan was inconsistent with the NPPF and there was no analysis of any suggested justification for departure from the development plan.

45. As to paragraph 50 of the NPPF Ms Graham Paul says that that relates to plan making and not decision taking and accordingly is irrelevant to the decision being made by the committee on this occasion. As to paragraph 55 Ms Graham Paul says there was insufficient analysis to justify departing from the plan.

46. I remind myself of what was said by Judge LJ, as he then was, in Oxton Farms, the case cited at paragraph 15(ii) by Hickinbottom J in the Zurich case referred to above. I have to ask myself whether the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken. I fail to see how such a criticism could be made of the officerôs report in this regard in the present case.

47. As is conceded by Ms Graham Paul sustainability may be capable of being a material consideration in considering a conflict with a development plan. What the officer did in the present case, in paragraph 6.10 of the report, was to invite the committee to note the effect of paragraphs 49, 50 and 55. It is not suggested that those paragraphs were misrepresented. Nor is it alleged that the Officer failed to point out that the proposed development fell outside the local plan. Nor did he fail to point out the objection to the principle of the proposed development (in both the latter cases he did so in paragraph 6.6). In my judgment in those circumstances it cannot sensibly be argued that the officer misled the committee in any material respect.

48. It is argued that those three paragraphs of the NPPF were irrelevant. I reject that suggestion too. As set out above, the NPPF provides for a presumption in favour of sustainable development which it says should be seen ñas a golden threadò running through decision taking. The weight to be given to those considerations in any given

case is a matter for the planning authority but it cannot, at least on facts such as the present, be said that the underlying principle is irrelevant.

49. Finally, it is suggested that the Officerôs report did not set out enough to justify departure from the development plan. In my judgment the report accurately and fairly sets out the competing considerations and it was a matter for the judgment of the planning authority how those considerations were resolved. In those circumstances I reject ground 2.

Ground 3 – Conservation Area

50. In support of her third ground Ms Graham Paul refers me to the general duty in relation to listed buildings and conservation areas in the exercise of planning functions, provided for by Sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. She points to the need for special attention to be paid to the desirability of preserving a listed building and its setting, and of preserving or enhancing the character or appearance of a conservation area.

51. She refers me to paragraph 6.25 of the officerôs report and the passage that reads

> *"the development has been laid out in such a way as to avoid any material intrusion within the landscape, with only glimpses of the buildings being able to be seen in views through to the site from the public domain and the conservation area…although the appearance of the site would change, as would the setting of the village, conservation area and surrounding residential properties this change is not considered to be visually harmful.".*

52. Ms Graham Paul says that such an assessment needs to be properly informed. She says that the author of the report did not visit the Claimantôs property and that there is no evidence that he visited the conservation area.

53. In my judgment this argument is hopeless. The Defendants had received a design and access statement from the interested party in respect of an earlier application. That application had been amended, at the Councilôs invitation, to reduce the number of new dwellings and the reporting Officer was aware of that. The Officer carried out a site assessment in the usual way and had the benefit of an illustrative plan. The report makes express reference to Section 72 of the 1990 Act (in paragraph 6.28).

54. The development neighbours a conservation area but is not located within it and the officer writing the report expressed a perfectly sensible planning judgment, based on his inspection and the history as he knew it to be, that the development would change the setting of the listed buildings and conservation area but would not be harmful. Furthermore the members of the committee had the benefit of local knowledge and were able to visit the site if they chose. A number of them did so.

55. I see no basis on which it can be said that this was so ill informed a judgment as to be vulnerable to challenge. On the contrary, it seems to me a judgment the committee was perfectly entitled to reach. In those circumstances ground 3 is dismissed.

Ground 4 – Jurisdiction

56. Finally, there is a challenge to the jurisdiction of the Area Planning Committee.

57. I have been provided with extracts from the Defendant Councilôs constitution. Chapter 3 of that constitution provides that the Council ñ*may make arrangements under Section 101 of the Local Government Act 1972 for the discharge of any of its functions by (a) a committee; (b) a subcommitteeé* ò Area 3 Planning Committee is required to consist of members of certain identified wards. The function of that planning committee, like the equivalent committee for Areas 1 and 2, is described as ñ*function relating to town and country planning and development control…except where recommended for approval in fundamental conflict with plans and strategies which together comprise the development plan.*ò.

58. Paragraph 3.1 further describes the responsibility of Area Planning Committees. It says that applications for planning permission ñ*recommended for approval in respect of development which is in fundamental conflict with the development plan,…should be reserved for determination by Council, or by reference to the Secretary of State, as appropriate.*ò.

59. Ms Graham Paul argues that this application related to a proposal for a development which is in fundamental conflict with the development plan. In support of that assertion she relies on what I take to be a speaking note used by the Claimant in addressing the committee on 7 January 2016. The note reads, in material part,

> *"the report states "there is an objection to the principle of the proposed development in broad policy terms. What this actually means is that this planning application is in fundamental conflict (with) the plans and strategies which together comprise the development plan.".*

60. There is nothing in that speaking note to indicate that the Claimant was making a point about the jurisdiction of the committee. On the contrary, as I read it, he was seeking to underline a clause in paragraph 6.6 of the officerôs report which precedes the clause read out. That clause reads ñ*consequently, the proposed development falls outside of the requirements of these policies*ò.

61. In my judgment, neither the remarks of the Claimant at the meeting nor the arguments advanced by Ms Graham Paul get close to establishing that this application was in fundamental conflict with the development plan. It is, of course, right that the development fell outwith the development plan; that much is acknowledged in the report. But, in my judgment, it cannot properly be said that the conflict was in any sense fundamental. This development did not significantly prejudice the fundamental aims, objectives or land allocations under the development plan as a whole. It did not prejudice strategic delivery of the plan. It did not amount to premature pre-judging of the plan making process. It was not of a type or scale which threatened the integrity of the plan.

62. Certainly, if the judgment were mine I would reject any suggestion that this development constituted a fundamental conflict. However the judgment is not mine; it is a planning judgment for the committee which can be challenged only on

Wednesbury grounds. The planning authority is entitled to a margin of appreciation in reaching such judgments and, in my view, this fell comfortably within that margin.

63. There is in Ms Graham Paulôs skeleton argument an argument that there was a failure to reach a judgment as to whether Area 3 Planning Committee had jurisdiction. That was not an argument actively pursued at the hearing. In my view, however, there is nothing in it. A Council is not obliged to set out its reasoning for the allocations of particular committees for every planning application. There is implicit in the fact of the allocation to an area committee that the planning authorities made a judgment that this is not a case requiring the attention of the full Council. That was the position here and I see no illegality in that decision.

Conclusions

64. It follows that I reject all four of the grounds advanced in support of this claim and the claim must be dismissed.

EP6

Caroline Payne

From: Ross Spicer <ross.spicer@blueyonder.co.uk>
Sent: 08 November 2017 09:51
To: Caroline Payne
Cc: Simon Gedye
Subject: Fernlea - Contingency Plan for Planning Approval Process

Caroline

Further to our discussions regarding the options for Fernlea, it remains the case that should we not obtain planning permission for the replacement dwelling then we will revert to our plan A of remodelling. As you know, plan A is to extend to both sides of the existing bungalow, convert the loft, add the porch and build the garage. Clearly the replacement dwelling would be far superior to the remodelling option in terms of sustainability, energy efficiency, functionality and design. In particular, it has been designed specifically to support retaining the openness of the green belt; the existing bungalow was built in 1927, a time before even the concept of green belt existed, and is somewhat anachronistic to the area being a rendered building. However, we shall make Fernlea into our ideal home; it is located in a village that we love, in an area of sublime beauty that we love, and close to the railway line between Sheffield and Manchester which we also love. You'll be aware that as a lifelong stalwart of the rail industry, the latter is of particular importance to one of us! We progressed the remodelling design to an advanced stage with our architect, Simon of Studio Gedeye, before deciding to pursue the replacement dwelling as a far better option for achieving our fully sustainable lifestyle and goals. Should the replacement dwelling therefore not be approved for some reason, we shall revert to these drawings.

Many thanks for your ongoing support and help

Ross and Anthony